IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 2, 2023 Session

AUREUS HOLDINGS, LLC, d/b/a MEDIA BREWERY
v. 3803 PARTNERS, LLC

Appeal from the Chancery Court for Davidson County
No. 20-0556-II Anne C. Martin, Chancellor

No. M2022-00505-COA-R3-CV

This case involves competing claims for breach of a commercial lease agreement. The tenant commenced this action seeking to recover the security deposit and pre-paid rent, contending that the landlord breached the lease by failing to comply with the notice-and-cure provision in the lease before leasing the premises to another tenant. The landlord denied any breach and filed a counterclaim for damages and attorney's fees contending that the tenant breached the lease by not paying rent. Each party moved for summary judgment, seeking affirmative relief as well as dismissal of the other party's claims. After ruling that the tenant was the first to materially breach the lease by failing to pay rent and holding that the landlord failed to comply with the notice-and-cure provision in the lease, the court summarily dismissed the tenant's complaint and the landlord's counterclaims. Both parties appeal. We affirm the dismissal of the tenant's complaint but reverse the dismissal of the landlord's counterclaims and remand for further proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part, Reversed in Part, and Remanded

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the court, in which ANDY D. BENNETT and JEFFREY USMAN, JJ., joined.

J. Brad Scarbrough and Cody M. Conner, Nashville, Tennessee, for the appellant, 3803 Partners, LLC.

Keane A. Barger, Nashville, Tennessee, for the appellee, Aureus Holdings, LLC.

OPINION

FACTS AND PROCEDURAL HISTORY

The tenant, Aureus Holdings, LLC d/b/a Media Brewery ("Aureus"), is a Nevada limited liability company specializing in advertising data and lead generation. The landlord, 3803 Partners, LLC ("3803"), is a Tennessee limited liability company that owns improved real property at 3801 Central Pike in Hermitage, Tennessee (the "Premises").

In May 2017, the parties entered into a five-year lease agreement. On August 23, 2017, the parties executed an amendment, whereby Aureus agreed to pay an additional $1,360.18 per month based on improvements to the Premises 3803 paid on Aureus's behalf (the "First Amendment"). After execution of the First Amendment, the base rent was set at $5,529.28 per month for the first year, $5,633.50 per month for the second year, $5,740.34 per month for the third year, $5,849.84 per month for the fourth year, and $5,962.08 per month for the final year.[1] The May 31, 2017 lease agreement and First Amendment are collectively referred to hereinafter as the "Lease."

The Lease required Aureus to make a $4,169.10 security deposit and pay $41,417.10 in advance for the last nine months of rent, both of which Aureus timely remitted. Section 6 of the Lease provided that "[i]f Lessee is not in default at the expiration or termination of this Lease . . . then Lessor shall return the Security Deposit to Lessee." As for the prepayment of the last nine months of rent, the Lease provided in Section 5 that, "[i]n the event of default by the Lessee, the rent paid in advance shall be retained by the Lessor as compensation for improvements made on the Lessee's behalf."[2]

Sections 5 and 7 of the Lease provided that "[a]ll rent payments [are] to be made on the first day of each month," and "[t]he total rent due upon each due date shall be paid in full to Lessor." Section 36 also specified that time was of the essence concerning the payment of rent.

In the event that Aureus failed to pay the rent as stipulated, Section 26 of the lease gave 3803 two alternative remedies: (1) "continue the Lease and recover damages for such failure," or (2):

> unless [Aureus] corrects or remedies any such failure or default within thirty (30) days . . . after [3803] has mailed written notice of same to [Aureus], then [3803] may elect to declare this Lease forfeited and terminated and at an end in all respects, and may, thereupon enter and take possession of said Premises for said breach and re-rent the same to such lessee as in the discretion of [3803] may be deemed suitable and proper.

[1] Pursuant to Sections 24, 25, and 35, Aureus was also responsible for tax increases, insurance increases, and common area operating expenses, which was considered "additional rent."

[2] Under Schedule A of the Lease, 3803 made "build-out" improvements of $117,590.

If 3803 properly terminated the lease pursuant to Section 26, it would have the right to collect an amount equal to:

> all expenses incurred by Lessor in recovering possession of the Premises, including reasonable attorneys' fees and costs; all reasonable costs and charges for the care of the Premises while vacant; all past due rent which is unpaid, plus interest thereon (at the interest rate specified in Paragraph 31); and an amount by which the entire rent for the remainder of the term exceeds the loss of rent that Lessee proves could have been reasonably avoided.

