STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1810

Kamboo Market, LLC,
Appellant,

vs.

Sherman Associates, Inc.,
defendant and third party plaintiff,
Respondent,

vs.

Abdirashid Jama, et al.,
third party defendants,
Appellants.

Filed June 27, 2011
Affirmed; motion denied
Larkin, Judge

Hennepin County District Court
File No. 27-CV-09-21373

Kirk M. Anderson, Minneapolis, Minnesota (for appellant)

Timothy M. Kelley, Aleava Rael Sayre, Leonard, Street and Deinard, Minneapolis, Minnesota (for respondent)

Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

Appellant challenges the district court's award of summary judgment in respondent's favor, as well as the district court's denial of its motion to amend its complaint. By notice of related appeal, respondent challenges the district court's attorney-fee award and its denial of respondent's motion for amended findings of fact and conclusions of law. We affirm.

FACTS

On September 28, 2004, appellant-tenant Kamboo Market, LLC and respondent-landlord Sherman Associates, Inc. entered into a commercial lease for property located at 1517 Sixth Street South and 620 16th Avenue North in Minneapolis. Tenant's president, Abdirashid Jama, and vice president, Emad Abed, signed the lease on tenant's behalf. Jama and Abed also signed a lease guaranty agreement.

The initial lease term began on November 1, 2004, and continued through December 31, 2009. Under the terms of the lease, tenant had a right to renew the lease for an additional five-year term as long as it was not in default; but tenant's right of renewal was subject to landlord's right not to renew.

On January 23, 2009, landlord provided tenant with written notice that landlord did not intend to renew the lease and that the lease would expire on December 31, 2009. By letter dated April 14, tenant asked landlord to "[p]lease accept this letter as notice that [tenant] intends to renew its option" under the lease.

On August 14, tenant sued landlord in district court, seeking a declaration that it had "lawfully exercised its right to renew the Lease for another five years." Tenant also asserted claims of fraudulent misrepresentation, equitable and promissory estoppel, breach of contract, breach of the implied duties of good faith and fair dealing, and negligent misrepresentation. Tenant alleged that during the lease negotiations and at the lease signing, landlord orally indicated that tenant would have the exclusive right to renew the lease for an additional five-year term.

Landlord served an answer, counterclaim, and third-party complaint naming Jama and Abed as third-party defendants. In its counterclaim, landlord sought a judgment declaring that it had properly exercised its right not to renew the lease. In its third-party complaint, landlord sought judgment against Jama and Abed, as guarantors, for breach of the lease guaranty.

On August 28, landlord commenced an eviction action against tenant, seeking possession of the leased premises based on tenant's failure to pay rent and real estate taxes. The district court consolidated the civil lawsuit and the eviction action. On January 29, 2010, landlord filed a motion for summary judgment in the civil suit. On February 16, tenant moved to amend its complaint to add a claim for rescission, alleging that landlord failed to disclose "a substantive and latent defect to the building resulting from a prior fire to the ceiling."

The district court granted landlord's motion for summary judgment in the civil suit and issued a writ of recovery for the leased premises in the eviction action. The district court also entered judgment against the guarantors for $81,739.83 in unpaid rent and real

estate taxes and directed landlord to file a separate motion for attorney fees and costs. The district court denied tenant's motion to amend its complaint.

Landlord filed a motion for amended and additional findings of fact and conclusions of law and a motion for attorney fees and costs. Landlord requested that the district court order tenant to pay holdover rent, as that term was defined in the lease. Landlord also sought $93,178.55 in attorney fees and costs. The district court denied landlord's motion for amended and additional findings of fact and conclusions of law and awarded landlord $52,039.80 in attorney fees and costs. The district court subsequently entered an amended judgment against tenant and the guarantors in the amount of $82,735.90. Tenant appealed to this court, and landlord filed a notice of related appeal.

D E C I S I O N

I.

