STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2202

Lariat Companies, Inc.,
Respondent,

vs.

Baja Sol Cantina EP, LLC, et al., defendants and third party plaintiffs,
Appellants,

vs.

Baja Sol Restaurant Group, LLC,
Third Party Defendant.

Filed August 19, 2013
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-CV-10-24879

Thomas J. Conley, Law Office of Thomas J. Conley, Minneapolis, Minnesota (for respondent)

Heather L. Marx, Cozen O'Connor, Minneapolis, Minnesota (for appellants)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and Worke, Judge.

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

LARKIN, Judge

Appellants challenge the district court's award of summary judgment to respondent, arguing that there are genuine issues of material fact regarding their contractual liability and damages. We affirm.

FACTS

On October 8, 2008, appellant Baja Sol Cantina EP, LLC entered into a commercial lease with respondent Lariat Companies Inc. The lease term was ten years, with a fixed annual rent. Baja Sol Cantina's president, appellant Michael R. Wigley, executed the lease on Baja Sol Cantina's behalf. Wigley also signed a personal guaranty.

Baja Sol Cantina was evicted for nonpayment of rent on July 1, 2010, and ordered to vacate the premises. Lariat sued appellants for breach of contract and sought judgment, jointly and severally, for unpaid rent and attorney fees and costs. Lariat moved for summary judgment, which was granted after a hearing on the motion. The district court awarded Lariat $2,224,237 in damages, pre- and post-judgment interest, and reasonable attorney fees. This appeal follows.

D E C I S I O N

"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). "[T]here is no genuine issue of material fact for trial when the nonmoving

party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). "[T]he party resisting summary judgment must do more than rest on mere averments." *Id.*

"[Appellate courts] review a district court's summary judgment decision de novo. In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted). "On appeal, the 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.

I.

Appellants first argue that because genuine issues of material fact exist regarding whether the lease was terminated, the district court erred by granting Lariat's motion for summary judgment.

"A lease may be terminated where the lessee surrenders the premises and the lessor accepts that surrender." *Benasutti v. Coast-to-Coast, Inc.*, 392 N.W.2d 695, 697 (Minn. App. 1986). "The intent necessary to rescind or terminate a lease is the same intent required to enter into one." *Id.* "There must be an agreement between lessor and lessee that the lessee surrenders the leased premises and the lessor accepts such surrender." *Id.* "Such an agreement can be either express or implied." *Id.*

However, "[u]nder Minnesota case law, even when a lease has been terminated the landlord is entitled to an amount equal to the 'damages resulting from the breach with the attendant obligation upon the landlord to use reasonable efforts to mitigate such damage subsequent to the breach.'" *Provident Mut. Life Ins. Co. v. Tachtronic Instruments, Inc.*, 394 N.W.2d 161, 165 (Minn. App. 1986) (quoting *Gruman v. Investors Diversified Servs., Inc.*, 247 Minn. 502, 508, 78 N.W.2d 377, 381 (1956)) (affirming a damages award under lease terms even though the lease had been terminated). In this case, the lease explicitly anticipated monetary recovery in the event of termination, stating:

> Landlord may terminate this Lease and forthwith repossess the leased premises and be entitled to recover forthwith as damages a sum of money equal to the total of (i) the cost of recovering the leased premises (including attorneys' fees, disbursements of counsel and any costs of suit), (ii) the unpaid rent earned at the time of termination, plus interest thereon as provided in Article II, section 2.7 of this Lease, (iii) the present value . . . of the balance of the rent for the remainder of the term less the present value . . . of the amount Tenant reasonably demonstrates that Landlord would in all likelihood receive from leasing the leased premises to another tenant for said period, taking into account the cost of reletting, the then-current market conditions, the time the leased premises was vacant and other similar costs, and (iv) any other sum of money and damages owed by Tenant to Landlord.

Even though caselaw and the unambiguous language of the parties' lease indicate that Baja Sol Cantina is liable for breach-of-contract damages in the event of lease termination, appellants contend that Baja Sol Cantina's contractual liability ends upon lease termination. Appellants' contention is unsupported and unpersuasive.