Additionally, under Section 31, 3803 could recover "reasonable attorney's fees, costs and expenses" from Aureus if it became necessary "to employ an attorney to enforce collection of the rents agreed to be paid, or to enforce compliance with any of the covenants and agreements."

In June 2019, Aureus vacated the Premises, retained a real estate agent, and began soliciting a potential subtenant.[3] Although it had vacated the Premises, Aureus continued to pay rent through December 2019, but it failed to pay rent for January 2020 or thereafter.

After Aureus failed to remit its January 2020 rent payment, Steve Francis, a managing member of 3803 sent an email on January 9, 2020, to Jim Battista, a managing member of Aureus, notifying Aureus that 3803 had not received the January rent payment. On January 27, 2020, Mr. Francis wrote to Mr. Battista again regarding the unpaid rent. In the second email, Mr. Francis expressly noted that any willingness to accept a late payment of the January rent was not to be construed as a waiver of 3803's rights to enforce the Lease. Furthermore, Section 29 expressly provides that the failure of 3803 "to declare any default immediately upon occurrence thereof or delay in taking any action in connection therewith shall not waive such default[.]"[4] Mr. Francis gave Aureus until the end of the month to pay but cautioned that 3803 expected to receive the January and February rent payments by the first of February.

Mr. Francis sent Aureus another email to Mr. Battista on February 7, 2020, asking when to expect payment and whether Aureus would pay the rent for March on time. He sent three follow-up emails, but Aureus did not respond until February 24, 2020, at which

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[3] Section 9 of the lease permitted Aureus to sublet the Premises so long as it obtained 3803's "prior written consent." 3803 was aware and supportive of Aureus's attempts to sublease the Premises so long as it continued to pay rent.

[4] Section 29. Non-waiver: "Failure of Lessor to declare any default immediately upon occurrence thereof or delay in taking any action in connection therewith shall not waive such default, but Lessor shall have the right to declare any such default at any time; no waiver of any default shall alter Lessee's obligations under the Lease, with respect to any other existing or subsequent default."

time Aureus stated that it would be speaking with its legal counsel and would contact 3803 afterward. A few days later, Aureus missed its March rent payment as well.

On March 18, 2020, 3803 leased the Premises to a third party, Function First Furniture ("F3"). The next day, 3803's attorney sent Aureus a "Notice of Default" stating that 3803 was immediately terminating the lease due to the nonpayment of rent. In response, Aureus demanded the return of its security deposit and advance payment. 3803 refused.

On June 16, 2020, Aureus filed a complaint for breach of contract against 3803 in the Davidson County Chancery Court. Aureus alleged that 3803 committed the first material breach of the lease by allowing F3 to occupy the Premises without giving Aureus 30 days to cure.[5] Aureus sought to recover its Security Deposit and pre-paid rent, in the amount of $45,568.20, plus its attorney's fees and expenses.

In its answer and counterclaim, 3803 alleged that Aureus committed the first material breach by not paying rent in January 2020 or thereafter.[6] It also asserted that it complied with the notice-and-cure provision in Section 26. For these reasons, 3803 argued that it had the right to retain the security deposit and advance payment. In addition, 3803 sought an award of damages, including unpaid rent (past and future), late penalties, interest, attorney's fees, and expenses.

After discovery, the parties filed competing motions for summary judgment. In its memorandum and order of February 26, 2022, the trial court granted, in part, and denied, in part, each motion. Based on the undisputed facts, the court held that Aureus "first materially breached the Lease Agreement when it failed to make rental payments for January, February, or March 2020." Thus, because Aureus was in default when the lease terminated, the court held that Aureus was not entitled to a refund of its security deposit and the prepaid rent. More specifically, the trial court reasoned and ruled, in pertinent part, as follows:

> In its Motion for Summary Judgment, [Aureus] argues that 3803 first breached the Lease Agreement by failing to provide notice and an opportunity to cure as required in Section 26 of the Lease Agreement. [Aureus] points to the fact that 3803 moved the new tenant into the Premises before giving written notice of breach and the opportunity to cure and that

[5] Aureus also claimed that 3803 breached the lease by unreasonably withholding its consent for potential sublessors. The trial court expressly pretermitted this issue, and Aureus has not raised it on appeal.

[6] 3803 alleged that Aureus breached the Lease by subletting the premises to a "former partner" without 3803's consent. The trial court pretermitted this issue, and 3803 has not raised it on appeal.

this terminated the Lease Agreement between Aureus and 3803. Thus, Aureus argues it had no further obligations under the Lease Agreement and is entitled to a return of the Security Deposit and nine months of rent prepayments.

