STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0380

Continental Clay Company Inc,
Respondent,

vs.

Foundry L.L.C.,
Appellant.

Filed December 16, 2024
Affirmed in part, reversed in part, and remanded
Johnson, Judge

Hennepin County District Court
File No. 27-CV-22-3004

Christopher L. Olson, Peter J. Frank, GDO Law, White Bear Lake, Minnesota; and

Nicholas H. Jakobe, Erstad & Riemer, P.A., Minneapolis, Minnesota (for respondent)

David J. Krco, Elizabeth R. Cox, Allison L. Dohnalek, Best & Flanagan, L.L.P., Minneapolis, Minnesota (for appellant)

Considered and decided by Bentley, Presiding Judge; Johnson, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

This appeal arises from a dispute between parties to a commercial lease. The landlord alleges that the tenant breached the lease by placing too much weight on the floor of its leased space. The tenant alleges that the landlord breached the lease by not giving

the tenant proper notice of the tenant's alleged breach. We conclude that the district court did not err by granting the tenant's motion for summary judgment on the landlord's claims. But we also conclude that the district court erred by granting the tenant's motion for summary judgment on the tenant's own breach-of-lease claim. We further conclude that, in light of that reversal, the district court erred by granting the tenant's motion for attorney fees. Therefore, we affirm in part, reverse in part, and remand for further proceedings.

FACTS

Continental Clay Company Inc. sells clay and other products that are used by potters. Since 1990, Continental Clay has leased space on the first floor of a building in northeast Minneapolis. Continental Clay stores clay products in the leased space on wooden pallets, each of which weighs approximately 2,000 to 3,000 pounds when full. The company usually stacks two or three pallets on top of each other, resulting in loads of between 6,000 and 9,000 pounds in the area of each pallet stack.

Between 1990 and 2021, the building was owned by a partnership known as Cathay. In 2011, Cathay discovered cracks in the ceiling of the basement below Continental Clay's space. Cathay hired the Thatcher engineering firm to inspect the ceiling and its structural supports. The Thatcher firm recommended that Continental Clay temporarily reduce the weight loads on the floor of its leased space by stacking no more than two pallets of clay products. Cathay made certain repairs, such as filling some cracks with epoxy and installing steel beams to reinforce the floor, at its own expense. After those repairs were completed, Cathay informed Continental Clay that it could return to its prior practice of stacking pallets three-high.

Nine years later, in December 2020, Continental Clay and Cathay executed a new lease for an additional ten-year term. Four months after that, in April 2021, Cathay sold the building to Foundry LLC. When the transaction was completed, Cathay assigned Continental Clay's lease to Foundry. The assignment document states, "[Cathay] hereby assigns, transfers, conveys and sets over to [Foundry] all of [Cathay's] right, title and interest, if any, in and to the Leases and Contracts."

Approximately four or five months after purchasing the building, Foundry learned of the ceiling cracking that had occurred below Continental Clay's space in 2011. Foundry spoke with Continental Clay, inspected its space, and observed pallets stacked three-high. Foundry contacted the then-former Thatcher engineer who had examined the cracking in 2011 and asked him to inspect the building again. Foundry requested that Continental Clay reduce the weight of the clay products on its floor by stacking pallets only two-high. Foundry then hired a different engineering firm, Herzog Engineering, to test and analyze the floor of Continental Clay's space. A Herzog engineer determined that the maximum load capacity of the floor would allow Continental Clay to stack pallets three-high in only a part of a storage room and to stack only one pallet in the remainder of its space. In February 2022, after receiving Herzog's written report, Foundry requested that Continental Clay reduce the weight on its floor in accordance with the Herzog report.

Later that month, an attorney representing Foundry sent Continental Clay a two-page letter captioned "30-day notice of lease violation." In the letter, Foundry stated that Continental Clay had breached the lease by "constant overloading of the floor . . . with heavy equipment and concrete mix," resulting in damage to the building and unsafe

conditions. The letter gave Continental Clay 30 days to cure the violation and stated that Foundry would commence an eviction action if Continental Clay did not cure within that period.

