STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0240

Lease Servicing Center, Inc.,
Respondent,

vs.

Michael Thomas, individually, and d/b/a Thomas Communications,
Appellant.

Filed September 22, 2009
Affirmed in part, reversed in part, and remanded
Stoneburner, Judge

Douglas County District Court
File No. 21C506000564

Andrew S. Hansen, Adam C. Trampe, Oppenheimer Wolff & Donnelly, L.L.P., 3300 Plaza VII Building, 45 South Seventh Street, Minneapolis, MN 55402 (for respondent)

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Considered and decided by Kalitowski, Presiding Judge; Stoneburner, Judge; and Collins, Judge.*

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

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

STONEBURNER, Judge

Appellant lessee challenges summary judgment granted to respondent equipment-leasing company, arguing that the district court erred by (1) failing to consider appellant's affidavits submitted in opposition to respondent's summary-judgment motion; (2) holding that appellant defaulted on leases; (3) holding that the cost of repairing equipment was undisputed; (4) concluding that the liquidated-damages clause of the leases is enforceable; (5) denying appellant's request for a jury trial; and (6) awarding attorney fees to respondent. We affirm the district court's holdings that (1) appellant defaulted under the leases by failing to keep the equipment in good repair; (2) the liquidated-damages clause in each lease is reasonable and enforceable for default caused by failure to make lease payments; and (3) the waiver of jury trial contained in the leases is enforceable. But, because we conclude that there are genuine issues of material fact on some issues and because other issues are not ripe for review, we reverse the district court's holdings that (1) appellant's affidavits filed in opposition to respondent's summary judgment motion were untimely; (2) appellant defaulted under the leases by failing to make lease payments; (3) the amount of damages for equipment repair is undisputed; and (4) respondent is entitled to attorney fees and costs at this time.

FACTS

In 2004, appellant Michael Thomas d/b/a Thomas Communications (Thomas)[1] was awarded contracts to perform horizontal drilling for a telecommunications project in California. Thomas arranged to lease, with an option to purchase, much of the necessary equipment for the project from respondent Lease Servicing Center, Inc. (LSC).

Thomas and LSC entered into two leases covering the equipment. Lease #12625 covers equipment listed on schedule A in the lease, and lease #12686 covers two additional pieces of equipment. Except for the description of equipment leased and payment amounts, the terms of the leases are almost identical, and lease #12686 is cross-collateralized with lease #12625 to provide that if either lease is in default, both leases will be considered in default.

Thomas encountered difficulties on the California project. In April 2005, Thomas contacted LSC about "unload[ing]" the equipment. LSC made arrangements with Sage Telecommunications Corporation (Sage) to assume Thomas's leases for all of the equipment leased from LSC. And LSC arranged for Sage to lease five trucks that Thomas had originally purchased to transport the equipment.

Before assuming the leases, Sage inspected the equipment and found that it had been damaged by vandalism and scavenging of parts. The equipment was repaired. LSC received $87,106 under the insurance policy that Thomas maintained on the equipment for cost of repair. Chris Canavati, secretary/treasurer of LSC later claimed that LSC actually paid $129,000 for repairs.

[1] For simplicity, we refer to Michael Thomas and Thomas Communications collectively.

The record contains a letter from Canavati on behalf of LSC to Sage dated May 24, 2005, enclosing: "[1] Assignment & Assumption Agreement; [2] Resolution of Board of Directors; [3] Request for Certificate of Insurance, [and 4] Copy of Original Lease Agreement & Equipment Schedule A for Your Records." The letter instructs Sage to sign and date the documents without altering them in any way. The record also contains a fax transmittal sheet from Sage to Canavati, dated June 23, 2005, stating that Sage "will UPS [lease documents] overnight" with the check for the first payment. Other language in the transmittal suggests that Sage will use Thomas's trucks, which were not covered by the leases, to transport the equipment and asks Canavati to "have the original Lessee make sure they are ready to go."[2]