In response, 3803 contends that Aureus first materially breached the Lease Agreement by failing to pay rent in January, February, and March 2020. Aureus argues that 3803 cannot sustain a first-breach defense because it specifically agreed and informed Aureus it could "hold off" on making the rent payments when otherwise due under the Lease Agreement, pointing to the email exchange between Mr. Francis [a managing member of 3803] and Mr. Battista [a managing member of Aureus] allowing Aureus to make January's rental payment late. 3803 appears to contend that it complied with the notice and opportunity to cure requirements, arguing that emails from Mr. Francis to Mr. Battista asking about the status of the rental payments amounted to notice to Aureus that it was in breach of the Lease Agreement.

The relevant facts of this case are not in dispute. In order to determine the obligations of the parties and whether one party materially breached and when, the Court turns to the terms of the Lease Agreement. Upon review, the Court finds that the Lease Agreement is clear and unambiguous. According to Sections 5 and 7 of the Lease Agreement, "[a]ll rent payments [are] to be made on the first day of each month," and "[t]he total rent due upon each due date shall be paid in full to Lessor." It is undisputed that Aureus did not make rental payments in January, February, or March 2020. Thus, the Court finds that Aureus first materially breached the Lease Agreement when it failed to make rental payments for January, February, or March 2020. While Aureus contends that there was either a waiver or acquiescence to the failure to pay rent, the Lease Agreement includes a "Non-waiver" provision in Section 29 which provides that "Failure of Lessor to declare any default immediately upon occurrence thereof or delay in taking any action in connection therewith **shall not waive such default**, but Lessor shall have the right to declare any such default **at any time**. . . ." Furthermore, Mr. Francis explicitly stated in his January 27, 2020 email to Mr. Battista that allowing a late payment of January's rent "is not to be construed as a waiver of our right to enforce any provision of the lease or the requirement that all other lease payments be made timely."

Since Aureus was in default based upon its nonpayment of rent, it is not entitled to a return of the Security Deposit or the last nine months of rent. Section 6 of the Lease Agreement provides that "[i]f Lessee **is not in default at the expiration or termination of this Lease** . . . then Lessor shall return the Security Deposit to Lessee." Aureus was in default at the termination of

> the Lease Agreement and is not entitled to a return of the Security Deposit. As for the prepayment of the last nine months of rent, the Lease Agreement provides in Section 5 that, "[i]n the event of **default** by the Lessee, the rent paid in advance **shall be retained by the Lessor** as compensation for improvements made on the Lessee's behalf (**notwithstanding remedies allowed in Article 26 of this lease**)." Thus, 3803 was entitled to retain the last nine months of rent based upon Aureus's default, despite the remedies discussed in Section 26 of the Lease Agreement. Therefore, based on the clear and unambiguous terms of the Lease Agreement, Aureus is not entitled to a return of the Security Deposit in the amount of $4,169.10 or the last nine months of rent in the amount of $41,417.10. Thus, Aureus's claim for breach of contract fails as a matter of law.

(Emphasis in order).

Turning to 3803's counterclaim, the trial court held that 3803's emails to Aureus in January and February 2020 did not constitute "written notice" of default under Section 26. The court also held that the March 6, 2020 "Notice of Default" failed to comply with Section 26 because it did not provide Aureus with a 30-day period to cure the default. Thus, the court held that 3803 was not entitled to the remedies under Section 26 or its attorney's fees and costs under Section 31. More specifically, the trial court reasoned and ruled, in pertinent part, as follows:

> Regarding 3803's counterclaim for breach of contract, Section 26 of the Lease Agreement sets forth 3803's remedies in the event of Aureus's default. Section 26 provides in relevant part that "[i]n the event Lessee fails to pay the rent as herein stipulated . . . then Lessor **may continue the Lease and recover damages** for such failure, or unless Lessee corrects or remedies any such failure or default within thirty (30) days . . . , **after Lessor has mailed written notice of same to Lessee**, then Lessor **may elect to declare this Lease forfeited and terminated** and at an end in all respects, and may, thereupon enter and take possession . . . **and re-rent** the same to such Lessee as in the discretion of Lessor may be deemed suitable and proper." Thus, 3803 could either 1) continue the Lease Agreement and recover damages, or 2) provide notice of default to Aureus with an opportunity to cure of thirty (30) days, and, if Aureus failed to cure within that timeframe, then 3803 could terminate the Lease Agreement and re-rent the Premises. However, 3803 did neither. Instead, 3803 submitted notice of default in a letter dated March 6, 2020, which did not provide an opportunity to cure. Less than thirty days later, on March 18, 2020, 3803 entered into a lease agreement with a new tenant. The Court finds that this new lease agreement terminated the Lease Agreement between 3803 and Aureus. Section 26 further provides that "[i]f the Lease is terminated **pursuant to the preceding paragraph**, Lessor

