STATE OF MINNESOTA
IN COURT OF APPEALS
A24-1141

Dale Zubke,
Respondent,

vs.

David Nelson, et al.,
Appellants.

Filed April 28, 2025
Affirmed
Cochran, Judge

St. Louis County District Court
File No. 69DU-CV-19-143

Bryan M. Lindsay, The Trenti Law Firm, Virginia, Minnesota (for respondent)

Robert E. Mathias, Duluth, Minnesota (for appellants)

Considered and decided by Slieter, Presiding Judge; Cochran, Judge; and Larson, Judge.

NONPRECEDENTIAL OPINION

COCHRAN, Judge

In this appeal, appellants challenge the district court's grant of summary judgment in favor of respondent on respondent's breach-of-contract claim. Appellants also challenge the district court's separate grant of summary judgment dismissing three of appellants' counterclaims. And appellants seek reversal of the district court's denial of their motion

for an amended judgment seeking to reduce the district court's award of damages on respondent's breach-of-contract claim. We affirm.

FACTS[1]

Appellant David Nelson and respondent Dale Zubke were once business partners who each held equal membership interests in appellant companies Bluewater Residential Services LLC, Northern Lights of Duluth LLC, and Preferred Dealer Services LLC. Over time, the relationship between Nelson and Zubke deteriorated, resulting in litigation regarding their jointly owned businesses. That litigation commenced in 2012. The parties resolved the litigation in 2016 by entering into two related agreements: a "Settlement Agreement and Release" and a "Redemption and Security Agreement" (RSA). Together, the two documents released the parties' claims against each other and provided for appellants to buy out Zubke's membership interests in the three companies.

Appellants' performance under the RSA gave rise to the current litigation. The RSA required appellants to pay Zubke $1,140,000, plus 6% interest per annum, as consideration for Zubke's membership interests in the companies. Appellants' financial obligation was to be paid primarily through monthly payments of $10,035.20. The parties also agreed on security for this obligation. Specifically, appellants were to "take all necessary action" to transfer title to four properties to Northern Lights and to obtain a mortgage executed by Northern Lights in favor of Zubke with the properties as collateral. Northern Lights was

[1] The following facts are based on the parties' summary-judgment filings, viewing the evidence in the light most favorable to the nonmoving party. *Henson v. Uptown Drink, LLC*, 922 N.W.2d 185, 190 (Minn. 2019).

responsible for document preparation and any other associated professional fees and recording fees. The parties further agreed that appellants would not lend or advance any money or incur any additional indebtedness, outside of the ordinary course of business, without the written consent of Zubke. The RSA also specifically provided that the failure of appellants to meet any of the covenants set forth in the agreement was an "[e]vent of [d]efault." If an event of default was not cured within seven days of receiving notice, appellants' outstanding financial obligations "shall be subject to a default interest rate of an additional 10% per annum over" the standard 6% interest rate. The RSA further provided that, if a default was not cured within 30 days, Zubke could require Nelson to sell his membership interests or the assets of the companies and ask a court to appoint a receiver to preside over the sale. The proceeds of the sale would then go to satisfy any outstanding obligations owed to Zubke. Relatedly, the parties' settlement agreement expressly provided that the settlement did not release any "claims that may arise out of a breach of the . . . [RSA]."

On May 1, 2017, approximately ten months after the parties signed the RSA, Zubke provided notice of default to appellants. The notice stated that appellants were in default because they had failed to transfer title to all four properties to Northern Lights and failed to execute a mortgage for the same as required by the RSA. The notice also provided that appellants were in default because Nelson used company funds to pay personal debts, in violation of the RSA. The notice further stated that appellants had seven days from receipt of the notice to execute and deliver the required real-estate documents, consistent with the cure period in the RSA, and gave appellants until June 30 to repay company funds used for

personal reasons. In November 2017, Zubke provided an additional notice of default which alleged 13 events of default, including the two events of default noticed in May.