In March 2022, Continental Clay commenced this action against Foundry. One week later, Foundry commenced an eviction action against Continental Clay, which later was consolidated with this action. In April 2022, Continental Clay amended its complaint. Continental Clay's amended complaint requests a declaratory judgment that Continental Clay has not breached its lease; that any breach-of-contract claim asserted by Foundry is barred by the statute of limitations and the equitable doctrines of laches, waiver, and estoppel; that Foundry's February 2022 letter is an invalid notice because it is too vague and ambiguous; and that Foundry may not terminate the lease or recover possession because Foundry did not give valid notice of Continental Clay's breach, as required by the lease. Continental Clay's amended complaint also alleges that Foundry breached the lease by commencing an eviction action without giving Continental Clay proper notice of its alleged breach. In September 2022, Foundry served an answer in which it alleged counterclaims of breach of contract, negligence, and eviction.

In January 2023, the parties filed cross-motions for summary judgment. Continental Clay sought summary judgment on all of Foundry's counter-claims. Foundry sought partial summary judgment on its first and third counterclaims (but not its second counterclaim for negligence) and on all of Continental Clay's claims.

In July 2023, the district court filed an order on the parties' cross-motions. The district court first ruled that Foundry's counterclaims are barred by Continental Clay's

equitable defenses of laches, waiver, and equitable estoppel. The district court next ruled, as a matter of law, that Foundry breached the lease by not giving Continental Clay valid notice of its alleged breach of the lease before commencing an eviction action. The district court then determined that its rulings had effectively resolved Continental Clay's claim for a declaratory judgment and that no justiciable controversy remained. Accordingly, the district court granted Continental Clay's motion and denied Foundry's motion. One week later, the district court administrator entered judgment in favor of Continental Clay.

In September 2023, Continental Clay filed a motion for attorney fees, costs, and expenses. Continental Clay argued that it is entitled to reimbursement pursuant to paragraph 19 of the lease, which provides that the prevailing party in an action to enforce the lease may obtain attorney fees, costs, and expenses from the losing party. Continental Clay sought approximately $118,000. In January 2024, the district court granted the motion and awarded Continental Clay most of the amount sought. One week later, the district court administrator entered judgment in favor of Continental Clay in the amount of approximately $105,000.

Foundry appeals from the July 2023 judgment and the January 2024 judgment.

DECISION

I. Continental Clay's Equitable Defenses to Foundry's Counterclaims

Foundry argues that the district court erred by concluding that its counterclaims are barred by Continental Clay's equitable defenses of laches, waiver, and equitable estoppel.

A district court must grant a motion for summary judgment if it finds "that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a

matter of law." Minn. R. Civ. P. 56.01. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the non-moving party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008) (quotation omitted). This court applies a *de novo* standard of review to a grant of summary judgment and views the evidence in the light most favorable to the non-moving party. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009). A *de novo* standard of review applies even with respect to equitable claims and defenses. *Herlache v. Rucks*, 990 N.W.2d 443, 450 n.4 (Minn. 2023); *SCI Minn. Funeral Servs., Inc. v. Washburn-McReavy Funeral Corp.*, 795 N.W.2d 855, 860-61 (Minn. 2011).

Continental Clay's equitable defenses to Foundry's counterclaims are based on evidence that, in 2011 and thereafter, Cathay expressly allowed Continental Clay to stack three pallets of clay products on top of each other. Continental Clay argued to the district court that, in light of Cathay's permission, stacking three pallets of clay products is not a breach of the lease.

Continental Clay's equitable defenses are based on the legal premise that Foundry's rights under the lease are derivative of the rights of Cathay, which assigned Continental Clay's lease to Foundry. The district court agreed with that premise, reasoning that "Foundry, as Cathay's successor-in-interest, steps into the shoes of Cathay, assuming the same rights that Cathay would have had before the assignment." The district court's reasoning is consistent with Minnesota caselaw, which provides, "An assignment operates to place the assignee in the shoes of the assignor, and provides the assignee with the same

legal rights as the assignor had before assignment." *Illinois Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 803 (Minn. 2004).

On appeal, Foundry argues that the district court erred for three reasons. First, Foundry argues that the district court erroneously relied on events occurring during the term of a prior lease, not the lease that Cathay and Continental Clay entered into in 2020, which was the lease in effect when the parties' dispute arose in 2021. But Cathay's approval of Continental Clay's pallet-stacking practices was not limited to the period of the prior lease. There is no evidence in the record that Cathay retracted its approval after the execution of the 2020 lease. Furthermore, Foundry does not contend that the terms of the lease in effect in 2011 were different from those of the 2020 lease. In fact, there is no evidence in the record that the relevant provisions of the two leases differed in any way. For purposes of Foundry's equitable defenses, whether Cathay's express approval of Continental Clay's pallet-stacking practices originated under a prior lease is not a material fact.