Appellants quote *Gruman* for the proposition that "[i]f [a landlord] ha[s] accepted [the leased property] back, and re-rented it to some other person, a rescission of the contract of lease would have been thereby effected, and defendant wholly released from his obligation." *Gruman*, 247 Minn. at 507, 78 N.W.2d at 380 (quotation omitted). It is not necessary to analyze that proposition because there is no evidence in the record that Lariat had re-rented the property at the time of the summary-judgment determination.[1] Moreover, although *Gruman* quotes an earlier case for that proposition, the holding in *Gruman* is, in part, that "[w]here by some act or statement lessor has indicated his acceptance of lessee's abandonment of leased premises and thus in effect terminated [the] lease, *his remedy is for damages resulting from breach* with attendant obligation to use reasonable effort to mitigate them subsequent to breach." *Id.* at 502-03, 78 N.W.2d at 378 (emphasis added).

Because (1) *Gruman* holds that a lessor may recover damages resulting from breach of the lease even though the lease is terminated, (2) *Provident* affirmed damages awarded under lease terms even though the lease had been terminated, (3) the lease in this case clearly provides for damages in the event of termination, and (4) appellants do not provide persuasive authority to support their contention that termination would absolve Baja Sol Cantina of contractual liability under the lease, we conclude that Baja Sol

[1] As explained in Section IV, it appears that the property was re-rented after the summary-judgment ruling. But as further explained in Section IV, we will not consider any evidence pertaining to the re-renting. For that reason, appellants' reliance on *Bowman v. Plumb* for the proposition that "if a landlord accepts a third party as a tenant in place of a prior lessee, in effect this constitutes an acceptance of the surrender of the leased property and a consequent termination of the prior lease by operation of law" is misplaced. 220 Minn. 547, 550, 20 N.W.2d 493, 494-95 (1945).

Cantina remains liable for breach-of-contract damages even if the lease was terminated. Thus, any issues of fact regarding whether or not Lariat accepted Baja Sol Cantina's surrender of the leased premises and thereby terminated the lease are not material. *See Zappa v. Fahey*, 310 Minn. 555, 556, 245 N.W.2d 258, 259-60 (1976) ("A material fact is one of such a nature as will affect the result or outcome of the case depending on its resolution.").

Moreover, because Baja Sol Cantina remained liable to Lariat for breach-of-contract damages under the lease even in the event of termination, the guarantor remained liable as well. Appellants' arguments on this point are that "the Guarantor's obligations are limited to payment of the obligations of the tenant," "without a principal debt, and with the Lease terminated, there remain[s] no further obligations of payment or performance for the Guarantor to guaranty," and "termination of the lease necessarily results in termination of the Guaranty." Those arguments are premised on the mistaken belief that Baja Sol Cantina's contractual liability under the lease ended on lease termination. As explained above, Baja Sol Cantina remained liable for damages under the lease in the event of termination. Thus, the guarantor remained liable for payment and performance of Baja Sol Cantina's obligations in the event of termination.

II.

Appellants next argue that because genuine issues of material fact exist regarding whether the franchisor, Baja Sol Restaurant Group, LLC, assumed the lease, the district court erred in granting Lariat's motion for summary judgment. Appellants contend that because Baja Sol Restaurant possessed the leased property after Baja Sol Cantina vacated

the property, a rebuttable presumption arose that Baja Sol Restaurant assumed the lease, which precludes an award of summary judgment.

"When [a] lessee transfers all of its interest in the lease to another for the entire term of the lease, an assignment of the lease occurs and privity of estate is created between the original lessor and assignee, giving the original lessor the right to enforce against the assignee all the covenants which run with the land, including the covenant to pay rent." *Southcross Commerce Ctr., LLP v. Tupy Props., LLC*, 766 N.W.2d 704, 707 (Minn. App. 2009) (quotation omitted). A third-party possessor's liability to a landlord is "based on privity of estate and not on privity of contract" and such an assignee is "liable for rent during the time [it] was in possession." *O'Neil v. A.F. Oys & Sons, Inc.*, 216 Minn. 391, 391, 395, 13 N.W.2d 8, 8, 10 (1944).

"Even without a formal assignment, one in possession may be an equitable assignee and subject to the covenants and obligations of the lease." *Southcross*, 766 N.W.2d at 708 (quotation omitted). "There is a rebuttable presumption that a third party in possession of leased premises is there as an assignee of the lessee." *Id.* And "when a nonmoving party to a summary-judgment motion puts forth undisputed evidence that conclusively establishes a rebuttable presumption in its favor, the moving party is precluded from obtaining summary judgment." *Id.* at 709.