We first address landlord's motion to dismiss tenant's appeal as moot. The doctrine of mootness requires appellate courts to "decide only actual controversies and avoid advisory opinions." *In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999). If a court cannot grant effective relief, the matter is generally dismissed as moot. *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005). Mootness, however, is "a flexible discretionary doctrine, not a mechanical rule that is invoked automatically." *Jasper v. Comm'r of Pub. Safety*, 642 N.W.2d 435, 439 (Minn. 2002) (quotation omitted). "If a party to an appeal suggests that the controversy has, since the rendering of judgment below, become moot, that party bears the burden of coming forward with the subsequent

events that have produced that alleged result." *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 98, 113 S. Ct. 1967, 1976 (1993).

The district court stayed tenant's writ of recovery in the eviction action pending appeal and conditioned the stay on tenant's (1) provision of a $59,265.48 supersedeas bond, later increased to $89,961.58; (2) guarantee of payment of costs on appeal; (3) compliance with the terms of the lease; and (4) payment of monthly rent. On November 22, 2010, landlord informed tenant that it was in violation of the lease because tenant owed CenterPoint Energy $24,066.45 for unpaid utilities at the leased property. In addition, tenant never posted the supersedeas bond. In December, the district court granted landlord's request for a writ of recovery of the premises, noting that tenant failed to comply with the lease by not paying CenterPoint Energy, thereby causing a lack of gas and heat at the property.

Landlord asserts that because tenant failed to satisfy the terms of the lease, it no longer has a right to extend the lease and that the appeal is therefore moot. Landlord argues that this court "cannot, under any of Tenant's claims, grant Tenant the relief it seeks – either the right to possess the Leased Premises for an additional five-year term or damages stemming from the refusal to renew the Lease. Because the Court cannot grant effective relief . . . Tenant's appeal is moot . . . ." But tenant's written submissions to this court indicate that tenant does not seek to repossess the property for an additional five-year term. We therefore do not consider whether such a request would be moot.

With regard to tenant's claims for money damages, landlord argues that any potential money damages are the result of tenant's breach of the lease and its resulting

inability to remain in possession of the property for an additional five-year term. Landlord essentially argues that because tenant cannot prevail on its request for damages, the issue is moot. But a claim is not moot simply because claimant's ability to prevail on the claim is questionable. Moreover, although landlord assumes that all of tenant's alleged damages arise from tenant's inability to extend the lease, tenant also seeks damages related to improvements made in reliance on landlord's alleged misrepresentations. Tenant's request for damages arising from landlord's alleged misrepresentations is not moot.

Lastly, landlord asserts that tenant's appeal of the district court's denial of tenant's motion to amend its complaint to add a claim for rescission is moot, arguing that this portion of tenant's appeal was rendered moot by tenant's subsequent breach of the lease. But again, landlord conflates the issue of whether tenant is entitled to relief with whether relief can be granted. If we remand, the district court could grant relief in the form of an amendment; but whether tenant is entitled to rescission is another question altogether. In sum, because a controversy exists regarding whether tenant is entitled to relief in the form of money damages and rescission, and because the district court would have the ability to grant either form of relief on remand, tenant's appeal is not moot. We therefore deny landlord's motion to dismiss.

II.

Tenant argues that the district court erred by granting landlord's motion for summary judgment. "A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with

the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). "On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "We review de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). "[T]he reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio*, 504 N.W.2d at 761.

Tenant's Claims

Tenant asserts that there is a genuine issue of material fact as to whether landlord made a fraudulent misrepresentation regarding the terms of the lease at execution and that the district court therefore erred by granting landlord's motion for summary judgment. Specifically, tenant argues that landlord altered a material provision of the lease without informing tenant, to wit, landlord added a term allowing landlord to unilaterally rescind tenant's five-year renewal option. The additional language is contained in Section 2.2 of the lease, which provides:

> Provided that Tenant is not in default under any term, condition or covenant contained in this Lease, Tenant shall have the option of renewing this Lease for one (1) additional five (5) Lease Year term (a "Renewal Term") on the terms and conditions as provided in this Lease. Notice of the exercise of any such option shall be given by Tenant to Landlord in writing not later than one hundred eighty (180)

> days prior to the expiration of the Initial Term or any Renewal Term. . . . *Notwithstanding the foregoing, Landlord reserves the right not to renew this Lease provided that Landlord gives Tenant written notice not later than one hundred twenty (120) days prior to the expiration of the Initial Term or any previous Renewal Term and in the event Landlord gives Tenant such notice, Tenant's option(s) to renew as provided herein shall be null and void.*

(Emphasis added.)