> shall have the right to collect an amount equal to: . . . all past due rent which is unpaid, plus interest thereon (at the interest rate specified in Paragraph 31); and an amount by which the entire rent for the remainder of the term exceeds the loss of rent that Lessee proves could have been reasonably avoided." Since 3803 failed to comply with the terms of the "preceding paragraph" by failing to provide an opportunity to cure, 3803 is not entitled to past due rent or the difference between the rent set forth in the Lease Agreement with Aureus and any new lease agreement. The Court further finds that 3803 is not entitled to any other damages, including attorney's fees, since it failed to comply with Section 26.
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> While 3803 argues that it provided notice of default via the emails sent from Mr. Francis to Mr. Battista, there is no explicit statement that Aureus is in default; rather, Mr. Francis simply asks about the status of the rental payments. The first time that the term "breach" is mentioned is in the March 6, 2020 letter sent from 3803's counsel to Aureus. Thus, the Court finds that this March 6, 2020 correspondence is the notice of default as required by Section 26. As such, 3803's counterclaim for breach of contract fails as a matter of law.

(Emphasis in order). For these reasons, the court dismissed Aureus's claims and 3803's counterclaims with prejudice. 3803 then filed a motion to alter or amend the judgment, which the trial court denied.

This appeal followed.

ISSUES

Both parties appeal, contending that the trial court erred by summarily dismissing their respective claims for breach of contract.[7]

[7] The issues as stated by 3803 are:

I. Whether the trial court erred in failing to set forth the legal grounds for granting Aureus's motion for summary judgment and denying 3803's motion for summary judgment.

II. Whether the trial court erred in concluding the clear, unambiguous language of § 26 of the lease agreement required 3803 to use the terms "default" or "breach" in its numerous notices to Aureus regarding Aureus's failure to pay rent in January, February, and March 2020 (and whether not including such language barred 3803's claim for damages).

III. Whether the trial court erred in dismissing 3803's breach of contract claim against Aureus and concluding 3803 is not entitled to recover damages for Aureus's breach of the lease agreement, despite the fact Aureus never advanced any such argument.

IV. Whether the trial court erred in concluding 3803 is not entitled to recover its attorney's fees pursuant to § 31 of the lease agreement.

STANDARD OF REVIEW

"Contract interpretation is a matter of law and, therefore, is subject to de novo review in this Court." *Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 465 (Tenn. 2012). Thus, "our standard of review is de novo on the record according no presumption of correctness to the trial court's conclusion of law." *Old Hickory Coaches, LLC v. Star Coach Rentals, Inc.*, 652 S.W.3d 802, 812 (Tenn. Ct. App. 2021) (citing *Allstate Ins. Co. v. Watson*, 195 S.W.3d 609, 611 (Tenn. 2006)).

This court reviews a trial court's decision on a motion for summary judgment de novo without a presumption of correctness. *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 250 (Tenn. 2015). Accordingly, this court must make a fresh determination of whether the requirements of Tennessee Rule of Civil Procedure 56 have been satisfied. *Id.*; *Hunter v. Brown*, 955 S.W.2d 49, 50 (Tenn. 1997). In so doing, we accept the evidence presented by the nonmoving party as true, consider the evidence in the light most favorable to the nonmoving party, and draw all reasonable inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002).

Summary judgment should 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 as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. "The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 83 (Tenn. 2008) (citing *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn.1993)). As our Supreme Court explained in *Rye v. Women's Care Ctr. of Memphis, MPLLC*:

> [W]hen the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense.

477 S.W.3d at 264 (emphasis in original). However, "if the moving party bears the burden of proof on the challenged claim at trial, that party must produce at the summary judgment stage evidence that, if uncontroverted at trial, would entitle it to a directed verdict." *TWB Architects, Inc. v. Braxton, LLC*, 578 S.W.3d 879, 888 (Tenn. 2019) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986)).

The only issue raised by Aureus reads: "The trial court erred in dismissing Aureus's breach-of-contract claim because 3803 committed the first uncured material breach by failing to comply with the lease's notice-and-cure provision."