Appellants contend that Baja Sol Cantina is completely relieved of its contractual liability to Lariat if Baja Sol Restaurant is an equitable assignee based on its temporary possession of the leased property after Baja Sol Cantina's eviction. The only case appellants cite as support for that assertion, *O'Neil*, concerns the termination of an

assignee's liability at the time of reassignment. *O'Neil* explains that where an assignee's liability is based on privity of estate and not on privity of contract, the "assignee of a lease may, by assigning it, even to a pauper, put an end to his liability in point of time." 216 Minn. at 395, 13 N.W.2d at 10 (quotation omitted). *O'Neil* is inapplicable because Baja Sol Cantina is not an assignee; it is the original contracting tenant.

Appellants do not cite persuasive authority to support their contention that an equitable assignment of the lease to Baja Sol Restaurant would have ended Baja Sol Cantina's contractual liability to Lariat. Moreover, the lease expressly states: "No assignment shall release tenant of any of its obligations under this Lease or be construed or taken as a waiver of any [of] Landlord's right or remedies hereunder." Thus, any issues of fact regarding whether or not Baja Sol Restaurant assumed the lease by possessing the leased property are not material. *See Zappa*, 310 Minn. at 556, 245 N.W.2d at 259-60 ("A material fact is one of such a nature as will affect the result or outcome of the case depending on its resolution.").

As to the guarantor's liability in the event of assignment, the guaranty expressly provides that it "shall be a continuing Guaranty, and the liability of Guarantor hereunder shall in no way be affected, modified or diminished by reason of any assignment, renewal, modification or extensions of the Lease." Appellants nonetheless argue that there is an unresolved and genuine issue of material fact as to "whether the Guaranty (by its defined terms) guaranties performance of the Franchisor as successor or assignee of the Lease."

"[A]n unconditional guaranty is a separate obligation from the principal obligation." *Nat'l City Bank of Minneapolis v. Lundgren*, 435 N.W.2d 588, 591 (Minn. App. 1989), *review denied* (Minn. Mar. 29, 1989). Guarantors may, in the guaranty contract, waive defenses and make themselves unconditionally liable for the indebtedness at issue. *See id.* at 592 (stating that the guarantor "expressly waived his right to assert release of the debtor as a defense to the bank's enforcement of the guaranty"). The personal guaranty in this case stated: "This guaranty is an absolute and unconditional guaranty of payment and performance." This plain and unambiguous language indicates that Wigley's obligations were absolute and continuing. *See Midland Nat'l Bank of Minneapolis v. Sec. Elevator Co.*, 161 Minn. 30, 41, 200 N.W. 851, 856 (1924) (holding that the defendant's argument failed as a matter of law because he was "prevented by the language of his own contract from invoking [the legal theory at issue]"). We therefore conclude that there are no genuine issues of material fact regarding Wigley's liability under the personal guaranty.

III.

Appellants also argue that there are genuine issues of material fact regarding damages. To prevail on a breach-of-contract claim, the plaintiff must prove damages. *Christians v. Grant Thornton, LLP*, 733 N.W.2d 803, 808 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007).

Appellants first contend that Lariat's damages should have been reduced by "the amount [Lariat] would in all likelihood obtain from a future tenant." The lease limits Lariat's future-rent damages to

> the present value . . . of the balance of the rent for the remainder of the term *less the present value . . . of the amount Tenant reasonably demonstrates that Landlord would in all likelihood receive from leasing the leased premises to another tenant for said period*, taking into account the cost of reletting, the then-current market conditions, the time the leased premises was vacant and other similar costs.

(Emphasis added.)

Appellants argue that they "presented evidence that [Lariat] was likely to re-let the Property within a matter of months." That evidence consisted of a newspaper article describing the strong leasing market in Eden Prairie for restaurants. The newspaper article is hearsay and properly disregarded. *See* Minn. R. Evid. 801(c) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); *Murphy v. Country House, Inc.*, 307 Minn. 344, 349, 240 N.W.2d 507, 511 (1976) (hearsay is not admissible to oppose summary judgment). Lariat, on the other hand, presented an affidavit stating that the property had been listed for lease with a retail broker, but no offers had been received.

Appellants also argue that the district court should have deducted any rent that Lariat received from Baja Sol Restaurant during its possession of the property from the damage award. But the record does not indicate that Baja Sol Restaurant paid any rent to Lariat. This record does not establish a genuine issue of material fact regarding the amount of damages due under the contract. *See DLH*, 566 N.W.2d at 71 (stating that no genuine issue of material fact exists "when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently

probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions").