In January 2019, more than two years after the RSA became effective, Zubke commenced the current litigation against appellants. Zubke brought a breach-of-contract claim, based on allegations that appellants breached the RSA. The factual allegations in the complaint generally reflect events detailed in the notices of default, including that appellants failed to transfer title to all four properties and execute the associated mortgage, and that Nelson paid personal debts with company funds. As relief, Zubke requested "[a]n award against [appellants] in an amount equal to the unpaid principal plus accrued and unpaid interest owed." In response, appellants filed a document including an answer and counterclaims. The district court interpreted the filing as asserting counterclaims for (1) tortious interference, (2) breach-of-contract, (3) bad faith, and (4) contribution.[2]

In June 2022, Zubke moved for summary judgment on his claim for breach-of-contract. Zubke argued that he was entitled to summary judgment because the undisputed evidence showed that appellants had "not transferred the real property into ownership of Northern" or executed "the mortgage securing" the buyout of Zubke's stake in the businesses. Zubke supported his motion with property records. He also emphasized that for one of the four properties, Nelson had transferred title into his personal name instead of Northern Lights, contrary to the terms of the RSA. Zubke further argued Nelson

[2] Appellants' counterclaims do not allege specific causes of action but the district court interpreted their counterclaims as alleging these causes of action, without objection, when it analyzed the claims pursuant to Zubke's motion for summary judgment.

breached the RSA by using business funds in a manner that was not permitted by the RSA. He filed financial records and the opinion of a certified personal accountant to support this basis for summary judgment. Consequently, Zubke argued that he was entitled to judgment as a matter of law for these breaches of the RSA.

Appellants responded by bringing a cross-motion for summary judgment, seeking dismissal of Zubke's breach-of-contract claim. Appellants agreed that there were no genuine issues of material fact regarding the transfer of title or execution of the mortgage but argued that they had not violated the provision in the RSA because the RSA did not have a deadline for taking those actions. With regard to the claim of improper use of company funds, appellants argued that any personal use of company funds was permitted by the RSA as "management fees" or "ordinary business dealings," and therefore the claim was precluded by the settlement agreement.

The district court granted Zubke's motion for summary judgment on his breach-of-contract claim and denied appellants' cross-motion. The district court concluded, based on publicly available property records, that there was no disputed issue of material fact as to whether appellants had transferred title and executed a mortgage for the properties as required by the RSA because "these failures are proved by the public record." The district court further concluded that Zubke was entitled to summary judgment because this breach was material. Additionally, the district court determined, based on the financial records submitted by Zubke, that there were no genuine issues of material fact as to whether Nelson had used company funds in violation of the RSA.

After concluding that Zubke was entitled to summary judgment on the issue of liability, the district court turned to the issue of damages. The district court determined that, in the event of default, the RSA allowed for liquidation of company assets to pay appellants' outstanding obligations under the contract and the imposition of an additional 10% interest rate. As a result, the district court granted relief in the form of liquidation of company assets to satisfy appellants' outstanding obligations and ordered Zubke to submit an updated amortization schedule with the imposition of the additional 10% interest rate. Zubke submitted such an amortization schedule, without objection from appellants. The updated amortization schedule, which included the additional 10% interest rate, reflected that appellants' outstanding financial obligation to Zubke under the RSA was $1,328,856.43. After reviewing the updated amortization schedule, the district court determined that the schedule gave Nelson credit for all payments he previously made to Zubke pursuant to the RSA, and ordered judgment be entered against Nelson in the amount specified. The district court later appointed a receiver to oversee appellants' operations and finances.

In June 2023, Zubke moved for summary judgment on appellants' counterclaims. The district court granted Zubke's motion in part, dismissing all of appellants' counterclaims except their counterclaim for contribution. The parties proceeded to a bench trial on appellants' counterclaim for contribution. The district court determined that Zubke was liable for contribution to appellants and ordered judgment be entered in favor of appellants in the amount of $5,397.50.

Following entry of judgment, appellants then moved for a new trial and to amend the judgment. Appellants' motion asserted multiple grounds for relief, including that the district court erred in granting Zubke's motions for summary judgment. Appellants also asked the district court to reduce the $1,328,856.43 in damages awarded to Zubke in the judgment by $812,000, to reflect the amount that appellants had paid under the RSA prior to the court entering judgment. The district court denied appellants' motion.

This appeal follows.

