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Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0195

Ryan Alvar, et al.,
Appellants,

vs.

Nicollet Residences, LLC, et al.,
Respondents.

Filed January 29, 2024
Reversed and remanded
Ross, Judge

Hennepin County District Court
File No. 27-CV-22-310

Tim Sullivan, Somermeyer Sullivan PLLC, Minneapolis, Minnesota (for appellants)

Malcolm P. Terry, Bernick Lifson, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Bratvold, Presiding Judge; Ross, Judge; and Schmidt, Judge.

NONPRECEDENTIAL OPINION

ROSS, Judge

A couple leasing an apartment in a building that the landlord represented as "smoke free" complained to the landlord that heavy marijuana smoke was seeping into the bedroom they shared with their infant child, and they identified the neighboring apartment where the smoke was originating. The landlord appears to have investigated and informed the corporate leaseholder of the offending apartment that the occupant must cease smoking

marijuana or face immediate eviction, and the leaseholder agreed that eviction for the occupant's marijuana use would be proper. The landlord did not evict the violating tenant or otherwise cause the occupant to cease using marijuana over the next five months, despite the couple's ongoing complaints. The couple sued the landlord for breach of the covenant of habitability and breach of contract based on their lease terms, among other claims. The district court granted the landlord's motion for summary judgment and dismissed the couple's civil complaint. We reverse and remand for further proceedings because the evidence reveals material fact disputes regarding both claims, preventing judgment as a matter of law for the landlord.

FACTS

We base the following summary of the facts on the undisputed evidence in the record and on reasonable factual inferences that favor the parties against whom the district court granted summary judgment.

Appellants Ryan Alvar and Amy Schmidt lived in and worked from a 24th-floor residential unit they leased from respondents American Management Services Central, Cushman & Wakefield, and Nicollet Residences LLC (collectively, American Management) from February 2021 through August 2022. The couple's unit was in The Nic on Fifth, an upscale Minneapolis apartment building where a corporate tenant, Churchill Corporate Services, leased the penthouse unit. A Churchill client—a Minnesota Vikings football player—began occupying the 24th-floor penthouse unit on about July 20, 2021.

Alvar and Schmidt lived in their unit with their toddler, and they had another child in July 2021. Shortly before Schmidt gave birth, the couple informed American

Management, who promoted the building as "smoke free" and included lease provisions declaring that it would immediately terminate the lease of violators, that marijuana smoke had been seeping into their unit. They informed American Management on July 25 that the smoke was emanating from the unit that Churchill leased and was being occupied by the athlete.

The next day, American Management emailed Churchill a "Lease Violation Warning" that included the following specifics, among other concerns:

> On Sunday, July 25th we were made aware that a marijuana smell was coming from apartment #2401. This is not only a lease violation but also illegal. This action needs to stop ***immediately***, or it will result into a written lease violation and that will result into termination/eviction action to be taken.

Churchill wrote back to American Management apologetically, asking to be "updated if the violations continue." Churchill asked about the eviction procedures but remarked, "We obviously want to avoid them at any cost but . . . want to give [the] client a heads up as to what [he] can expect if he doesn't stop."

The smoking continued to emanate from the athlete's unit, and, despite gaps in the record, it appears that American Management informed Churchill of repeated complaints about it. It sent a "friendly reminder" email to Churchill on July 30, restating that "we are a 'NO SMOKING' community," specifying that smoking "is prohibited on your balcony, amenity deck and certainly within your home," and thanking Churchill for its "prompt attention" to the concern. Churchill's agent wrote American Management on August 3, again apologizing: "I know I probably sound like a broken record, but please know that I am truly sorry for these repeated issues. We've been very clear with the occupant as to the

rules and have made it crystal clear to him that if this happens again both he and Churchill will be evicted from the unit." The email continued, "If it happens again I completely understand if you have to proceed with the eviction."

The couple continued to complain about smoke emanating from the athlete's unit into the common areas and their apartment. American Management wrote Churchill again on August 10,

> It still continues to be an issue that you have been smoking marijuana within your home as the entire 24th floor smells this and it is not the first time we have smelled marijuana coming from your home. This has been noted to you on July 25th, August 3rd, we had a conversation with your guest on August 6th and then it continued to happen throughout the weekend and on Monday, August 9th after 9pm. This is clearly unacceptable behavior! The Nic on Fifth is a non-smoking property & a Crime/Drug Free property and this is a direct violation of your lease agreement.

Churchill acknowledged the ongoing problem, informing American Management, "I told him the next violation and he's out," adding, "If you have to evict us I completely understand."