Appellants next contend that there are genuine issues of material fact regarding Lariat's efforts to mitigate damages. Generally, "landlords are under no obligation to mitigate damages after a tenant abandons leased premises." *Control Data Corp. v. Metro Office Parks Co.*, 296 Minn. 302, 306, 208 N.W.2d 738, 740 (1973). If the lease is terminated, however, the landlord must "use reasonable efforts to mitigate such damages subsequent to the breach." *Gruman*, 247 Minn. at 508, 78 N.W.2d at 381. Because the issue of termination is undetermined, we will assume that Lariat had a duty to mitigate.

Lariat provided the district court with an affidavit from its real estate coordinator detailing the efforts taken to re-let the property, including listing the property with its real estate broker. Appellants counter that they conducted internet searches and "[d]espite diligent efforts . . . unturned no advertisement that the [p]roperty was available to rent." But the breaching party has the burden of proving that damages could have been mitigated. *Lanesboro Produce & Hatchery Co. v. Forthun*, 218 Minn. 377, 381, 16 N.W.2d 326, 328 (1944). Appellant's internet search is insufficient to create a genuine issue of material fact regarding respondent's effort to mitigate damages. *See DLH*, 566 N.W.2d at 71.

IV.

Lastly, appellants argue that this court should not "affirm the [district] court's entry of a judgment that resulted in a clear double recovery to [Lariat]." *Compare Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 379 (Minn. 1990) (prohibiting double recovery

for the same misconduct), *with Ill. Farmers Ins. Co. v. Schmuckler*, 603 N.W.2d 138, 141 (Minn. App. 1999) ("We note, however, that double recoveries are not absolutely prohibited and were not prohibited at common law."), *review denied* (Minn. Feb. 24, 2000).

Appellants contend that Lariat "has now admitted to this Court that it re-let the Property at issue on July 14, 2011 pursuant to the terms of a ten-year lease" and "[u]nder the new lease, [Lariat] is entitled to a payment of rents . . . in the amount of $1,188,800.00 from 2011 until 2021." Appellants continue: "Based upon this record, [Lariat] is seeking the affirmance of a judgment that amounts to a double recovery for eight years of future rents. Indeed, and what is of more concern, is that the record is clear that [Lariat] obtained this double recovery *before* the entry of judgment against [a]ppellants."[2]

Although appellants' assertions suggest a genuine issue of material fact regarding damages, appellants did not present any evidence regarding Lariat's re-letting of the property when defending Lariat's motion for summary judgment. And, our review of the district court's award of summary judgment must be based on the record as it existed at the time of the summary-judgment ruling.[3] *See Thiele v. Stich*, 425 N.W.2d 580, 582-83

[2] The district court held the summary judgment hearing on April 12, 2011, and issued its order for summary judgment on June 20. Respondent re-let the property on July 14, and the district court entered final judgment on October 22, 2012.

[3] Our review of the record indicates that appellants moved the district court to vacate its order for summary judgment prior to entry of judgment. In support of the motion, appellants argued that after the district court ordered summary judgment, they learned that Lariat had been in negotiations to re-let the property and that Lariat subsequently executed a ten-year lease on the property. The district court denied the motion to vacate,

(Minn. 1988) ("An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below."). Because that record contains no evidence regarding Lariat's re-letting of the property, appellants' double-recovery argument is unavailing.

In conclusion, there are no genuine issues of material fact that preclude an award of summary judgment for Lariat. We therefore affirm.

Affirmed.

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reasoning that appellants "made a strategic litigation decision not to engage in discovery prior to the dispositive motion hearing" and "did not show that they employed reasonable investigation efforts to find and produce evidence." Thus, the district court concluded that "[t]he record does not reflect a reasonable excuse for [appellants'] failure to exercise due diligence at the summary judgment stage of the proceedings."

In asking this court to reverse summary judgment based on factual assertions that were presented in support of the motion to vacate but not in opposition to Lariat's motion for summary judgment, appellants essentially seek review of the order denying their motion to vacate. *See* Minn. R. Civ. App. P. 103.04 (stating that "on appeal from a judgment [the appellate courts] may review any order involving the merits or affecting the judgment" but explaining that "[t]he scope of review afforded may be affected by whether proper steps have been taken to preserve issues for review on appeal"). But for reasons unknown to this court, on appeal, appellants do not mention the motion to vacate or assign error to the district court's ruling on the motion. Because appellants do not assign error to the ruling or brief the issue on appeal, we will not review the district court's ruling on appellants' motion to vacate or consider the factual assertions made in support of the motion. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating that because an issue was not argued in the briefs, it "must be deemed waived").