The record contains copies of the assignment agreements, which were prepared by LSC. The agreements state that LSC "has expressed its willingness to give its written consent" to the assignment, and provide that, Thomas, assignor, assigns all of its rights under the leases to Sage, assignee, and Sage assumes all of Thomas's obligations, including the obligation to pay LSC the balance on each lease. The copies of these agreements in the record are signed only by Sage's president and a witness. But it is not disputed that Sage took over all of the equipment covered by both leases and has remained current in payments due under both leases. Canavati testified at his April 2007 deposition that LSC did not use a lease with Sage, "they were just signing an assignment

[2] On September 23, 2005, Sage and HDD Capital, Inc., a leasing company owned by Canavati, entered into lease #12902 covering the five trucks.

and assumption of the lease." It is undisputed that Thomas was current on payments for both leases when Sage assumed Thomas's obligations to LSC.

In March 2006, LSC sued Thomas, asserting for the first time that Thomas defaulted on the leases by failing to make payments from November 2005. LSC demanded, in relevant part, "reasonable damages in a sum in excess of $50,000" for the remaining balance of lease #12625 and equipment-repair and repossession costs, attorney fees, costs and disbursements, and prejudgment interest. Additionally, LSC demanded "reasonable damages in the sum of $29,779.92 for the remaining balance of [lease #12686] together with attorney fees, costs and disbursements and prejudgment interest."

Thomas moved to dismiss and answered, challenging personal jurisdiction and asserting that LSC failed to join necessary parties, including Sage. The district court denied Thomas's motion to dismiss for lack of personal jurisdiction and requested further briefing on the issue of failure to join necessary parties. Thomas later withdrew its motion to dismiss for failure to join necessary parties.

LSC then moved for partial summary judgment.[3] LSC asserted that it is undisputed that Thomas ceased making lease payments on both leases in 2005 and that the equipment was damaged in Thomas's possession. LSC asserted that it is undisputed that there were no written modifications to the leases, both of which state that any modification must be in writing. LSC asserted that it was entitled to all remaining lease

[3] The motion sought summary judgment for remaining lease payments under counts one and two of the complaint, but did not seek summary judgment for alleged unreimbursed costs of repair or for the claim in count three for a commission for selling Thomas's trucks.

payments, referencing the provision in the leases for accelerated lease payments on default. LSC asserted that by releasing the equipment it had not been made whole because "a release of defaulted equipment is simply a new lease lost." LSC invoked the liquidated damages formula set forth in paragraph 13 of the leases, providing, in relevant part, that if Thomas does not pay any lease payment or breaks any promise in the agreement, Thomas will be in default allowing LSC to terminate or cancel the lease and require immediate payment of the remaining balance and/or return of the equipment to LSC. Paragraph 13 requires Thomas to pay repossession costs, attorney fees, and court costs, and it provides that "failure to enforce [LSC's] rights under this Agreement does not prevent [LSC] from enforcing any rights at a later time."

Thomas again moved to dismiss, asserting that LSC's claims "are based [on] fraud and illegality" and seeking attorney fees under Minn. Stat. § 549.211 (1998) (permitting award of attorney fees when a party acts in bad faith). Thomas specifically asserted that LSC lacked standing to pursue the lawsuit based on its sale of the leases to Minnwest Capital Corporation (Minnwest), a subsidiary of Minnwest Bank; that LSC received more in insurance proceeds than it could document in costs of repair; and that Thomas was not in default when the equipment was turned over to LSC, which had no damages for loss of lease payments.

In its reply to Thomas's motion to dismiss, LSC produced an assignment of Minnwest's rights, stated that the costs of repairs are a disputed question of fact, and argued that the leases could not be modified by oral agreement.

Thomas, in its reply to LSC's motion for partial summary judgment, argued that LSC's claim that Thomas defaulted by failing to make the lease payments ignored the assignment of the leases to Sage.[4] Thomas submitted the affidavits of Michael Thomas, his attorney Michael Ablan, and his accountant Lori Adams, asserting that Thomas never defaulted on lease payments, challenging LSC's claims for the cost of repairs to the equipment, asserting that Thomas cooperated in the assignment which was completed while Thomas was current in lease payments, and stating that insurance proceeds retained by Thomas did not fully compensate it for repairs and replacements that it made to the equipment.