To survive when a party files a properly supported motion for summary judgment pursuant to Rule 56, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading," but must respond and set forth specific facts by affidavits—or one of the other means provided in Tennessee Rule of Civil Procedure 56—establishing that there is a genuine issue for trial. *Rye*, 477 S.W.3d at 265 (alteration in original) (quoting Tenn. R. Civ. P. 56.06). "Whether the nonmoving party is a plaintiff or a defendant—and whether or not the nonmoving party bears the burden of proof at trial on the challenged claim or defense—at the summary judgment stage, '[t]he nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party.'"[8] *TWB Architects*, 578 S.W.3d at 889 (alteration in original) (quoting *Rye*, 477 S.W.3d at 265).

If the moving party makes a properly supported motion, the burden shifts to the nonmoving party to "set forth specific facts *at the summary judgment stage* showing that there is a genuine issue for trial." *Rye*, 477 S.W.3d at 265 (internal quotation marks omitted; emphasis in original).

ANALYSIS

Our task in this case involves the interpretation of a lease agreement. "'The legal effect of the terms of a lease are governed by the general rules of contract construction[]' as in any other contract." *Dick Broad. Co., Inc. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 664 (Tenn. 2013) (citations omitted).

"A cardinal rule of contractual interpretation is to ascertain and give effect to the intent of the parties." *Allmand*, 292 S.W.3d at 630 (citing *Allstate Ins. Co. v. Watson*, 195 S.W.3d 609, 611 (Tenn. 2006)). We initially determine the parties' intent by examining the plain and ordinary meaning of the written words that are "contained within the four corners of the contract." *84 Lumber Co. v. Smith,* 356 S.W.3d 380, 383 (Tenn. 2011) (citing *Kiser v. Wolfe*, 353 S.W.3d 741, 747 (Tenn. 2011)).

The literal meaning of the contract language controls if the language is clear and unambiguous. *Allmand*, 292 S.W.3d at 630. However, if the terms are ambiguous in that they are "susceptible to more than one reasonable interpretation," *Watson,* 195 S.W.3d at 611, we must apply other established rules of construction to aid in determining the contracting parties' intent. *Planters Gin Co. v. Fed. Compress & Warehouse Co.*, 78 S.W.3d 885, 890 (Tenn. 2002). The meaning of the contract becomes a question of fact only if an ambiguity remains after we have applied the appropriate rules of construction.

[8] As the Supreme Court explained in *TWB Architects*, "[t]his is the standard Tennessee courts must apply when ruling on summary judgment motions regardless of which party bears the burden of proof at trial." 578 S.W.3d at 889.

Id. (quoting *Smith v. Seaboard Coast Line R.R. Co.,* 639 F.2d 1235, 1239 (5th Cir. 1981) (per curiam)).

I. SUMMARY DISMISSAL OF AUREUS'S BREACH OF CONTRACT CLAIM

Aureus filed a complaint against 3803 for breach of contract, seeking a judgment in an amount equal to the security deposit and prepaid rent. The trial court determined that Aureus was the first to materially breach the lease by failing to pay rent. For this reason, the court ruled:

> Since Aureus was in default based upon its nonpayment of rent, it is not entitled to a return of the Security Deposit or the last nine months of rent. Section 6 of the Lease Agreement provides that "[i]f Lessee **is not in default at the expiration or termination of this Lease** . . . then Lessor shall return the Security Deposit to Lessee." Aureus was in default at the termination of the Lease Agreement and is not entitled to a return of the Security Deposit. As for the prepayment of the last nine months of rent, the Lease Agreement provides in Section 5 that, "[i]n the event of **default** by the Lessee, the rent paid in advance **shall be retained by the Lessor** as compensation for improvements made on the Lessee's behalf (**notwithstanding remedies allowed in Article 26 of this lease**)." Thus, 3803 was entitled to retain the last nine months of rent based upon Aureus's default, despite the remedies discussed in Section 26 of the Lease Agreement. Therefore, based on the clear and unambiguous terms of the Lease Agreement, Aureus is not entitled to a return of the Security Deposit in the amount of $4,169.10 or the last nine months of rent in the amount of $41,417.10. Thus, Aureus's claim for breach of contract fails as a matter of law.

(Emphasis in order). Aureus contends that this was error.