Churchill wrote American Management the next day, saying, "We told [the athlete] he needs to vacate the unit by Friday 8/20 by 4PM." But the next day Churchill wrote again, saying, "To be honest, he hasn't responded to any of our communication so I do not have a feel on him. I am just hoping that he goes quietly." The athlete's mother and later, his brother, apparently attempted to intervene to avoid his expulsion from the unit, and American Management wrote Churchill saying, "I just don't want us going back on what you have told him as this has been an [on]going issue."

Churchill wrote American Management on September 9 to report that the athlete had not complied with Churchill's attempts to remove him from the unit, saying, "I really did have my hopes up that we were going to be able to resolve this amicably with [the athlete] but it looks like that is not the case. . . . [He] has decided he isn't moving. He clearly just thinks he is above all law and rule and no sense can be talked into him. Unfortunately, at this point, legal means will have to be taken against Churchill to evict." The email continued, "Please go ahead and start proceedings on your end."

American Management did not pursue Churchill's invitation to evict Churchill and expel the athlete. About three weeks later, American Management wrote Churchill on September 27 indicating that tenants in addition to the couple were also complaining that marijuana smoke continued to emanate from the Churchill unit: "Today we just had a resident that is a new move in come down at 9am [and] complain about #2401. [M]arijuana smell all weekend coming from the apartment throughout the weekend." The couple's complaints about marijuana smoke from the unit continued into December, when American Management again sent Churchill a "Lease Violation" warning. Churchill responded recognizing the futility of the warning, stating, "We will of course send a notice to [the athlete] but I think we both know what good it will do."

American Management never initiated eviction proceedings against Churchill or took steps to oust the athlete in the five months of the couple's continued complaints about marijuana smoke infiltrating their apartment. At various points during that period, American Management instead offered the couple four purported solutions. It offered to install a "door sweep" (a rubber strip attached to the bottom of a door to reduce airflow

under the door) on their entry door. It offered to place an air purifier within their unit. It offered to pay for them to move into a different unit within the building. And it offered them the opportunity to break their lease without penalty. The couple demanded instead that American Management act to stop the marijuana smoke from entering their unit. The couple endured the marijuana smoke in their home and in the common areas through late December 2021, days before the athlete vacated the unit voluntarily. This appears to coincide with the Vikings waiving his contract and his joining the Arizona Cardinals.

The couple sued American Management for breach of contract based on the lease terms and breach of contract based on the covenant of habitability, among other claims. They based their breach-of-contract claim on the theory that their lease obligated American Management to investigate and act on the complaints of marijuana emanating from the Churchill unit by remedying the problem and fulfilling its purported commitment to maintaining a smoke-free environment. They based their breach-of-the-covenant-of-habitability claim on American Management's alleged failure to keep "the premises and all common areas . . . fit for the use intended by the parties" and "to maintain the premises in compliance with the applicable health and safety laws . . . during the term of the lease" as required by Minnesota Statutes section 504B.161 (2022).

The district court granted American Management's summary-judgment motion and dismissed the couple's claims. It based judgment on the habitability claim on its conclusion that the couple had "not shown a genuine issue of material fact that [American Management's] attempts to cure [the couple's] complaints about [the athlete] were unreasonable or ineffective." And it granted judgment on their contract claim partly on its

reasoning that, "[b]ecause [lease] termination is a severe consequence, it would be reasonable to anticipate that [American Management] require[s] more than another tenant's complaint of odor before terminating a tenant['s lease] for marijuana use."

The couple appeals.

DECISION

Alvar and Schmidt appeal from the district court's grant of summary judgment. We review grants of summary judgment *de novo* to determine if genuine issues of material fact exist precluding judgment as a matter of law. Minn. R. Civ. P. 56.01; *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 754 (Minn. 2005). In doing so, we view the record evidence in the light most favorable to the nonmoving party and resolve any doubts and factual inferences against the moving party. *Staub v. Myrtle Lake Resort, LLC*, 964 N.W.2d 613, 620 (Minn. 2021). For the following reasons, we conclude that the record evidence prevents summary judgment favoring American Management.

I

American Management is not entitled to summary judgment on the couple's contract-breach claim based on the alleged breach of the covenant of habitability. The covenant of habitability is codified in Minnesota and incorporates into every residential lease, among other duties not applicable here, the landlord's duty to maintain "the premises and all common areas . . . fit for the use intended by the parties" and "to maintain the premises in compliance with the applicable health and safety laws of the state, and of the local units of government where the premises are located." Minn. Stat. § 504B.161, subd. 1(a)(1), (4). The legislature directs us to liberally construe these duties. *Id.*, subd. 3.

