STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0959

Tesfaye Shikur,
Respondent,

vs.

Eric Halverson, et al.,
Appellants.

Filed March 21, 2022
Affirmed in part, reversed in part, and remanded
Connolly, Judge

Ramsey County District Court
File No. 62-CV-19-1170

Chad McKenney, Bradley D. Hendrikson, Donohue McKenney, Ltd., Maple Grove, Minnesota (for respondent)

Nathan M. Hansen, North St. Paul, Minnesota (for appellants)

Considered and decided by Connolly, Presiding Judge; Smith, Tracy M., Judge; and Klaphake, Judge.*

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

On appeal in this commercial-lease dispute, appellants argue that the district court erred in holding them jointly and severally liable for breach of the commercial lease.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Appellants also challenge the district court's award of damages to respondent, arguing that the district court abused its discretion by failing to offset damages from respondent's breach of the lease, declining to reduce the damages for failure to mitigate, and awarding appellant damages for the price he paid for his business. We affirm in part, reverse in part, and remand.

FACTS

In February 2015, respondent Tesfaye Shikur purchased a convenience store business for $136,882. The convenience store is located in a commercial building in Vadnais Heights that contains four separate commercial retail units (hereinafter the "property"). Appellant Jeffrey Halverson is the Ramsey County owner of record of the property. But according to Jeffrey, he sold the property to his brother, appellant Erik[1] Halverson, on a contract for deed. The contract for deed, however, was never filed with Ramsey County.

Shortly after purchasing the convenience store, Shikur entered into a ten-year commercial lease (hereinafter the "lease") with Erik, who represented himself as the owner of the property. Under the terms of the lease, Shikur, as lessee, was responsible to maintain the plumbing and heating installations, but the lessor was required to maintain the roof. The lease also stated that if lessor "fails to maintain [the roof] after sixty days written notice from Lessee to Lessor, Lessee shall have the right, in his sole discretion, to make such repairs or maintenance and deduct the cost of such repairs or maintenance from the rents

[1] When this case was filed, Erik's first name was erroneously spelled with a "c."

owed under this Lease." Although Jeffrey claimed that he had no "contractual relationship" with Shikur, he signed the lease as "Consented to by Jeffrey Halverson" as the contract for deed vendor.

Shikur opened his convenience store in March 2015, but within three months, the roof started leaking. According to Shikur, he immediately informed Erik of the problem, but Erik failed to fix the leak. Over the course of the next three years, Shikur informed Erik several times in writing of the leaking roof, but all efforts by Erik to fix the problem failed.

In February 2018, a fire technician from the City of Vadnais Heights (city) notified the Halversons by letter that there were multiple leaks in the roof. A tarp was subsequently placed over the HVAC unit on the roof. The city's planning and development director then followed up with the Halversons by letter on August 3, 2018, reiterating that the roof leaked and informing them that the "temporary mitigation measures you have taken on the roof appear to cover HVAC units and other utilities and may negatively affect the roof's drainage." And the fire technician notified Jeffrey on August 8, 2018, that he had 30 days to fix the roof. Although Shikur and the Halversons all denied placing the tarp on the roof, the roof was never repaired.

In September 2018, Shikur filed a rent-escrow action to force the Halversons to repair the roof. The parties entered into a mediated agreement wherein the Halversons agreed to repair the roof with licensed contractors and provide notice to Shikur of the repairs. The Halversons, however, failed to comply with the agreement.

On October 11, 2018, Xcel Energy issued a "red tag" order shutting off the gas to the HVAC due to a carbon monoxide leak. Because there was no heat in the building, Shikur attempted to hire a contractor to fix the HVAC unit. According to the contractor, Erik prevented him from going up on the roof to fix the HVAC unit. Shikur was then forced to close his store intermittently due to the lack of heat, and by early 2019, the lack of heat in the building caused a pipe to burst.

Shikur vacated the property and later brought suit against the Halversons alleging that Erik breached the lease by failing to maintain and repair the roof. Shikur's complaint also alleged claims for breach of the duty of good faith and fair dealing, unjust enrichment, and promissory estoppel. Finally, Shikur claimed that he had been constructively evicted and requested a declaratory judgment stating that he has the right to withhold rent, or alternatively that any rent due should be held in escrow by the district court. Shikur also sought damages for the amount he paid for his business as well as loss of yearly revenue for the remaining years left on the lease.

The Halversons answered and counterclaimed alleging that Shikur breached the lease by failing to (1) maintain the HVAC, electrical, and plumbing systems; (2) pay utility costs; (3) pay rent; and (4) provide insurance coverage and a certificate of insurance coverage on the property. The Halversons also alleged claims for negligence, unjust enrichment, and promissory estoppel.