The district court, by order filed October 9, 2007, denied both Thomas's motion to dismiss and LSC's motion for summary judgment. The district court noted that Thomas did not argue that material fact questions prevented summary judgment on LSC's claims for lease payments, but rather asserted that LSC had no damages, that it was not in default or was not given notice of default, and that if LSC's position is correct, the assignments to Sage would be void and Thomas would be entitled to the rent paid by Sage. The district court concluded that the issues had been insufficiently addressed by the parties, including the issues surrounding Sage's lease of the equipment, leaving "genuine issues of material fact . . . unanswered."

[4] Thomas's reply to LSC's summary judgment motion states that "the [district] court already has copies of the Assignments executed by Michael Thomas on July 23, 2005." But the district court file forwarded to this court does not contain copies of the assignments signed by Thomas.

In April 2008, Thomas again moved to dismiss for failure to state a claim on which relief could be granted for future lease payments and asserting that LSC is not the real party in interest to pursue claims for the lease payments. Again Thomas argued that LSC had no damages for lease payments and argued that the remedies provided in the leases did not permit both return of the equipment and acceleration of lease payments. Thomas argued that the assignment to Sage released it from its obligations under the leases, but also stated that for purposes of Thomas's motion to dismiss, it would assume default occurred. Thomas then argued that the remedies permitted under Minn. Stat. § 336.2A-523,-527 do not allow LSC to re-lease the equipment and also collect lease payments from Thomas. Thomas argued that LSC's assertion that by re-leasing to Sage it lost a second stream of lease payments is not supported by the evidence, citing Canavati's deposition testimony that he had no financial interest in the equipment when it was re-leased because LSC had already sold the leases to Minnwest. And Thomas argued that the liquidated-damages clause for accelerating the remaining lease payments was unreasonable and unenforceable under applicable provisions of the Uniform Commercial Code. Thomas reasserted its argument that Minnwest was the proper party, not LSC, with regard to future lease payments.

LSC again moved for partial summary judgment seeking (1) judgment for the remaining lease payments plus interest, or in the alternative for lost profits plus interest; (2) judgment for $41,894 for repairs to the equipment; (3) judgment for $3,257.24 for the cost of repossession and transportation of the equipment, plus interest; and (4) costs and attorney fees. LSC asserted that it is undisputed that Thomas defaulted under the leases

and that the only dispute involved Thomas's failure to pay any damages for its breaches: a question of law. LSC's recitation of "undisputed material facts" includes Canavati's deposition testimony that the cost of repair was $129,000 and an assertion that "[i]f [Thomas] had fulfilled [its] lease obligations, LSC would have been able to rent other equipment to Sage, therefore receiving the profits from two leases rather than only one." LSC calculated lost profits based on profits it would have made under Thomas's lease, determined by "adding the profits made on the lease finance portion of the leases and the equipment sale portion of the leases," for a total of $136,350.

In this motion for summary judgment, LSC argued that Thomas defaulted by stopping payments "in August 2006"[5] by stating that it would no longer be making payments and asking LSC to repossess the equipment, and by failing to keep the equipment in good repair. LSC asserted that Thomas had not denied being in default under the leases. LSC argued the reasonableness of the liquidated-damages clauses in the leases and, in the alternative, that it was entitled to lost profits as a "lost volume" lessor under Minn. Stat. § 336.2A-528(2). As support for its claim for cost of repairs, LSC relied only on the affidavit of Canavati stating that damages for repairs totaled $129,000.

Thomas responded to LSC's motion for partial summary judgment with a motion in limine to prevent LSC from arguing that it is a lost-volume lessor and with affidavits of Michael Thomas and his attorney, Michael Ablan, dated May 5, 2008. The district

[5] It is not clear from the record why August 2006 is stated as the date on which Thomas stopped making payments. There is a citation to an affidavit of Canavati, but the affidavit does not support this date.

court held that the motion in limine was untimely and declined to consider any of Thomas's submissions.