Second, Foundry argues that the district court erroneously determined its rights under the lease by relying not on the *written terms* of Cathay's lease but, rather, on Cathay's *conduct*. Foundry contends the district court "imputed" Cathay's conduct to Foundry and that such imputation is not supported by caselaw. Foundry does not cite any Minnesota caselaw to support its contention. It appears that Foundry's contention is inconsistent with supreme court caselaw stating that a third party "may assert all equities and defenses against the assignee that were available against the assignor." *Illinois Farmers*, 683 N.W.2d at 803 (citing *Dennis v. Swanson*, 223 N.W. 288, 290 (Minn. 1929)). In this

respect, Minnesota law appears to be consistent with well-established common-law principles, such as, "The right of an assignee is subject to any defense or claim of the obligor which accrues before the obligor receives notification of the assignment . . . ." Restatement (Second) of Contracts § 336(2) (Am. L. Inst. 1981). In addition, a comment to this section of the Restatement provides that "the assignee's right is subject to defenses and claims *arising from dealings between assignor and obligor in relation to the contract*." Restatement (Second) of Contracts § 336(2), cmt. b (Am. L. Inst. 1981) (emphasis added). Foundry has not cited any caselaw, from Minnesota or elsewhere, that limits the effect of an assignment to the written terms of a contract, without regard for the conduct of the parties to the contract.[1]

[1]Foundry cites two opinions from other jurisdictions that purportedly "limited the application of defenses against an assignee when those defenses are based on an assignor's conduct." *See 2301 M Street Coop. Ass'n v. Chromium LLC*, 209 A.3d 82, 84 (D.C. 2019); *In re Marriage of Comer*, 927 P.2d 265, 266 (Cal. 1996). But neither of those opinions supports Foundry's broad argument. In the first cited opinion, the court reasoned that, if a lease agreement were modified by the assignor-landlord and the tenant before an assignment, the assignee-landlord "would only be bound by the modification if it had actual or constructive notice of the modification." *2301 M Street*, 209 A.3d at 89. The *2301 M Street* opinion is inapplicable because this case does not concern a "modification" of a lease and, in any event, Foundry does not claim that it did not have constructive notice of the conduct on which Continental Clay's equitable defenses are based. In the second cited opinion, the court reasoned that a parent's assignment of child-support payments to a county agency is not subject to the doctrines of laches or equitable estoppel because of a strong public policy "adopted for the benefit of the public" that protected the county's right to the assigned payments and because the conduct on which the equitable defenses were based occurred *after* the assignment. *Comer*, 927 P.2d at 274, 277. The *Comer* opinion is inapplicable because it is not concerned with a commercial lease, the policies relevant to child support do not apply to commercial leases, and the relevant conduct occurred after the assignment. Thus, the applicable law is found in the Minnesota caselaw and Restatement provision discussed above.

Third, Foundry argues that the district court erred by reasoning that its counterclaim is barred by laches. Foundry contends that the doctrine of laches does not apply if a statute of limitations applies. The applicable rule of law is that "laches has no application where the main action is brought *within the time prescribed by our statute of limitations*." *Aronovitch v. Levy*, 56 N.W.2d 570, 573 (Minn. 1953) (emphasis added); *see also Hanson v. Northern States Power Co.*, 268 N.W. 642, 643 (Minn. 1936). A six-year statute of limitations applies to a breach-of-lease claim. Minn. Stat. § 541.05, subd. 1(1) (2022); *Erickson v. Abby Science, Inc.*, No. A17-0661, 2018 WL 256732, *5-6 (Minn. App. Jan. 2, 2018). Cathay did not assert a breach-of-lease claim against Continental Clay within six years of 2011, when Continental Clay resumed its practice of stacking pallets three-high after receiving Cathay's permission to do so. Thus, the district court did not err by applying the doctrine of laches.

Foundry also contends that the district court erred on the ground that "it did not consider Continental Clay's unclean hands." But Foundry never presented an unclean-hands argument to the district court. Consequently, the district court did not err by not considering the issue, and the argument may not be made for the first time on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Foundry does not specifically challenge the district court's application of the doctrines of waiver and estoppel. Accordingly, the district court's conclusions concerning those two equitable defenses are unchallenged, and each is an additional independent basis for summary judgment on Foundry's counterclaims. *See Hunter v. Anchor Bank, N.A.*, 842 N.W.2d 10, 17 (Minn. App. 2013), *rev. denied* (Minn. Mar. 18, 2014).