Tenant complains that landlord not only failed to inform tenant of the new language, but also misrepresented its inclusion by telling tenant, at the lease execution, that the terms of the lease were in accord with the parties' negotiation and agreement that tenant would have a right to a five-year-renewal term. Although tenant received a copy of the lease prior to execution, tenant executed the lease without reading it.

> To state a claim for fraudulent misrepresentation, a plaintiff must establish that (1) there was a false representation by a party of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made as of the party's own knowledge without knowing whether it was true or false; (3) with the intention to induce another to act in reliance thereon; (4) that the representation caused the other party to act in reliance thereon; and (5) that the party suffer[ed] pecuniary damage as a result of the reliance.

Specialized Tours, Inc. v. Hagen, 392 N.W.2d 520, 532 (Minn. 1986). "To prevail on a claim of fraudulent misrepresentation, the complaining party must set forth evidence demonstrating both actual and reasonable reliance." *Hoyt Properties, Inc. v. Prod. Res. Grp., L.L.C.*, 736 N.W.2d 313, 320-21 (Minn. 2007). "In defending a motion for summary judgment [regarding fraudulent misrepresentation], the nonmoving party must

come forward with some evidence demonstrating a genuine issue as to the actual reliance and the reasonableness of the reliance." *Id.* at 321.

The district court viewed the facts in the light most favorable to tenant and stated:

> Landlord led Tenant to believe that the five-year Lease option could be renewed at Tenant's behest, provided only that Tenant is not in default. Tenant believed that Lease renewal was in its sole control. At the Lease signing, Landlord orally affirmed that the Lease conformed to the parties' previously negotiated terms. Tenant received a copy of the Lease prior to signing. Tenant signed the Lease without reading it, based on Landlord's representations. The misrepresentation complained of appears to be two-fold: 1) Landlord's failure to raise the disputed term during negotiations, and 2) Landlord's statement at the Lease signing that the terms of the written Lease conformed to the parties' previously negotiated terms.

The district court granted landlord's motion for summary judgment because "[w]hile Tenant claims a misrepresentation here, he cannot recover based upon that misrepresentation because his reliance on the misrepresentation was not justifiable." We agree. Tenant fails to raise a genuine issue of material fact as to the reasonableness of its reliance on the alleged misrepresentation. Reliance is unreasonable as a matter of law when a "written contract provision explicitly state[s] a fact completely contradictory to the claimed misrepresentation." *Johnson Bldg. Co. v. River Bluff Dev. Co.*, 374 N.W.2d 187, 194 (Minn. App. 1985), *review denied* (Minn. Nov. 18, 1985). The lease clearly states that landlord has the right not to renew the lease. Tenant would have realized this had it simply read the lease. "Parties who sign plainly written documents must be held liable, otherwise such documents would be entirely worthless and chaos would prevail in our business relations." *Currie State Bank v. Schmitz*, 628 N.W.2d 205, 210 (Minn. App.

2001) (quotation omitted). Because the alleged misrepresentation directly contradicts the unambiguous lease terms, tenant's purported reliance on the claimed misrepresentation is unjustifiable and its fraudulent misrepresentation claim fails as a matter of law.