DECISION

Appellants raise several issues on appeal. Appellants first challenge the district court's order granting Zubke's motion for summary judgment on his breach-of-contract claim. Appellants also challenge the district court's grant of summary judgment in favor of Zubke on three of appellants' counterclaims. Finally, appellants argue that the district court abused its discretion when it denied their motion to amend the judgment against them. We address each argument in turn and conclude that none of appellants' arguments warrant reversal.

I. The district court did not err when it granted summary judgment in favor of Zubke on Zubke's breach-of-contract claim.

We review summary-judgment decisions de novo. *City of Waconia v. Dock*, 961 N.W.2d 220, 229 (Minn. 2021). When reviewing a summary-judgment decision, "we view the evidence in the light most favorable to the nonmoving party and resolve all doubts and factual inferences against the moving parties." *Henson*, 922 N.W.2d at 190 (quotation omitted). Summary judgment is properly granted only when there are no genuine issues

of material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.01; *Hagen v. Steven Scott Mgmt., Inc.*, 963 N.W.2d 164, 172 (Minn. 2021). There is a genuine issue of material fact "when there is sufficient evidence regarding an essential element to permit reasonable persons to draw different conclusions." *St. Paul Park Refin. Co. v. Domeier*, 950 N.W.2d 547, 549 (Minn. 2020) (quotation omitted). But "the nonmoving party 'must do more than rest on mere averments' to create a genuine issue of material fact that precludes summary judgment." *Hagen*, 963 N.W.2d at 172 (quoting *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70-71 (Minn. 1997)).

Appellants argue that the district court erred when it granted summary judgment in favor of Zubke on his breach-of-contract claim. Specifically, appellants argue that the district court erred when it determined that appellants breached the RSA and awarded damages that were not related to any injury Zubke incurred as a result of the breach. Zubke responds that the district court properly granted summary judgment because the undisputed facts show that appellants breached the RSA when they failed to perform their duties under the RSA in a reasonable amount of time after performance was demanded. Zubke also contends that the district court did not err in its award of damages because the damages awarded were specifically authorized by the RSA. We consider each argument below.

Liability

To recover based on a breach-of-contract, the plaintiff must show "(1) formation of a contract, (2) performance by plaintiff of any conditions precedent to his right to demand performance by the defendant, and (3) breach of the contract by defendant." *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 833 (Minn. 2011). The issue raised by appellants on

appeal focuses on the third prong: whether the district court correctly determined that the undisputed facts established that appellants breached the RSA.

In seeking summary judgment, Zubke argued that appellants breached the RSA provision requiring appellants to transfer title to four properties to Northern Lights and execute a mortgage in favor of Zubke. The RSA does not include a deadline for completion of the title transfers and execution of the mortgage, but it does provide that appellants shall "take all necessary action to title the real property . . . and to effectuate the mortgage[]."

At the summary-judgment hearing in June 2022, appellants argued that they were not in breach because the RSA does not include a deadline for performance under this provision. The district court disagreed. The district court concluded that they were in breach because appellants had not complied with the "clear and absolute" requirement in the RSA regarding the real property, long after they received notice of default in May 2017. The district court emphasized that, as of the hearing in June 2022, appellants still had not complied with this requirement of the RSA, and concluded they were in breach.

"Failure to perform under a contract when performance is due establishes an immediate breach." *Id.* at 837. If the contract does not specify when performance is due, it is due within a "reasonable amount of time" once another party requests performance. *Chin v. Zoet*, 418 N.W.2d 191, 194-95 (Minn. App. 1988); *see also Hill v. Okay Constr. Co.*, 252 N.W.2d 107, 114 (Minn. 1977) (stating "where a contract is silent as to the time of performance, the general rule is that the contract must be performed within a reasonable time"). While the question of what constitutes a reasonable time for performance is usually

a fact question, "the court may and should in a proper case determine the question as a matter of law." *Henry v. Hutchins*, 178 N.W. 807, 809 (Minn. 1920).

On appeal, appellants do not contest that the property records show that, as of June 2022, they did not complete all four title transfers and execute a mortgage with the properties as collateral as required by the RSA. Instead, they again argue that their lack of compliance does not constitute a breach because the RSA does not include a specific deadline for completion of these obligations. Alternatively, they seem to argue that a fact question exists as to whether they failed to perform in a reasonable amount of time. Appellants' arguments are not persuasive.