While the motions were pending, LSC wrote to the district court pointing out that the leases contain a waiver of a jury trial and asking the district court to reschedule the trial as a court trial. The district court set the matter for a court trial.

After a hearing, the district court denied Thomas's motion to dismiss (which the court treated as a motion for summary judgment) and granted partial summary judgment to LSC, based on its understanding that Thomas was not contesting that it had defaulted under the leases. The district court held that the liquidated-damages clauses were reasonable and awarded liquidated damages in the amount of lease payments from August 1, 2005. The district court also awarded LSC's entire claim for equipment repair costs and repossession costs. In a subsequent order, the district court awarded costs and attorney fees. This appeal followed.[6]

D E C I S I O N

I. Standard of review

"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).

> 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

[6] The parties dismissed, without prejudice, all claims and counterclaims not decided on partial summary judgment.

> party is entitled to a judgment as a matter of law. On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.

Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted).

II. The district court erred by refusing to consider affidavits submitted by Thomas with its motion in limine in opposition to summary judgment.

Thomas does not dispute that its motion in limine was untimely under Minn. R. Gen. Pract. 115.04 (requiring non-dispositive motions to be filed 14 days prior to hearing). But two of the affidavits filed with the motions were filed specifically in opposition to LSC's motion for partial summary judgment, and the third was filed both in support of the motion in limine and in opposition to the summary judgment motion. These affidavits were not untimely to oppose summary judgment under Minn. R. Gen. Pract. 115.03(b)(2) (providing that supplementary affidavits in response to a dispositive motion must be filed at least 9 days prior to hearing). The hearing was scheduled for May 14, 2008, and the record reflects that the affidavits were filed by facsimile on May 5, 2008. Because the affidavits were timely submitted under Minn. R. Gen. Pract. 115.03(b)(2), the district court erroneously relied on Minn. R. Gen. Pract. 115.04 to reject them as untimely for the purpose of opposing the summary judgment motion.[7] *See Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45–46 (Minn. 1997) (stating that the district court's ruling on admission of evidence will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion).

[7] LSC suggests other grounds on which the district court might have rejected these affidavits, but we decline to speculate that the district court would have rejected the affidavits on other grounds.

III. Summary judgment was not appropriate on the issue of Thomas's default for failing to make lease payments.

Thomas argues that the district court erred by stating that Thomas conceded default and erred insofar as it concluded that Thomas's default was established by undisputed evidence. We agree. Although Thomas stated that it would presume default for the purpose of the argument in its motion to dismiss, Thomas did not concede default for purposes of LSC's summary judgment motion and has consistently and persistently argued that it was never in default for failing to make lease payments.

Thomas has not asserted that the issue of its default is a question of fact. Rather, it has asserted that Sage's assumption of the leases precludes a finding that Thomas defaulted in lease payments as a matter of law, because it was current in lease payments at the time of assignment, and Sage subsequently paid all amounts due.

At the hearing on LSC's summary judgment motion, Thomas told the district court that the principal issue is whether or not Thomas was in default when it surrendered the equipment. Thomas initially agreed with the court that whether someone is in default is, in large part, a "legal issue" and asserted that the only material fact questions involved the amount of the cost of repairs and the reasonableness of damages claimed by LSC. Later in the hearing, Thomas noted that any dispute that Thomas assigned the leases to Sage creates a material question of fact.

LSC has consistently avoided any real analysis of the effect of the assignments on Thomas's liability for the remaining lease payments. LSC argued that lease modifications must be in writing, but has not presented any argument or authority that an

assignment of a lease is a modification of the lease or that the writings supporting the assignment do not satisfy the requirement for a writing. LSC has raised the apparent lack of Thomas's signature on the assignments and has argued that the assignments were purely agreements between LSC and Sage that had nothing to do with Thomas. But LSC drafted the assignments, reflecting LSC's consent to the assignments and designating Thomas the assignor and Sage the assignee. LSC has not explained how Thomas could have assigned the leases if, as LSC now argues, Thomas was in default through anticipatory breach, failure to repair, and failure to make lease payments.