Several of tenant's other claims are likewise precluded under this reasoning. Summary judgment was properly granted on tenant's equitable estoppel and negligent misrepresentation claims because those claims also require reasonable reliance on alleged misrepresentations. *See N. Petrochemical Co. v. U.S. Fire Ins. Co*., 277 N.W.2d 408, 410 (Minn. 1979) (requiring reasonable reliance to establish an equitable estoppel claim); *Flynn v. Am. Home Prods. Corp.*, 627 N.W.2d 342, 350-51 (Minn. App. 2001) (listing "reasonable reliance" as an element of negligent misrepresentation). Moreover, promissory estoppel only applies where no contract exists. *Banbury v. Omnitrition Int'l., Inc.*, 533 N.W.2d 876, 881 (Minn. App. 1995). Because a fully-executed contract exists here, promissory estoppel is inapplicable.

With regard to tenant's claim that landlord breached the implied duties of good faith and fair dealing, tenant argues that the district court erred by granting landlord's motion for summary judgment because landlord acted in bad faith by misrepresenting the content of the lease and by intending to "take over the exceedingly valuable improvements made by [tenant], take over [tenant's] business contacts for itself, and otherwise profit from [tenant's] labors," as evidenced in an August 20, 2008 letter.

A party "does not act in bad faith by asserting or enforcing its legal and contractual rights." *Sterling Capital Advisors, Inc. v. Herzog*, 575 N.W.2d 121, 125 (Minn. App. 1998) (quotation omitted). Because landlord had the contractual right not to

renew the lease, it did not breach the implied covenant of good faith and fair dealing. Moreover, the August 20 letter merely states that landlord "will likely choose to not renew the lease so we can redevelop the property or relocate the Mosque to the property ourselves." The letter does not suggest that landlord was acting in bad faith or attempting to "take over" tenant's business. Finally, Minnesota law does not recognize a separate cause of action for breach of the implied covenant of good faith when it arises from the same conduct as a breach-of-contract claim.[1] *See Wild v. Rarig*, 302 Minn. 419, 441-42, 234 N.W.2d 775, 790 (1975) ("A malicious or bad-faith motive in breaching a contract does not convert a contract action into a tort action."). Tenant's breach-of-contract and breach-of-implied-duties-of-good-faith-and-fair-dealing claims arise from the same conduct: landlord's refusal to allow tenant to lease the property for an additional five-year term. For these reasons, the district court did not err by awarding summary judgment on this claim.

In sum, the district court did not err by granting landlord's motion for summary judgment on all of tenant's claims, including its request for declaratory judgment.

Landlord's Claims

Tenant asserts that "[t]he district court's grant of [landlord's] claim for damages [in the amount of $81,739.83], was not ripe for summary judgment" because section 3.3 of the lease was ambiguous. "In interpreting a contract, the language is to be given its plain and ordinary meaning." *Brookfield Trade Ctr., Inc. v. Cnty. of Ramsey*, 584

[1] Tenant does not assert that the district court erred by granting landlord's motion for summary judgment on its breach-of-contract claim.

N.W.2d 390, 394 (Minn. 1998). "A contract is ambiguous if its language is reasonably susceptible to more than one interpretation." *Id.* "Whether a contract is ambiguous is a question of law that we review de novo." *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008).

Section 3.3 of the lease states:

> In addition to the monthly installments of Minimum Rent, Tenant shall pay on a monthly basis as Additional Rent during the term hereof all costs and expenses of every kind relating to the Leased Premises, including but not limited to the increase in annual Real Estate Taxes and Landlord's Insurance over the base year of 2005.

Landlord contends, and the district court agreed, that tenant contracted to pay the increase in annual real estate taxes over the base year of 2005. Tenant insists that it understood "that it would be paying the increase from year-to-year — the increase determined from the prior year." But tenant's understanding of section 3.3 is only relevant if the language is ambiguous. *See Fena v. Wickstrom*, 348 N.W.2d 389, 390 (Minn. App. 1984) (stating that "the intent of the parties becomes relevant only when the contract language is ambiguous"). Section 3.3 is not ambiguous. As noted by the district court, tenant's interpretation "ignores the language 'over the base year'" of 2005. The district court correctly concluded that the contract was unambiguous and granted landlord's motion for summary judgment on its third-party complaint.