The parties filed cross-motions for summary judgment. The district court granted the Halversons' motion for summary judgment in part, dismissing several of Shikur's claims. But the district court determined that there were issues of fact related to who

breached the lease and whether the Halversons breached the implied covenant of good faith and fair dealing. Thus, the district court denied the Halversons' motion for summary judgment in part and denied Shikur's motion for summary judgment in its entirety.

Following a bench trial, the district court determined that Shikur failed to prove that the Halversons breached the implied covenant of good faith and fair dealing when Erik prohibited Shikur from inspecting and repairing the HVAC unit and roof. But the district court determined that the Halversons materially breached the lease by failing to properly repair the roof, thereby excusing Shikur from performing his obligations under the lease. The district court then awarded Shikur loss-of-business damages of $136,882, and security-deposit damages of $2,300. However, the district court specifically concluded that Shikur had not met his burden of proof for future damages as outlined in Exhibit 31. That exhibit outlined damages that were sought for lost profits from January 2016 to December of 2017, in the amount of $32,475. The district court entered judgment against the Halversons, "jointly and severally, in the amount of $139,182." This appeal follows.

DECISION

In the absence of a motion for a new trial, our scope of review includes substantive legal issues properly raised to and considered by the district court, whether the evidence supports the findings of fact, and whether those findings support the conclusions of law and the judgment. *See Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 309–10 (Minn. 2003) (stating that new-trial motion is not prerequisite to appellate review of substantive legal issues properly raised and considered in district court); *Gruenhagen v. Larson*, 246 N.W.2d 565, 569 (Minn. 1976) (stating that absent

motion for new trial, appellate courts may review whether evidence supports findings of fact and whether findings support conclusions of law and judgment). "Findings of fact are not clearly erroneous unless [the reviewing court is] left with the definite and firm conviction that a mistake has been made." *In re Polaris, Inc.*, 967 N.W.2d 397, 409 (Minn. 2021) (quotation omitted). This court does not "'reweigh the evidence when reviewing for clear error.'" *Id.* (quoting *In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 221 (Minn. 2021)). If the "record reasonably supports the findings at issue on appeal, it is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary." *Kenney*, 963 N.W.2d at 223 (quotation omitted).

I.

The Halversons argue that the district court erred in holding them jointly and severally liable for the breach of the lease. We agree. "[A] lease is a form of a contract." *Metro. Airports Comm'n v. Noble*, 763 N.W.2d 639, 645 (Minn. 2009). A person cannot be sued for breach of contract unless he is a party to that contract. *Mahoney v. McLean*, 4 N.W. 784, 784 (Minn. 1880). Here, the lease provides that it "is made between Eri[k] Halverson . . . [h]erein called Lessor, and . . . Shikur . . . , [h]erein called Lessee." Nowhere in the lease agreement is Jeffrey identified as a party to the agreement. Although Jeffrey's signature appears on the last page of the lease under the phrase "Consented to by," there is no indication that his signature makes him a party to the lease. Because Jeffrey is not a party to the lease, he cannot be held liable for a breach of the lease.

Shikur argues that the district court properly held Jeffrey liable under the lease agreement because both brothers "were acting together and benefitting from the Lease and

were suing [Shikur] jointly for damages and alleging [Shikur] breached the Lease." But when the language of a contract is clear and unambiguous, courts "enforce the agreement of the parties as expressed in the language of the contract." *Storms, Inc. v. Mathy Constr. Co.*, 883 N.W.2d 772, 776 (Minn. 2016). And a party may not rely on extrinsic evidence to create ambiguity in a contract if ambiguity does not otherwise exist. *Minn. Teamsters Pub. & Law Enf't Emps. Union, Loc. 320 v. County of St. Louis*, 726 N.W.2d 843, 847-48 (Minn. App. 2007), *rev. denied* (Minn. Apr. 25, 2007). As addressed above, the lease agreement clearly states that it is between only Erik and Shikur. Consequently, there is no need to examine extrinsic evidence of the parties' actions to determine whether Jeffrey is a party to the contract.

Shikur further argues that Jeffrey should be held liable under the lease because the Halversons "did not provide any record proof that a contract for deed existed." But as the district court found, Erik "testified that he was in the process of purchasing the property from his brother." That finding is supported by the record. Erik testified that he bought the property on a contract for deed. Although Shikur makes much of the fact that the contract for deed was never recorded, Erik's failure to record the contract for deed does not invalidate the contract. Rather, it may simply subject him to civil penalties. *See* Minn. Stat. § 507.235, subds. 2, 5 (2020) (providing for civil penalties to be paid to county or city). In any event, Shikur cites no legal authority holding that invalidation of the contract

for deed would make Jeffrey a party to the lease between Erik and Shikur. We therefore conclude that the district court erred by holding Jeffrey liable under the lease agreement.[2]

II.