For the first time on appeal, LSC argues that the lack of Thomas's signature on the assignment documents, LSC's failure to consent to the assignments in writing, and the lack of a written forbearance agreement between Thomas and LSC precludes Thomas from arguing that it was not in default for failing to make the lease payments. But the parties have never fully briefed or argued, and the district court has never addressed, the effect on the obligations and rights of the parties of the existing writings and LSC's actual consent to the assignments.

We conclude that the same deficiencies that prevented summary judgment in the first round of motions continue to exist: there are material questions of fact about whether Thomas defaulted under the leases by failing to make lease payments. Although some issues surrounding Thomas's default may be questions of law, because these issues have never been fully briefed, argued to or decided by the district court, we decline to address

them on appeal.[8] *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that this court will generally not consider matters not argued to and considered by the district court).

Because the arguments made to the district court concerning the legal effect of the purported assignment of Thomas's leases to Sage were never addressed by the district court, it is not possible to review the court's determination that Thomas was in default for failing to make lease payments. The district court's determination appears to have been based, at least in part, on the fact that Thomas's second dispositive motion assumed default for purposes of the motion. But Thomas never conceded default through failure to make lease payments and the district court erred by assuming default for purposes of the summary judgment motion and by concluding that there are no material issues of fact concerning default for failing to make lease payments.

IV. Summary judgment was appropriate on the issue of Thomas's default for failing to keep equipment in good repair.

The district court also concluded that Thomas's default under the leases by failing to keep the equipment in good repair as required by the lease is not disputed. The record confirms that, in district court, Thomas never specifically challenged LSC's allegation that it defaulted under the leases by failing to keep the equipment in good repair. For the

[8] For example, LSC, at oral argument on appeal, argued that the third paragraph of the assignments, stating that the assumption agreement "shall not relieve the Assignor of its obligations under the [leases] . . . [and assignor] shall not be relieved of its liability under the agreement because of any agreement, release, compromise or novation which may be made by [LSC] with [Sage] . . . with respect to the [lease or assignment agreement]" means that, notwithstanding Sage's assumption of Thomas's obligations to pay LSC the balance under the leases, Thomas was also required to make such payments for a previous default. This argument was never raised or addressed in the district court.

first time, at oral argument on appeal, Thomas denied that it was in default, arguing that the damage was caused by third parties and that Thomas met its obligation by insuring the equipment. Because this argument was never raised in the district court, we conclude that the district court did not err in concluding that the undisputed facts before it at the time of the hearing supported summary judgment that Thomas defaulted under this provision of the lease.

V. Thomas raised a sufficient question about the amount of damages for equipment repair to preclude summary judgment.

There remains, however, an issue of material fact about the consequences of Thomas's default by failing to keep the equipment in good repair. After the equipment was found to be damaged and was repaired, LSC drafted documents stating that Thomas, as assignor, assigned its rights under the leases to Sage, indicating that LSC did not choose to pursue default for damage to the property until its lawsuit in 2006, after Sage had assumed all of Thomas's obligations under the leases. Additionally, the damages asserted by LSC for this default consist of the gap between the amount LSC claims it spent on repairs and the amount it was reimbursed by Thomas's insurer for repairs. LSC has never sought accelerated lease payments as a consequence of damage to the equipment. And the district court did not examine whether the liquidated damages clause would be reasonable for default under the repair provisions. The only issue surrounding damage to the equipment has been whether the record supports Canavati's assertion that LSC incurred $129,000 in repair costs.

LSC argues that Thomas has not and cannot dispute Canavati's assertion that LSC spent $129,000. We disagree. LSC has asserted the claim and has the burden of proving its damages by a preponderance of evidence. But Canavati's deposition tesitimony does not support the assertion in his affidavit that LSC spent $129,000 on repairs. Thomas has consistently pointed out that Canavati has been unable to support his claimed figure. Thomas raised a sufficient challenge to the amount LSC spent on repairs to preclude summary judgment on the issue of whether LSC is entitled to recover the difference between its claim of $129,000 and the amount it recovered from Thomas's insurer. LSC does not cite any subsequently discovered evidence that resolved the fact question about this amount. We conclude that LSC's damages for repairs remains a fact question identified by the district court at the time of LSC's first motion for partial summary judgment. To the extent that Canavati's statement of the amount is unsupported by his personal knowledge or corroborating evidence, that statement should be submitted to the factfinder for a credibility determination.