Tenant further argues that because the district court erred by granting landlord's motion for summary judgment, it subsequently erred by entering judgment on the personal guaranties against Abed and Jama for $81,739.83 and by granting landlord's

motion for attorney fees and costs. Because the district court did not err by granting summary judgment for landlord, this argument is unavailing.

III.

Tenant also argues that the district court abused its discretion by denying its motion for leave to amend its complaint to add a claim for rescission. "The district court has broad discretion to grant or deny leave to amend a complaint, and its ruling will not be reversed absent a clear abuse of that discretion." *State v. Baxter*, 686 N.W.2d 846, 850 (Minn. App. 2004) (citing *Bellomo*, 504 N.W.2d at 761). "Ordinarily, amendments to pleadings should be freely granted except when prejudice would result to the other party." *Rhee v. Golden Home Builders, Inc.*, 617 N.W.2d 618, 621 (Minn. App. 2000). But "[a]n amendment may . . . be denied if it will accomplish nothing, such as when the amendment does not state a cognizable legal claim." *Envall v. Indep. Sch. Dist. No. 704*, 399 N.W.2d 593, 597 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987). "Whether the district court has abused its discretion in ruling on a motion to amend may turn on whether it was correct in an underlying legal ruling." *Doe v. F.P.*, 667 N.W.2d 493, 500-01 (Minn. App. 2003), *review denied* (Minn. Oct. 21, 2003).

In support of its motion to amend, tenant argued that landlord failed to disclose a "substantive and latent defect to the building resulting from a prior fire" and that the failure to disclose the defect gave tenant the right to rescind the lease.[2] Tenant admits

[2] Tenant argues on appeal that landlord's "misrepresentations of the terms of the lease merits rescission of the lease and the personal guarantee." Because this theory was not raised in the district court, we will not consider it on appeal. *See Thiele v. Stich*, 425

that it knew about the fire damage in 2005. In fact, tenant and landlord negotiated a three-month-rent-free period to compensate tenant for the purported misrepresentations about the condition of the building.

In denying the motion to amend, the district court reasoned that "[r]escission is simply an inapplicable remedy at this time" and that "[b]ecause tenant cannot maintain an action for rescission, tenant's motion to amend must be denied." *See Hunt v. University of Minnesota*, 465 N.W.2d 88, 95 (Minn. App. 1991) (stating, "[n]onetheless, an amendment to a complaint may properly be denied when the additional alleged claim cannot be maintained."). We agree. "The right to rescind must be exercised promptly upon discovery of the facts from which it arises for the reason that under the law it may be waived by continuing to treat the contract as a subsisting obligation." *Gaertner v. Rees*, 259 Minn. 299, 303, 107 N.W.2d 365, 368 (1961). Accordingly, if tenant wanted relief in the form of rescission, it should have made its rescission claim when the fire damage was discovered, not five years later in response to an eviction action. Moreover, "the general rule is that a party who wishes to rescind an agreement must place the opposite party in statu[s] quo." *Cut Price Super Markets v. Kingpin Foods, Inc.*, 356 Minn. 339, 353, 98 N.W.2d 257, 267 (1959). Because tenant's request for rescission was not timely and because it was not possible for the district court to return the parties to the status quo five years after tenant discovered the basis for its rescission claim, the district

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N.W.2d 580, 582 (Minn. 1988) (stating that generally, an appellate court will not consider matters not argued to and considered by the district court).

court did not abuse its discretion by denying tenant's motion to amend. *See Hunt*, 465 N.W.2d at 95.

IV.

By notice of related appeal, landlord argues that the district court erred by "failing to award all of the attorney's fees and costs [landlord] sought against the [g]uarantors and [tenant]." Two documents potentially support an attorney-fee award in this case. The guaranty document provides for attorney fees as follows:

> If Landlord at any time is compelled to take any action or proceeding in court or otherwise to enforce or compel compliance with the terms of the Lease or this Guaranty, the undersigned shall, in addition to any other rights and remedies to which Landlord may be entitled to hereunder or in law or in equity, be obligated to all costs and expenses, including attorneys' fees, incurred or expended by Landlord in connection with the protection, defense, or enforcement of the Lease or this Guaranty.