"Among a landlord's most basic rights is the right to receive rent." *Foster v. Shim*, No. 01A01-9512-CV-00569, 1997 WL 33620294, at *4 (Tenn. Ct. App. May 9, 1997) (quoting 5 *Thompson on Real Property* § 40.03(a), at *9 (David A. Thomas, Ed. 1994)). Pursuant to Sections 5 and 7 of the Lease Agreement, "[a]ll rent payments [are] to be made on the first day of each month," and "[t]he total rent due upon each due date shall be paid in full to Lessor." Furthermore, Section 36 specified that time is of the essence concerning the payment of rent.

"[A] contract providing that time is of the essence is enforceable, and failure to meet the specific and explicit time requirements constitutes a breach which permits the non-defaulting party . . . to terminate the contract." *Alexander & Shankle, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, No. M2006-01168-COA-R3-CV, 2007 WL 2316391, at *9

(Tenn. Ct. App. Aug. 13, 2007) (citing *LauLin Corp. v. Concord Prop.*, No. 03A019502-CH-00047, 1995 WL 511947, *4 (Tenn. Ct. App. Aug. 30, 1995)).

Aureus was required to pay rent on the first day of each month, and the Lease provided that time was of the essence. It is undisputed that Aureus has yet to pay rent that was due on January 1, 2020, on February 1, 2020, or thereafter.

The elements of a breach of contract claim are: (1) the existence of an enforceable contract, (2) nonperformance amounting to a breach of a contract, and (3) damages caused by the breach of contract. *ARC LifeMed, Inc. v. AMC-Tenn., Inc.*, 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005) (citations omitted). It is undisputed that the parties had an enforceable contract. Aureus's failure to pay rent in January 2020, as well as February and thereafter, constituted a nonperformance amounting to a breach of contract. Moreover, 3803 sustained damages as a consequence of Aureus's failure to pay rent. Thus, all three elements of a breach of contract claim have been established.

Therefore, Aureus was in material breach of the Lease by failing to pay rent when due on January 1, 2020, and it failed to cure its breach because it has yet to pay the rent owing for January, February, or March 2020. As a consequence, Aureus was in default of the Lease by failing to pay rent when it was due. Furthermore, and as we discuss in more detail below, we have also concluded that Aureus was "in default at the expiration or termination of this Lease," which occurred on March 6, 2020, when 3803 gave notice of such termination to Aureus.

As the trial court correctly noted in its ruling, 3803 was entitled to retain the prepayment of the last nine months of rent, pursuant to Section 5, "[i]n the event of default by" by Aureus. Additionally, as Section 6 provides, 3803 would only be required to return the security deposit to Aureus "[i]f Lessee is not in default at the expiration or termination of this Lease." Because Aureus was in default of the Lease, we affirm the trial court's ruling that Aureus is not entitled to a return of the security deposit in the amount of $4,169.10 or the last nine months of rent in the amount of $41,417.10.

For the foregoing reasons, we affirm the summary dismissal of Aureus's claim for breach of contract.

II. Summary Dismissal of 3803's Claims

3803 asserted a counterclaim for breach of contract based on Aureus's failure to pay rent for which it sought damages including but not limited to rent (past and future), late penalties, interest, expenses, and attorney's fees. Although the trial court found that "Aureus first materially breached the Lease Agreement when it failed to make rental payments for January, February, or March 2020," the court dismissed 3803's counterclaim

based on the finding that 3803 failed to comply with the notice-and-cure provision of Section 26.

3803 contends this was error for several reasons. Specifically, 3803 contends that the trial court erred by concluding that all of its claims were barred because 3803 failed to include the terms "default" or "breach" in its January notices to Aureus. It also contends that it was entitled to recover rent due for January, February, and March 2020 as well as its attorney's fees and costs incurred in defending Aureus's claims regardless of its compliance with Section 26. We shall discuss each issue in turn.

We begin with the trial court's interpretation of the notice-and-cure requirements in Section 26. The trial court's decision to dismiss 3803's counterclaim was based on the following reasoning:

> Regarding 3803's counterclaim for breach of contract, Section 26 of the Lease Agreement sets forth 3803's remedies in the event of Aureus's default. Section 26 provides in relevant part that "[i]n the event Lessee fails to pay the rent as herein stipulated . . . then Lessor **may continue the Lease and recover damages** for such failure, or unless Lessee corrects or remedies any such failure or default within thirty (30) days . . . , **after Lessor has mailed written notice of same to Lessee**, then Lessor **may elect to declare this Lease forfeited and terminated** and at an end in all respects, and may, thereupon enter and take possession . . . **and re-rent** the same to such Lessee as in the discretion of Lessor may be deemed suitable and proper." Thus, 3803 could either 1) continue the Lease Agreement and recover damages, or 2) provide notice of default to Aureus with an opportunity to cure of thirty (30) days, and, if Aureus failed to cure within that timeframe, then 3803 could terminate the Lease Agreement and re-rent the Premises. However, 3803 did neither. Instead, 3803 submitted notice of default in a letter dated March 6, 2020, which did not provide an opportunity to cure. Less than thirty days later, on March 18, 2020, 3803 entered into a lease agreement with a new tenant. The Court finds that this new lease agreement terminated the Lease Agreement between 3803 and Aureus. Section 26 further provides that "[i]f the Lease is terminated **pursuant to the preceding paragraph**, Lessor shall have the right to collect an amount equal to: . . . all past due rent which is unpaid, plus interest thereon (at the interest rate specified in Paragraph 31); and an amount by which the entire rent for the remainder of the term exceeds the loss of rent that Lessee proves could have been reasonably avoided." Since 3803 failed to comply with the terms of the "preceding paragraph" by failing to provide an opportunity to cure, 3803 is not entitled to past due rent or the difference between the rent set forth in the Lease Agreement with Aureus and any new lease agreement. The Court further finds that 3803 is

> not entitled to any other damages, including attorney's fees, since it failed to comply with Section 26.
>
> While 3803 argues that it provided notice of default via the emails sent from Mr. Francis to Mr. Battista, there is no explicit statement that Aureus is in default; rather, Mr. Francis simply asks about the status of the rental payments. The first time that the term "breach" is mentioned is in the March 6, 2020 letter sent from 3803's counsel to Aureus. Thus, the Court finds that this March 6, 2020 correspondence is the notice of default as required by Section 26. As such, 3803's counterclaim for breach of contract fails as a matter of law.

(Emphasis in order).

At issue is the proper interpretation of the Lease, the parties' contract. "When the language of the contract is plain and unambiguous, courts determine the intentions of the parties from the four corners of the contract, interpreting and enforcing it as written." *Crye-Leike, Inc. v. Carver*, 415 S.W.3d 808, 816 (Tenn. Ct. App. 2011) (citations omitted). "In such a case, the contract is interpreted according to its plain terms as written, and the language used is taken in its 'plain, ordinary, and popular sense.'" *Id.* (citations omitted).

Section 26 states in pertinent part:

> **In the event Lessee fails to pay the rent as herein stipulated**, **. . . Lessor may continue the Lease and recover damages for such failure, or unless Lessee corrects or remedies any such failure or default within thirty (30) days . . . after Lessor has mailed written notice of same to Lessee, then Lessor may elect to declare this Lease forfeited and terminated and at an end in all respects**, and may, thereupon enter and take possession of said Premises for said breach and re-rent the same to such Lessee as in the discretion of Lessor may be deemed suitable and proper. . . . Should Lessor declare this Lease terminated and forfeited as aforesaid, then Lessee agrees to surrender peaceful possession of same, and Lessor may re-enter with or without legal process.
>
> If the Lease is terminated pursuant to the preceding paragraph, Lessor shall have the right to collect an amount equal to: all expenses incurred by Lessor in recovering possession of the Premises, including reasonable attorneys' fees and costs; all reasonable costs and charges for the care of the Premises while vacant; all past due rent which is unpaid, plus interest thereon (at the interest rate specified in Paragraph 31); and an amount by which the entire rent for the remainder of the term exceeds the loss of rent that Lessee proves could have been reasonably avoided.

(Emphasis added).

Section 26 clearly affords 3803 two options in the event Aureus fails to pay rent. The first option reads, "In the event Lessee fails to pay the rent as herein stipulated, . . . Lessor may continue the Lease and recover damages for such failure[.]" Under the first option**,** 3803 was not required to provide any notice. Instead, it could allow the lease to remain in effect and "recover damages" for Aureus's failure to pay rent. Thus, notwithstanding whether the notices 3803 sent Aureus in January and February or on March 6, 2020, satisfied the second option under Section 26, Aureus remains liable to 3803 for rent, late fees, and interest owing prior to 3803 entering into a lease with F3 on March 18, 2020.