The undisputed facts demonstrate, as a matter of law, that appellants did not perform within a reasonable amount of time after Zubke demanded performance. *See Chin*, 418 N.W.2d at 194-95. The RSA states that appellants "shall take *all necessary action* to title the real property identified in exhibit D in the name of Northern Lights and to effectuate the mortgage[]." (Emphasis added.) On May 1, 2017, Zubke provided notice of default based on appellants' failure to complete the title transfers and execute the mortgage, effectively demanding performance of this provision. Appellants subsequently did not perform within the seven-day cure period provided by the RSA. And public land records filed with the district court indicate that appellants had still not performed as of June 2022—more than five years after appellants first provided notice of default. Appellants do not point us to any facts in the record that provide a reason for their nonperformance beyond mere averments that were made well after the district court granted summary judgment in favor of Zubke. Based on the undisputed facts, we conclude

that five years was, as a matter of law, more than a reasonable amount of time for appellants to retitle the four parcels of real property identified in the RSA and execute the associated mortgage, particularly given that these actions were required to secure appellants' buyout of Zubke's interests under the RSA. *See Henry*, 178 N.W. at 809 (stating that, in the proper case, a reasonable time to perform can be determined as a matter of law). We therefore conclude that the district court did not err when it determined that appellants breached their obligation under the RSA to "take all necessary action to title the real property" and "effectuate the mortgage[]." *See Chin*, 418 N.W.2d at 194-95 (stating that if a contract does not specify when performance is due, it is due within a "reasonable amount of time" once another party requests performance).

Appellants appear to argue, in the alternative, that there are genuine issues of material fact precluding summary judgment because the RSA is ambiguous as to when performance was due. Appellants further argue that the district court "inserted an arbitrary date" for performance. The district court's analysis, however, was tied to the terms of the RSA. The district court did not insert an arbitrary date. Nor did the district court create an ambiguity regarding when performance was due. Instead, the district court determined that because Zubke provided notice of default on May 1, 2017, appellants had until May 8 under the terms of the RSA to perform to avoid the consequences specified in the RSA. The district court also emphasized that appellants were still in default as of the time of the summary-judgment hearing in July 2022. Based on our de novo review, and for the reasons explained above, we agree with the district court that the undisputed facts show, as a matter of law, that appellants failed to comply with the RSA real-estate requirements within a

reasonable amount of time, and there is no ambiguity in the RSA precluding summary judgment. *See Henry*, 178 N.W. at 809. Therefore, the district court did not err in granting summary judgment in favor of Zubke on his breach-of-contract claim.[3]

Damages

Appellants further argue that the district court erred in its award of damages to Zubke for his claim of breach-of-contract. A breach-of-contract claim "fails as a matter of law if the plaintiff cannot establish that he or she has been damaged by the alleged breach." *Roberts v. Brunswick Corp.*, 783 N.W.2d 226, 233 (Minn. App. 2010) (quotation omitted), *rev. denied* (Minn. Aug. 24, 2010). When the plaintiff makes a general claim for damages, they may "recover those damages that naturally and necessarily result from the alleged breach." *Logan v. Norwest Bank Minn., N.A.*, 603 N.W.2d 659, 663 (Minn. App. 1999). But when the "parties stipulate what the consequences of a breach of agreement shall be, such stipulation, if reasonable, is controlling and excludes other consequences." *Indep. Consol. School Dist. No. 24, Blue Earth Cnty. v. Carlstrom*, 151 N.W.2d 784, 786 (Minn. 1967).

Appellants contend that the district court erred when it granted summary judgment and awarded damages in favor of Zubke because there are factual disputes regarding whether Zubke was financially damaged by appellants' breach. Appellants' argument is unavailing. Because the RSA provided specific remedies in the event of a breach, Zubke

[3] We need not address the district court's alternative ground for summary judgment—misuse of company funds—because this material breach alone supports the district court's grant of summary judgment for breach of contract.

was not required to present evidence that he was financially damaged by appellants' breach of the RSA for the district court to award damages pursuant to the RSA. *See id.* Therefore, no disputed issues of fact exist as to the existence of damages under the RSA.[4]