American Management does not dispute the assertion that its failure to prevent marijuana smoke from infiltrating the couple's unit would constitute a failure to maintain the premises fit for the intended use or that the failure to prevent the infiltration would constitute failure to maintain the premises in compliance with the law. It instead relies on the notion that it cannot be liable for those alleged failures because the couple declined its attempts to cure the problem.

American Management cites our reasoning in *Rush v. Westwood Village Partnership* for the proposition that a landlord cannot be held liable for breaching its duties under the covenant of habitability if a landlord proposes a solution and the tenant rejects that solution, preferring a different one. 887 N.W.2d 701, 709 (Minn. App. 2016), *rev. denied* (Minn. Mar. 14, 2017). Based on that proposition, American Management contends that the couple's failure to offer evidence that the proposed solutions would have been ineffectual allows for summary judgment favoring American Management. The contention fails.

American Management reads *Rush* too broadly. The issue in *Rush* differs substantially from ours, and its reasoning therefore does not apply here. The issue in *Rush* was "whether a landlord commits a per se breach of the covenant to ensure that a residential premises is fit for its intended use by electing one method of repair over the tenant's preferred method." 887 N.W.2d at 703. In those consolidated appeals, residential tenants brought rent-escrow actions after complaining about bedbug infestations, and the landlord proposed to eradicate the pests immediately using one method (a low-cost chemical treatment) while the tenants objected and insisted on a different method (a high-cost heat

treatment). *Id.* at 704. The treatment alternatives promised identical success rates. *Id.* We found relevant a different provision of the covenant-of-habitability statute, which is the landlord's requirement "to keep the premises in reasonable repair." *Id.* at 706 (citing Minn. Stat. § 504B.161, subd. 1(a)(2)). In that context, we recognized that the covenant of habitability "does not impose liability where the landlord cures or attempts to cure a defect within a reasonable time using an effective method of repair, even when the tenant prefers a different repair method or is inconvenienced by the chosen method." *Id.* at 709. It is clear that our circumstances are materially different.

Rush does not resemble this case. In *Rush* the question of liability went to a fact-finder at trial and the issue on appeal was whether a *per se* statutory violation resulted from a landlord's immediately choosing one effective method of eradication over another effective method. *Id.* at 703. The issue here differs considerably. Our question is whether a fact-finder could conclude that the landlord's failure to prevent marijuana-smoke infiltration during five months of continual complaints demonstrates its breach of the covenant to maintain "the premises and all common areas . . . fit for the use intended by the parties" and "to maintain the premises in compliance with the applicable health and safety laws." Minn. Stat. § 504B.161, subd. 1(a)(1), (4). This is not a repair case where the issue is whether the tenant can maintain a claim after refusing to agree to an undisputedly adequate low-cost eradication method that was equally adequate to the high-cost method the tenant demanded. The tenant here presumably would have accepted any adequate method that the landlord employed to restore the home to its habitable condition, and the question is whether the landlord maintained the property in that condition.

We add that the record, construed in the couple's favor, could support a finding that American Management was aware that the marijuana smoke emanating from the Churchill apartment permeated not only the couple's unit and the units leased by other tenants, but also inundated the common areas the tenants use to access those units. And contrary to American Management's representations, the record does not undisputedly show that the couple rejected all its purportedly remedial proposals. The record does not undisputedly establish, for example, that the couple rejected American Management's offer to install a door sweep. Nor does it show why American Management failed to unilaterally install the sweep. More significant, a fact-finder might reasonably conclude from common knowledge and experience that an air purifier *inside* the couple's unit would have done nothing to prevent the smoke from entering the unit, because a purifier would, at most, merely filter smoke from the air after it had already invaded the unit. A fact-finder might also conclude that a door sweep could do nothing to prevent smoke from continuing to permeate the common area just outside the couple's unit or prevent that smoke from entering the unit every time the couple opened their door. The other two supposed remedial efforts (allowing the couple to end their lease or move to a different apartment) both involve the couple leaving their leased premises, not the landlord's meeting its duty to maintain the leased unit's fitness for habitation.

It is true, as American Management argues, that the couple did not engage in substantial discovery to present more evidence to oppose summary judgment. But they each submitted a declaration detailing the continued presence of marijuana smoke in their apartment. And the record evidence, including the emails between American Management

and Churchill, is sufficient to reveal disputed issues of material fact as to whether marijuana smoke rendered Alvar and Schmidt's apartment unfit or uninhabitable.