Thus, the district court did not err by granting Continental Clay's summary-judgment motion on Foundry's counterclaims based on Continental Clay's equitable defenses of laches, waiver, and estoppel.[2]

II. Continental Clay's Claim Based on Foundry's Notice of Lease Violation

Foundry also argues that the district court erred by ruling that, as a matter of law, it did not give proper notice to Continental Clay of Continental Clay's alleged breach of the lease. To reiterate, we apply a *de novo* standard of review to the district court's grant of a motion for summary judgment. *See Valspar Refinish*, 764 N.W.2d at 364.

As stated above, Continental Clay alleges that Foundry breached the lease by commencing an eviction action without giving Continental Clay proper notice of Continental Clay's alleged breach of the lease. Continental Clay's breach-of-lease-by-insufficient-notice claim is based on paragraph 16 of the lease, which states:

> Default. If an uncured default be made in the payment of the rent, or any party thereof, or in any of the covenants herein contained to be kept by the Lessee, Lessor may, after fifteen (15) days for unpaid rent or any other amount owing under this Lease, and thirty (30) days written notice for all other defaults (except that such thirty (30) day period shall be

[2]Foundry also argues that the district court erred by excluding a supplemental report of an expert witness and by excluding hearsay evidence of the out-of-court statements of the Thatcher engineer. The district court expressly noted that the supplemental expert report did not "factor into [its] analysis on the issues of waiver, laches, or estoppel." Foundry challenges that ruling only for purposes of a remand, stating that this court should "reverse the district court's ruling and direct the district court to consider the supplemental expert report as part of the record *in any further proceedings on remand*." (Emphasis added.) Similarly, Foundry seeks reversal of the hearsay ruling for purposes of "any further proceedings on remand." But there will be no further proceedings on Foundry's counterclaims because we have concluded that the district court properly granted summary judgment to Continental Clay on those claims. Thus, we need not resolve Foundry's arguments concerning the supplemental expert report or the excluded hearsay evidence.

> extended for a reasonable period of time if the alleged default is not reasonably capable of cure and Lessee proceeds to diligently cure the default, for a period not to exceed ninety (90) days), and at its election declare said Term ended and reenter the Premises or any part thereof, with or (to the extent permitted by law) without notice or process of law, and remove Lessee or any persons occupying the same, without prejudice to any remedies which might otherwise be used for arrears of rent, and Lessor shall have at all times the right to distrain for rent due.

In essence, paragraph 16 of the lease allows the landlord to terminate the lease, remove the tenant, and re-enter the premises if the landlord gave the tenant written notice of the tenant's default (other than a failure to pay rent) at least 30 days earlier, or as much as 90 days earlier if more time was reasonably necessary to allow the tenant to cure the default and the tenant was attempting to do so.

Foundry's notice of default is a two-page letter signed by its attorney. The pertinent portions of the letter state as follows:

> [Y]ou are in violation of Section 2 of the Lease. Section 2 of the Lease provides in part: "Lessee shall, at all times through the Term of this Lease, including renewals and extensions, and at its sole expense, keep and maintain the Premises in a clean, safe, sanitary and first class condition and in compliance with all applicable laws, codes, ordinances, rules and regulations . . . ."
>
> Further, you are in violation of Section 3 of the Lease. Section 3 of the Lease provides in part: "Lessee will not allow the Premises to be used for any purpose that will increase the rate of insurance thereon, nor for any Purpose other than that hereinbefore specified, and will not load floors with machinery or goods beyond the floor load rating prescribed by applicable municipal ordinances."
>
> Further, you are in violation of Section 12 of the Lease. Section 12 of the Lease provides in part: "Lessee will not . . .

> in any way change any . . . structural portions of the Building without the prior written consent of Lessor . . . ."
>
> These violations have been caused by Continental Clay Company's constant overloading of the floor of the Premises with heavy equipment and concrete mix. This overloading of the floor has (1) damaged the Building's floor/ceiling/support structures; (2) created an unsafe condition; and (3) changed the floor by causing deterioration and excessive wear and weakening. The floor simply cannot withstand the excessive loading that Continental Clay Company is subjecting it to on a daily basis. If the overloading continues, it could very well result in a massive failure of the flooring system. This situation is not acceptable, and it cannot be allowed to continue.
>
> If you do not cure this lease violation within thirty (30) days of the date of this notice, I will commence an eviction action against you, and you will be responsible for the cost of that eviction action. Further, you must refrain from future lease violations in order to avoid lease termination.