Appellants next argue that the amount of damages awarded to Zubke was unreasonable. This argument is similarly unavailing. The RSA specifies how damages are to be calculated in the event of default. Because the parties stipulated to the calculation of damages in the RSA, it is controlling if reasonable. *Id.* Appellants argue that the application of the remedy provided by the RSA is unreasonable because it "had no relation to any actual loss for the failure to file documents." But the title transfers and mortgage that appellants failed to execute were meant to secure the large amount of funds that appellants owed Zubke under the RSA. And the title transfers and mortgage were a material term of the contract because the security they provided was part of the consideration offered to Zubke in exchange for the buyout. *See Black's Law Dictionary* 1778 (12th ed. 2024) (defining material term as "[a] contractual provision dealing with a significant issue such as subject matter, price, payment, quantity, quality, duration, or the

[4] Appellants also argue that the district court erred in its award of damages because the award "seems to have been treated almost like liquidated damages that must not be punitive in nature or excessive in amount." We decline to consider the argument because appellants have not adequately briefed the issue. *See State Dep't of Lab. & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (stating appellate courts decline to reach issues that are inadequately briefed). In their brief, appellants do not address the requirements for determining whether a liquidated damages clause is punitive, including whether the actual damages are "incapable or very difficult of accurate estimation" and whether the damages are "a reasonable forecast of just compensation for the harm that is caused by the breach." *Lagoon Partners, LLC v. Silver Cinemas Acquisition Co.*, 999 N.W.2d 113, 119-20 (Minn. App. 2023) (quoting *Gorco Constr. Co. v. Stein*, 99 N.W.2d 69, 74-75 (Minn. 1959)), *rev. denied* (Minn. Mar. 19, 2024).

work to be done"). Failing to obtain the mortgage secured by those properties damaged Zubke because, without the mortgage, the amount he was owed under the RSA was never secured in the manner agreed to by the parties. We therefore conclude that the RSA reasonably provided damages in an amount equal to what appellants still owed Zubke under the RSA. While the RSA also imposed an additional 10% interest on appellants' outstanding obligation, the resulting 16% interest rate is a permissible interest rate in this circumstance. *See* Minn. Stat. § 334.01, subd. 2 (2024) (establishing permissible interest rates). Consequently, the district court's award of damages was related to appellant's breach, and it did not err when it calculated damages based on the terms in the RSA.

Procedural Defects

Appellants next argue that Zubke's motion for summary judgment did not conform to the Minnesota Rules of General Practice and therefore the district court abused its discretion by hearing the motion. Specifically, appellants contend that Zubke's motion did not provide notice of the issues as required and was untimely because it was filed 24 days prior to the hearing, not 28 days. Minn. R. Gen. Prac. 115.03(a), (d). While appellants are correct that Zubke's motion was four days late under the rules, appellants' own cross-motion for summary judgment was filed three days after the deadline for such motions. Minn. R. Gen. Prac. 115.03(a)-(b). Because both parties' filings were untimely, the district court waived formal compliance with the timelines and heard the motion in the interest of justice. *See* Minn. R. Gen. Prac. 115.07. In their brief, appellants fail to acknowledge that the district court waived compliance with the rule. Instead, they focus on Zubke's lack of compliance. But, absent a showing of an abuse of discretion by the district court in waiving

compliance with the rule, appellants have not demonstrated that the district court erred by hearing Zubke's motion for summary judgment. *See id.* ("If irreparable harm will result absent immediate action by the court, or if the interest of justice otherwise require, the court *may* waive or modify the time limits established by this rule." (emphasis added)). Moreover, appellants fail to detail how they are prejudiced by either the timing of Zubke's filing of his summary-judgment motion or the lack of notice of the issues. Without the existence of prejudice, "no grounds exist for reversal." *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 98 (Minn. 1987). Consequently, appellants' argument is unavailing.[5]

For these reasons, we conclude that the district court properly granted summary judgment in favor of Zubke on his breach-of-contract claim and awarded damages consistent with the RSA.