This brings us to the second option provided for in Section 26, which reads in pertinent part: "In the event Lessee fails to pay the rent as herein stipulated, . . . unless Lessee corrects or remedies any such failure or default within thirty (30) days . . . after Lessor has mailed written notice of same to Lessee, then Lessor may elect to declare this Lease forfeited and terminated and at an end in all respects[.]" The "failure or default" at issue here is the failure to pay rent. Moreover, the requirement to provide "written notice of same" is, again, the requirement to mail notice of the failure to pay rent. As the plain language of Section 26 states, 3803 was merely required to give Aureus notice that it had not received the rent payment; there is no requirement that it include the terms "breach" or "default." *See Crye-Leike, Inc. v. Carver*, 415 S.W.3d at 816 (When the language of the contract is plain and unambiguous, we interpret the contract as written.). Thus, Section 26 does not require that "written notice of same" include the words "default" or "breach," only notice of the fact that 3803 had not received the rent payment, which notice starts the running of the 30-day cure period.

It is undisputed that Mr. Francis, acting on behalf of 3803, provided notice in an email to Mr. Battista of Aureus on January 9, 2020, as well as two more occasions in January and February, that it had not received Aureus's rent payment. Thus, 3803 satisfied the notice component of Section 26 by giving written notice to Aureus that it had not received the January payment.[9]

As Section 26 further provides, once Aureus received notice that 3803 had not received the January rent payment, Aureus had 30 days to cure its default by paying the

[9] We acknowledge that Aureus contends on appeal that 3803 failed to provide written notice via U.S. mail; however, the Lease does not require notice via "U.S. mail," it only requires "mail." More significantly, in oral arguments before the trial court, Aureus's counsel conceded: "The lease doesn't say mail. It says — well, it says mail, but it doesn't say U.S. postal mail. So it could have been email." Accordingly, we deem this issue waived.

rent, late fees, and penalties that were due.[10] Had Aureus remitted the required payment within the 30-day period, then its breach or default would have been cured. However, Aureus failed to cure "such failure or default" within the 30-day grace period.

Because Aureus failed to cure its default within 30 days of the January 9, 2020 notice, 3803 had the option, as stated in Section 26, to "declare this Lease forfeited and terminated and at an end in all respects" and "enter and take possession of said Premises for said breach and re-rent the same to such Lessee as in the discretion of Lessor may be deemed suitable and proper."[11]

On March 6, 2020, while acting in compliance with Section 26, counsel for 3803 served upon Aureus "Notice of Material Breach of Lease and Reletting of Leased Premises" in which it informed Aureus that while it would attempt to mitigate its damages by reletting the premises, 3803 retained the right to collect the unpaid balance, all expenses associated with reletting the premises, the amount owed for the remainder of the term of the Lease, and its costs and expenses incurred related to Aureus's material breach, including attorney's fees.

As Section 26 clearly states, all that was required of 3803 to "take possession of said Premises for said breach and re-rent the same" was to provide notice to Aureus of "any such failure" to "pay the rent as herein stipulated" at least 30 days before 3803 terminated the Lease. 3803 provided its first notice to Aureus on January 9, 2020, of "such failure" to pay rent. Thus, 3803 satisfied Section 26 by giving written notice to Aureus in January that it had not received the January payment. Because Aureus failed to cure such failure or default within 30 days of said notice, 3803 complied with the notice-and-cure provision of the Lease as stated in Section 26. Accordingly, 3803 was entitled to terminate the lease, as it did pursuant to the March 6, 2020 notice, re-rent the premises and sue for damages that include past due rent and deficiencies in future rental receipts as Section 26 expressly provides, and to recover other damages, including its attorney's fees and costs pursuant to Section 31.

For the foregoing reasons, we reverse the summary dismissal of 3803's counterclaim and remand with instructions to reinstate its counterclaim and for further proceedings consistent with this opinion.

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[10] Under Paragraph 7 of the Lease, Aureus owed a penalty of 10% of any rent payment due if such payment is not paid by the fifth of the month.

[11] Pursuant to Section 26, 3803 also had the right to collect "all expenses incurred by Lessor in recovering possession of the Premises, including reasonable attorneys' fees and costs; . . . all past due rent which is unpaid, plus interest thereon . . . ; and an amount by which the entire rent for the remainder of the term exceeds the loss of rent that Lessee proves could have been reasonably avoided."

We also find that 3803 is entitled to recover its reasonable and necessary attorney's fees and expenses incurred in this appeal and remand for the court to determine the amount and enter judgment accordingly.

IN CONCLUSION

We affirm the summary dismissal of Aureus's claims, reverse the summary dismissal of 3803's counterclaims, and remand for further proceedings consistent with this opinion. Costs of appeal are assessed against Aureus Holdings, LLC.

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FRANK G. CLEMENT JR., P.J., M.S.