The Halversons challenge the district court's award of damages to Shikur. "[L]eases are contracts to which [appellate courts] apply general principles of contract construction." *RAM Mut. Ins. Co. v. Rohde*, 820 N.W.2d 1, 14 (Minn. 2012). A damages award for a breach-of-contract claim should put the injured party in the position in which it would be had the contract been performed. *Lesmeister v. Duffy*, 330 N.W.2d 95, 102 (Minn. 1983). The fact-finder "need not adopt the exact figures of any witness in determining damages, and as long as its finding is within the mathematical limitations established by the various witnesses and is otherwise reasonably supported by the evidence as a whole, such finding must be sustained." *Fudally v. Ching Johnson Builders, Inc.*, 360 N.W.2d 436, 439 (Minn. App. 1985) (quotation omitted). But "damages which are speculative, remote, or conjectural are not recoverable." *Leoni v. Bemis Co., Inc.*, 255 N.W.2d 824, 826 (Minn. 1977) (quotation omitted).

In reviewing an award of damages, we "consider the evidence in the light most favorable to the verdict." *Rayford v. Metro. Transit Comm'n*, 379 N.W.2d 161, 165 (Minn.

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[2] We also note that joint-and-several liability for damages would not have been appropriate because the commercial-lease agreement is the only contract at issue in this case. *See Duluth Superior Erection, Inc. v. Concrete Restorers, Inc.*, 665 N.W.2d 528, 538 (Minn. 2003) ("In Minnesota, joint-and-several liability for damages in contract actions applies only where two persons independently and unintentionally breach separate contracts, closely related in point of time, to the same person, and it is not reasonably possible to make a division of the damages caused by the separate breaches.").

App. 1985), *rev. denied* (Minn. Feb. 14, 1986). "The award should not be set aside unless it is manifestly and palpably contrary to the evidence." *Id.* (quotation omitted).

The Halversons challenge the district court's damages award on three grounds. They argue that the district court abused its discretion by (A) failing to offset damages from Shikur's breach of the lease; (B) declining to reduce Shikur's damages for his failure to mitigate; and (C) awarding Shikur damages for the price he paid for his business.

A. Alleged failure to offset damages

The Halversons argue that the district court abused its discretion by failing to "offset the damages from Shikur's breaches of the lease agreement against any damages due him under the lease." But this argument is not properly before us because the Halversons have raised it for the first time in this appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that this court generally does not consider arguments that were not presented to and considered by the district court). Moreover, the district court rejected the Halversons' claim that Shikur was liable for Shikur's alleged breaches of the lease agreement. Rather, the district court found that "a significant amount of evidence" was received at trial regarding Shikur's notice to Erik "about the leaking roof, including at least eleven letters from [Shikur] to [Erik] about the roof leaking, as well as multiple communications between [Erik] and the [city] where [Erik] promised he would fix the roof." The district court also found that Erik "testified that he had patched several places but offered no other evidence or testimony from any other source confirming that the roof has been fully repaired." The district court then concluded that the Halversons breached the lease by failing to repair the roof, and that this "breach excused [Shikur's] performance

in the remaining lease agreement." Because Shikur's performance under the lease agreement was excused by the Halversons' breach, he was not liable for any breaches of the lease agreement and, therefore, the district court was under no obligation to offset any damages that may have been caused by Shikur's nonperformance under the lease.

B. Alleged failure to mitigate

The Halversons also argue that the district court abused its discretion by not reducing Shikur's damages based on "his failure to mitigate." We disagree. Generally, the party alleging a loss because of a tort or breach of contract has a duty to mitigate damages. *Lesmeister*, 330 N.W.2d at 103; *County of Blue Earth v. Wingen*, 684 N.W.2d 919, 924 (Minn. App. 2004); *Deutz-Allis Credit Corp. v. Jensen*, 458 N.W.2d 163, 166 (Minn. App. 1990) (stating that an injured party must use "reasonable diligence and good efforts to minimize . . . losses"). But here, the district court found that Shikur's attempts to mitigate any damages were thwarted by the Halversons. Specifically, the district court found that Shikur "offered to repair the HVAC unit and roof" and "hired . . . an HVAC contractor to inspect and repair the HVAC unit," but that Erik "prevented [the HVAC contractor] from going onto the roof to inspect the damage and begin the HVAC repairs." The district court's findings are supported by the contractor's testimony. Moreover, the district court found, and the record shows, that Shikur undertook many efforts to get the roof fixed, such as notifying the Halversons several times about the problem and, finally, initiating a rent escrow action in an attempt to force the Halversons to repair the roof. Shikur's efforts demonstrate that he used reasonable diligence and good efforts under the circumstances to

mitigate any damages. The district court, therefore, did not abuse its discretion by declining to reduce Shikur's damages for a failure to mitigate.