II. The district court did not err in its summary-judgment analysis of appellants' counterclaims.

Appellants next challenge the district court's grant of summary judgment dismissing all but one of their counterclaims. As discussed above, the district court interpreted appellants' counterclaims as alleging claims of (1) tortious interference, (2) breach-of-contract, (3) bad faith, and (4) contribution. After considering the summary-judgment filings, which included an affidavit and exhibits filed by Zubke's counsel, the district court dismissed the first three counterclaims. The district court concluded, based on the

[5] Appellants also argue that Zubke's motion for summary judgment on appellants' counterclaims have the same procedural defects. However, Zubke's summary-judgment motion was timely and provided notice of the counterclaims that he sought to have dismissed.

undisputed facts, that Zubke was entitled to judgment as a matter of law on each of those counterclaims.

Appellants seem to argue that the district court erred in granting summary judgment and dismissing those counterclaims because Zubke's motion for summary judgment was in effect a motion for judgment on the pleadings. But appellants do not explain why the district court should have viewed Zubke's motion for summary judgment as a motion for judgment on the pleadings. Nor do they provide any legal support for this argument. "[T]he burden of showing error rests upon the one who relies upon it." *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 237 N.W.2d 76, 78 (Minn. 1975) (quoting *Waters v. Fiebelkorn*, 13 N.W.2d 461, 464 (Minn. 1944)). And assignments of error based on mere assertions "unsupported by argument or authority" are forfeited. *Scheffler v. City of Anoka*, 890 N.W.2d 437, 451 (Minn. App. 2017), *rev. denied* (Minn. Apr. 26, 2017). Because appellants do not fully explain their argument or provide any authority in support of it, we consider this argument forfeited.

Regardless, our review of the district court's order shows that it properly applied the summary-judgment standard to Zubke's motion on the counterclaims and correctly granted summary judgment in favor of Zubke on three of the counterclaims. Therefore, appellants have not demonstrated that the district court erred when it dismissed three of appellants' counterclaims pursuant to Zubke's motion for summary judgment.

III. The district court did not abuse its discretion when it denied appellants' motion to amend the judgment.

Finally, appellants argue that the district court abused its discretion when it denied appellants' posttrial motion for an amended judgment because it should have amended the judgment to reduce the amount owed by the amount appellants had already paid Zubke under the RSA.[6] Zubke responds that the district court did not abuse its discretion because the updated amortization schedule, which the district court used to calculate the amount awarded, accounted for all payments that appellants had made to Zubke under the RSA.

The district court may, upon a motion from a party, "amend its findings or make additional findings, and may amend the judgment accordingly if judgment has been entered." Minn. R. Civ. P. 52.02. "We review the district court's decision whether to grant a motion for amended findings for an abuse of discretion." *Landmark Cmty. Bank, N.A. v. Klingelhutz*, 927 N.W.2d 748, 754 (Minn. App. 2019). A district court abuses its discretion when its decision is based on an erroneous view of the law or against logic and facts in the record. *Id.* "On appeal from denial of a motion for amended findings, the burden is on the appellant to show there is no substantial evidence reasonably tending to sustain the [district] court's findings." *Crittenden v. Whippoorwill Ranch Campground, Inc.*,

[6] Following trial, appellants filed a motion which, in part, requested that the district court amend the judgment entered against them. While appellants did not specifically ask the district court to amend any of its findings, we address appellants' argument regarding their motion to amend the judgment as a motion for amended findings in the interest of completeness. *See* Minn. R. Civ. P. 52.02 (providing that, upon timely motion, a district court "may amend its findings or make additional findings" and "may amend the judgment accordingly if judgment has been entered").

406 N.W.2d 624, 626 (Minn. App. 1987) (citing *Nielsen v. City of St. Paul*, 88 N.W.2d 853, 864 (Minn. 1958)).

Appellants' argument that the district court abused its discretion in denying their motion to amend the judgment to reduce the damages award is unavailing. Appellants do not point to any facts in the record that suggest that the updated amortization schedule does not credit them for the payments that they made to Zubke. And our independent review of the updated schedule confirms that it does in fact credit appellants for their payments to Zubke. While appellants' resulting obligation under the schedule is larger than what they originally owed under the RSA, the increase is because appellants' monthly payments did not cover the interest that accrued while appellants were in default. Consequently, appellants have failed to meet their burden of demonstrating that "there is no substantial evidence reasonably tending to sustain the [district] court's findings." *Id.* The district court did not abuse its discretion when it denied their motion to amend the judgment.

Affirmed.