And the lease provides for an award of attorney fees incurred "in connection with the Tenant's Event of Default."

The district court concluded that "[t]he lease and guaranty language allow[] fees only where the Landlord is the party bringing the action in Court or enforcing or compelling compliance with the terms of the Lease." Thus, the district court limited its attorney-fee award to fees incurred in connection with the eviction action. Landlord

argues that it is entitled to recover all of its attorney fees, whether they were incurred in connection with its eviction action or tenant's civil suit.[3]

"Contract interpretation is a question of law, subject to de novo review." *Info Tel Communications, LLC v. Minnesota Public Utilities Comm'n*, 592 N.W.2d 880, 884 (Minn. App. 1999), *review denied* (Minn. July 28, 1999). "A contract is ambiguous if its language is reasonably susceptible to more than one interpretation." *Brookfield Trade Ctr.*, 584 N.W.2d at 394.

The language in the guaranty implicates situations where landlord "is compelled to take any action or proceeding in court" to "enforce or compel compliance with" the terms of the lease or guaranty. This language is reasonably interpreted as applying to actions initiated by the landlord. But the guaranty also mentions costs and fees incurred in connection with the "protection" or "defense" of the lease or guaranty, and landlord could "enforce" the terms of the lease by defending against tenant's civil action. Thus, the guaranty is also reasonably interpreted as providing for attorney fees and costs in actions that were not initiated by the landlord. Because this language is reasonably susceptible to more than one interpretation, we construe the ambiguity against the landlord as the drafter of the document. *See Benson v. City of Little Falls*, 379 N.W.2d 711, 713 (Minn. App. 1986) (stating that ambiguity in a contract is to be resolved against the drafter unless it is inequitable to do so). Under this construction, the district court did not err by limiting its award of attorney fees and costs to those incurred by landlord in its eviction

[3] The district court awarded attorney fees of $45,033.75 and costs of $7,006.05. Landlord argues that it is entitled to "a minimum total of $93,178.55 in attorney's fees and costs."

action. And because the lease provides for an award of attorney fees in connection with tenant's default and tenant's default was the central issue in the eviction action, attorney fees were appropriately awarded in that action.

V.

Landlord argues that the district court abused its discretion by denying its motion for amended findings and conclusions of law concerning the amount of the judgment, specifically, the amount of rent awarded for tenant's possession of the property after termination of the lease. Landlord argues that it was entitled to holdover rent, equal to 1.5 times the normal rent payment, for the period of January to December 2010. Landlord did not request this relief in its initial motion for summary judgment, and the district court denied landlord's later attempt to obtain this relief through a motion for amended findings and conclusions of law. This court reviews a district court's denial of a motion for amended findings of fact for an abuse of discretion. *Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006), *review denied* (Minn. Nov. 14, 2006).

Section 2.4 of the lease states that "[i]f Tenant does not vacate the Leased Premises on the expiration or termination of this Lease, Tenant shall be a tenant at will for the holdover period" and must pay 1.5 times the normal rent during any holdover period. The district court concluded that, as a matter of law, the lease terminated on December 31, 2009. But the district court stayed a writ of recovery in the eviction action pending appeal, thereby providing tenant with a legal basis to remain in possession of the property beyond December 31, 2009. The district court noted that "[a]t the time of the stay, the parties contemplated that tenant would pay rent, in accordance with the lease, as

though tenant had a legal right to remain in the property." The district court therefore reasoned that "[r]equiring tenant to now pay 'holdover rent' is simply unfair" and that "[t]enant rightfully relied on [the district] [c]ourt's interlocutory order governing the terms of tenancy during litigation." And the district court understandably refused to "go back in time and [o]rder a fifty percent increase in Tenant's rent obligation." Under these circumstances, the district court did not abuse its discretion by refusing to amend its findings of fact and conclusions of law to require tenant to pay holdover rent.

Affirmed; motion denied.

Dated:

Judge Michelle A. Larkin