C. Award of damages for the price Shikur paid for his business

Finally, the Halversons challenge the district court's award of damages to Shikur for the price he paid for his business, arguing that the damages award is erroneous because there was no evidence presented at trial "of the value of the business at or near the time of the breach." We agree.

The "usual measure of damages" for a landlord's breach of a covenant to repair "is the difference between the fair rental value of the premises as warranted and as they were during the tenancy." Milton R. Friedman, *Friedman on Leases* § 10.501a, at 637-38 (3d ed. 1990); *see also* Restatement (Second) of Property: Landlord & Tenant § 10.2 (1977) (setting forth a list of damages that may be recovered by a tenant for a landlord's failure to fulfill his obligations under the lease). Consequential damages may be available to a tenant whose lease is breached by the landlord. *See Romer v. Topel*, 414 N.W.2d 787, 789 (Minn. App. 1987) (affirming district court's award of consequential damages to tenant), *rev. denied* (Minn. Jan. 20, 1988); *see also Friedman*, § 10.501a, at 637-38 (stating that a tenant "may . . . recover consequential damages" for a landlord's breach of covenant to repair). "Consequential damages are the damages which naturally flow from the breach of a contract, or may reasonably be contemplated by the parties as a probable result of a breach of the contract." *Imdieke v. Blenda-Life, Inc.*, 363 N.W.2d 121, 125 (Minn. App. 1985), *rev. denied* (Minn. Apr. 26, 1985). A plaintiff in a contract action has the burden of proving

damages. *D.H. Blattner & Sons, Inc. v. Firemen's Ins. Co.*, 535 N.W.2d 671, 675 (Minn. App. 1995), *rev. denied* (Minn. Oct. 18, 1995).

In *Teachout v. Wilson*, this court reversed an award of loss-of-bargain damages where the only evidence introduced to prove damages was the price at the time of the sale of the business, which was two and one-half years after the original contract was breached. 376 N.W.2d 460, 464 (Minn. App. 1985), *rev. denied* (Minn. Dec. 30, 1985). In concluding that this was not sufficient, this court observed that there was no baseline from which damages could be calculated because "[t]here [was] no evidence of the fair market value of the business at or near the time of the breach." *Id.*

Here, the district court awarded Shikur consequential damages for the Halversons' breach of the lease, concluding that Shikur "suffered damages, which were foreseeable, in the following amount due to [the Halversons'] breach: . . . Loss of a business $136,882." But the district court denied Shikur's claim for future damages in the form of lost profits for 2016 and 2017. These two decisions are irreconcilable. Presumably, the district court denied Shikur's claim for lost profits because, without any evidence supporting his claim, lost profits were too speculative to be recoverable. *See Leoni*, 255 N.W.2d at 826 ("[D]amages which are speculative, remote, or conjectural are not recoverable."). The same reasoning applies to the value of Shikur's business. Shikur presented no evidence of the value of his business before the breach and after the breach. *See Teachout*, 376 N.W.2d at 464. In fact, the district court failed to explain why Shikur's business should be valued at the amount he paid for it in 2015 when it also rejected the claim for lost profits for 2016 and 2017. It only seems logical that if the business was not turning a profit in 2017, it

would be worth less than Shikur paid for it in 2015. Thus, without any evidence demonstrating the value of Shikur's business at the time of the breach, a conclusion that it is worth the amount he paid for it is mere speculation.

Moreover, the district court never made a finding as to when exactly the breach occurred. Because an award of consequential damages flow from the breach, the lack of a finding as to when the breach occurred, as well as a lack of evidence supporting the loss in value of the business due to the breach, cannot sustain the district court's award of damages to Shikur for the price he paid for his business in 2015. *See Imdieke*, 363 N.W.2d at 125 ("Consequential damages are the damages which naturally flow from the breach of a contract, or may reasonably be contemplated by the parties as a probable result of a breach of the contract."). We therefore reverse the district court's award of damages and remand for a determination of (1) the date of the breach of the lease, (2) the appropriate amount of damages incurred at the time of the breach, which in turn must be based on (3) the value of the business before the breach and after the breach. Such a valuation of the business must also reflect (as the district court has already determined) that Shikur has not proven future damages (in the form of lost profits).

Affirmed in part, reversed in part, and remanded.