VI. The district court did not err by concluding that the liquidated-damages clauses are enforceable for default in lease payments.

Thomas argues that the district court erred in holding that the liquidated-damages clauses in the leases are enforceable, citing Minn. Stat. § 336.2A-504 (1) (2004) (providing for liquidated damages in a lease "but only at an amount or by a formula that is reasonable in light of the then anticipated harm caused by the default or other act or omission"). The district court, citing Minn. Stat. Ann. § 336.2A-504 U.C.C. cmt., para. 3 (West 2002), that explains that the "then anticipated harm" is assessed by the parties'

expectations at the time of contracting, concluded that, at the time the parties entered into the lease, it was reasonable that the anticipated harm from a default by Thomas would be the loss of the remaining lease payments, as well as the possibility that LSC would be stuck with the equipment. The district court concluded that a liquidated-damages provision that allowed LSC to repossess the equipment and collect the remaining lease payments on the leases was reasonable "in light of the anticipated harms." We agree and conclude that the district court did not err in concluding that, as a matter of law, the liquidated-damages clauses in the leases are enforceable, if there is a determination that Thomas defaulted in lease payments.[9] *See E.D.S. Constr. Co. v. N. End Health Ctr., Inc.*, 412 N.W.2d 783, 786 (Minn. App. 1987) (stating that liquidated-damage provisions are assessed by examining the circumstances under which they are drafted and enforceable "where damages are not readily ascertainable and where the amount fixed is reasonable in light of the contract as a whole, the nature of the damages contemplated, and the surrounding circumstances"), *review denied* (Minn. Nov. 18, 1987).

VII. The district court did not abuse its discretion by denying Thomas's request for a jury trial.

A party may waive a jury trial by written consent. Minn. R. Civ. P. 38.02. The district court, in its discretion, may allow a party to withdraw its waiver of a jury trial

[9] We note, however, that we are not by this opinion intending to decide whether the liquidated-damages clauses would be reasonable for default in failing to maintain the equipment in good repair, because, as demonstrated by the damages LSC seeks for this alleged breach of the lease, no lease payments were lost while the equipment was unusable and cost of repair may be an adequate remedy for such breach, as demonstrated by the fact that LSC only sought cost of repair for this breach.

"where the withdrawal will not prejudice the opposite party." *Wittenberg v. Onsgard*, 78 Minn. 342, 348, 81 N.W. 14, 16 (1899).

Thomas argues that it did not knowingly and voluntarily waive its right to a jury trial by signing the lease agreements that contain a jury-trial waiver. Thomas points to the disparity in bargaining power between it and LSC, the fact that the leases were not negotiated, the fact that Michael Thomas did not read the leases, and the fact that the waiver is "buried in fine print" to argue involuntary waiver. Thomas also notes it had limited time to respond to LSC's request to enforce the waiver.

LSC correctly notes that Michael Thomas's failure to read the leases is irrelevant. *See Watkins Prods., Inc. v. Butterfield*, 144 N.W.2d 56, 58 (Minn. 1966) (stating: "People [who can read and write] who sign documents that are plainly written must expect to be held liable thereon. Otherwise written documents would be entirely worthless and chaos would prevail in our business relations.").

Although we agree that the waiver of a jury trial is in fine print, the lease agreements are only two pages long, all of the print is fine, and the provision is plainly stated under a numbered paragraph titled "LAW." Under these circumstances, we conclude that the district court did not abuse its discretion in enforcing the provision.

VIII. Award of costs and attorney fees is reversed.

Because we have determined that summary judgment was inappropriate on several issues, we reverse the award of attorney fees and costs entered pursuant to summary judgment.

Affirmed in part, reversed in part, and remanded.