We are not persuaded otherwise by American Management's assertion that the couple provided no evidence that what they smelled was actually marijuana smoke. The assertion, particularly at this summary-judgment stage, is hollow. Accepting for the sake of argument American Management's legally unsupported premise that some sort of expert or scientific evidence would be necessary for a fact-finder to rely on the couple's statements that the smoke was marijuana smoke, a fact-finder might instead rely on other evidence to prove the allegation. A fact-finder might, for example, make the finding based on what appears to be American Management's numerous admissions that marijuana smoke was permeating the common areas and the couple's apartment. A fact-finder might be so persuaded by American Management's emails to Churchill indicating that its agents had concluded that marijuana smoke was constantly emanating from Churchill's unit, or by Churchill's admissions that this was so. American Management's email on August 10, 2021, for example, seems to admit that American Management had already determined that Churchill's client "[has] been smoking marijuana within [his] home" because "the entire 24th floor smells this and it is not the first time we have smelled marijuana coming from [the] home." And Churchill agreed with American Management's inculpatory statements, apologizing for the ongoing and unresolved marijuana use and acknowledging that its consequent eviction would be proper. The record includes evidence sufficient to create a disputed issue of fact as to whether marijuana smoke was permeating the common areas and the couple's home.

Counsel for American Management maintained during oral argument on appeal that the "we" in American Management's emailed statement that "it is not the first time we have smelled marijuana coming from [the] home" was not a reference to the property manager who wrote and sent the email. We have found no direct or even circumstantial evidence in the record supporting counsel's speculation. At most, counsel's comment identifies a fact dispute, and if that is so, it is a fact dispute that will likely be difficult for American Management to win since its regional property manager also wrote, "I got your [voicemail] . . . . I have all three managers up there right now trying to track down where [the marijuana smoke is] coming from. They DO smell it." We hold that the undisputed facts and the inferences that can reasonably be drawn from the evidence in the couple's favor prevents summary judgment on the couple's habitability claim.

II

American Management also is not entitled to summary judgment on the couple's claim of breach of contract. To prevail on this claim, the couple must prove that a contract existed, that they performed their obligations under the contract, and that American Management breached the contract. *See Lyon Fin. Servs. Inc. v. Ill. Paper & Copier Co.*, 848 N.W.2d 539, 543 (Minn. 2014). A breach of contract occurs when a party, without legal excuse, fails to perform a promise that forms all or part of the contract. *Id.* American Management does not challenge that the evidence supports the first two elements—contract formation and the couple's performance. It questions only whether the evidence supports the couple's claim that American Management failed to perform its promises under the lease contract.

Our question is whether the record reveals a material fact dispute concerning whether American Management had a duty under the lease to maintain the couple's unit and common areas free of smoke and, if so, whether it met that duty. We believe the contract burdened American Management with that duty and that the evidence could allow a jury to find that it failed to meet the duty.

American Management argues that the couple's contract-breach claim fails simply because their covenant-breach claim fails. We have already determined that the covenant-breach claim survives the summary-judgment motion, so this argument cannot lead us to affirm.

American Management alternatively highlights a provision in the lease addendum that declares, "Although [American Management] prohibit[s] smoking in all interior parts of the apartment community, there is no warranty or guaranty of any kind that [the couple's] dwelling or the apartment community is smoke free." It contends that this caveat defeats the couple's contract claim as a matter of law. The contention is unconvincing because it ignores what we read to be a clarifying, implied obligation two sentences later in the same provision: "You must report violations of our no-smoking policy before we are obligated to investigate and act." We read American Management's contractual statement that it is "obligated to investigate and act" on tenant reports of "violations of [its] no-smoking policy" unambiguously in context to mean that, although it does not warrant that a tenant will enjoy a smoke-free environment in the absence of adequate reporting, it is obligated to investigate reported violations and to act on them to maintain a smoke-free environment. A material fact dispute then arises as to whether American Management's

five months of back-and-forth emails with Churchill or its offer to install a door sweep or air purifier met that obligation. A fact-finder will decide this issue in the context of all the circumstances, including the contract's drug-free housing addendum. That addendum prohibits the illegal use of marijuana and declares that "[a] single violation . . . shall be deemed a serious violation" and constitute "good cause for termination of the Lease Contract."

We add that if we were to read the statements in the warranty provision as competing rather than complementary, we would conclude that they are instead ambiguous. If that were so, we still would have uncovered a fact issue, because the interpretation of an ambiguous contract is a question of fact. *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003). And when contract terms are ambiguous, they are construed against the drafter, which in this case is American Management. *See RAM Mut. Ins. Co. v. Rohde*, 820 N.W.2d 1, 15 (Minn. 2012). Either way, we reject American Management's implied argument that the warranty language renders the "obligat[ion] to investigate and act" language ineffectual and requires summary judgment in its favor. We hold instead that the warranty provision does not support summary judgment.

In sum, the record reveals material fact disputes bearing on the couple's claims of breach of the covenant of habitability and breach of contract. We therefore reverse the district court's summary-judgment decision favoring American Management.

Reversed and remanded.