The district court concluded, as a matter of law, that Foundry's notice did not comply with paragraph 16 of the lease on the ground that the letter "only makes reference to broad sections of the lease," does not give Continental Clay "specifics . . . that would provide guidance as to how to cure the alleged default," and "provides no guideline that Continental Clay may have used to cure the alleged default."

Foundry contends that the district court erred for three reasons. First, Foundry contends that "the plain language of the Lease does not require that Foundry explain *how* a tenant must cure a default." Second, Foundry contends that the notice's descriptions of the lease violations ("Continental Clay Company's constant overloading of the floor of the Premises") is, by itself, "sufficient notice for how to cure—namely, redistributing its products to reduce the weight of Continental Clay's pallets stacked on the floor." Third,

Foundry contends that Continental Clay "knew Foundry wanted it to reduce the load on the floor caused by its 9,000-pound stacks of pallets."

Each of Foundry's contentions is valid. First, paragraph 16 of the lease makes a single reference to "written notice" but does not require that any particular information or level of detail be included. A court should not "remake" a contract by adding terms to which the parties did not agree. *See Anderson v. Twin City Rapid Transit Co.*, 84 N.W.2d 593, 599 (Minn. 1957). Second, the obvious means of curing a default based on overloading of the floors is to reduce the load. Indeed, the district court stated that "it logically follows that the cure for such default would be to reduce the load on the floors." Third, Foundry submitted evidence that the parties' prior communications had made clear how Foundry wanted Continental Clay to reduce the weight loads on the floor of its premises. Specifically, Foundry's owner and president testified in a deposition that Foundry gave Continental Clay a copy of the Herzog report, which described what Continental Clay should do given the maximum load capacity of the floor slab, and that Foundry specifically requested that Continental Clay not exceed that capacity.

Continental Clay contends that Foundry's notice is non-compliant because the letter did not cite the municipal ordinance that requires a lesser weight load. But paragraph 16 of the lease does not require legal citations in a notice of default. Such a requirement would impose a higher standard on a landlord's communications with a tenant than the rules of civil procedure impose on attorneys in a civil action. *See* Minn. R. Civ. P. 8.01.

Thus, the district court erred by granting Continental Clay's motion for summary judgment on its claim that Foundry breached the lease by not giving Continental Clay

proper notice of Continental Clay's alleged breach of the lease. Therefore, we reverse the order for summary judgment with respect to Continental Clay's breach-of-lease claim and remand for further proceedings on that claim.

III. Attorney Fees

Foundry last argues that the district court erred by granting Continental Clay's motion for attorney fees.

Continental Clay's award of attorney fees is based on paragraph 19 of the lease, which states, "Losing party shall pay and discharge all reasonable costs, attorney's fees and expenses that shall be made and incurred by the prevailing party in enforcing the covenants and agreements of this Lease, including recovering possession of the Premises." In its January 2024 order, the district court reasoned that the lease allows the prevailing party to recover attorney fees and that Continental Clay was the prevailing party.

Foundry's argument for reversal has two parts. First, Foundry argues that, if this court were to reverse the district court's summary-judgment rulings, Continental Clay would not be entitled to any attorney fees because, in that event, Continental Clay would not be a "prevailing party" and Foundry would not be a "losing party." Second, Foundry argues in the alternative that, even if this court were to affirm the district court's summary-judgment order, the district court erred by ordering the reimbursement of three categories of attorney fees totaling approximately $33,000. In response, Continental Clay does not challenge the first part of Foundry's argument but, rather, focuses on the second part.

As described above in part II, we have concluded that the district court erred by granting Continental Clay's motion for summary judgment on its claim that Foundry

breached the lease by not giving Continental Clay proper notice of Continental Clay's alleged breach of the lease. We are remanding for further proceedings with respect to that claim. Our conclusion in part II means that Continental Clay is not now a "prevailing party" and Foundry is not now a "losing party" with respect to that claim. For that reason, the district court erred by granting Continental Clay's motion for attorney fees. This conclusion is not intended to preclude a future motion for attorney fees after a final determination of all claims.

Thus, we reverse the district court's order granting Continental Clay's motion for attorney fees.

Affirmed in part, reversed in part, and remanded.