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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1864**

Thomas R. Fritz, et al.,  
Appellants,

vs.

Greenwood Marina, LLC,  
Respondent.

**Filed May 21, 2012  
Affirmed  
Bjorkman, Judge**

Hennepin County District Court  
File No. 27-CV-10-5933

Jeffrey Lambert, Jeffrey Lambert P.A., Wayzata, Minnesota (for appellants)

Mark W. Vyvyan, Matthew B. Millis, Fredrikson & Byron, P.A., Minneapolis, Minnesota  
(for respondent)

Considered and decided by Bjorkman, Presiding Judge; Kalitowski, Judge; and  
Schellhas, Judge.

**UNPUBLISHED OPINION**

**BJORKMAN**, Judge

Appellants challenge summary judgment dismissing their claims in this lease  
dispute and granting respondent's counterclaim. We affirm.

## FACTS

Appellant Thomas R. Fritz is the sole shareholder of appellant T. Fritz Enterprises, Inc. Fritz Enterprises leased a building on the shore of Lake Minnetonka where it operated a restaurant. Respondent Greenwood Marina, LLC acquired the building in June 2000, and Kent Carlson, Greenwood's sole member and officer, asked Fritz to continue to lease the building from Greenwood. On June 5, 2000, Fritz and Greenwood executed a lease for the remainder of the year, plus a ten-year term.

The lease prohibited Fritz Enterprises from assigning the lease or subletting the building "without the prior written consent of [Greenwood], which consent will not be withheld unreasonably." The lease required Fritz Enterprises to (1) provide written notice 90 days before any proposed assignment or sublease, with "the name and identity of the transferee, and its controlling persons, the nature of the transferee's business, the transferee's then current financial information and the transferee's proposed use," and (2) pay an "administrative fee" of \$500 "[w]ith any request for an assignment or sublease." And the lease defined the reasonable bases for withholding consent:

[Greenwood]'s consent shall be deemed reasonably withheld based upon any concern [Greenwood] may have regarding the use to which the proposed transferee may put the Premises or based upon concerns related to possible lack of harmony between such proposed use of transferee and other uses or occupants in the Complex or concerns related to the financial strength, character, quality or reputation of the transferee.

Fritz experienced substantial operating losses throughout the term of the lease. He informed Carlson that he needed to find a new restaurant tenant and, after several years of

searching for prospective subtenants or assignees, proposed a series of possible transfers. This appeal focuses on four of these proposals.

Fritz first presented a sublease proposal to Greenwood in late 2007.<sup>1</sup> Restaurateur Peter Benincasa formed a limited liability company, Tavern Management Group (TMG), with his wife and investor John Bliss for the purpose of subleasing the building and operating a restaurant. Fritz and Benincasa reached a preliminary agreement concerning a sublease for the remaining term of the lease. They met with Carlson in December to explain TMG's concept for a new restaurant and the proposed subleasing arrangement. Carlson seemed receptive, so Fritz had his attorney draft a sublease agreement. Fritz and TMG executed the sublease on January 1, 2008, and sent it to Greenwood for approval. Fritz also discharged the existing restaurant manager and retained Benincasa on an interim basis to ensure a smooth transition of ownership and operation.

Carlson responded to the proposal in a letter dated January 21, 2008. The letter identified six items that Fritz or TMG needed to address before Greenwood would decide whether to consent to the sublease proposal:

1. Financial information on [TMG]
2. A copy of the business plan as shown on Exhibit B of the proposed Sublease Agreement
3. A copy of the Parking Agreement with the Old Log Theater property owner
4. Resolution of the sewer lift station improvement with the City of Greenwood
5. Better understanding of the new improvements that [TMG] intends to make

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<sup>1</sup> Fritz proposed a different subtenant sometime earlier in 2007, but the proposal fell through and is not at issue in this case.

6. Better understanding of the long term plans for [TMG] and its potential exit strategy

The letter also highlighted Greenwood's concern about the financial viability of the new restaurant concept and its compatibility with other businesses located in the marina complex. Carlson proposed that Benincasa operate for one year under the "current management agreement" with Fritz, with the possibility of a longer term commitment if Greenwood's concerns were assuaged.

Benincasa was upset about the letter and advised Carlson that TMG had no financial information because it "was just a start up" and that "it didn't matter since Fritz was guaranteeing all of the lease payments"; that he had previously explained the business plan, which was "to essentially continue the operation of the restaurant"; and that Carlson's other concerns were immaterial to the sublease proposal. Bliss withdrew from the project. Fritz never paid Greenwood the \$500 administrative fee in connection with the request for consent to the sublease.

In the first half of 2008, Fritz and Benincasa continued to operate the restaurant at a loss while pursuing a viable subtenant. Early in July, they told Carlson that they would not be able to interest prospective investors in the building unless Greenwood substantially reduced the base rent. Greenwood agreed to do so, and the parties executed an amendment to the lease that reduced the rent, added a mutual termination provision, and added Fritz Enterprises as a party. The amendment did not alter the provision governing assignments and subleases.

Fritz and Benincasa presented a second transfer proposal in late 2008. They proposed assigning the lease, with an extended term, to investors Bill Wanner, Brian Morgan, and Kevin Rouse. In early November, Carlson met with Fritz, Benincasa, and two of the potential investors. They advised Carlson that Benincasa would be the operating manager and shareholder, but the group did not otherwise present a business plan. Nor did they provide any financial information for Bill Wanner or pay the \$500 administrative fee. In January 2009, Benincasa provided a financial projection for the proposed restaurant that anticipated minimal profits. Because of the lack of information about Bill Wanner's financial status and the group's inability to demonstrate a viable business plan, Greenwood did not consent to this proposed assignment.

Benincasa and Fritz requested consent for a third transfer arrangement in early 2009. This proposal involved an assignment of the lease, for an extended term, to two investors who had run successful local restaurants. Investor Todd Holmers was to provide the bulk of the funding for the project, but he never provided any personal financial information. Carlson independently learned that Holmers was facing more than \$1,000,000 in unsatisfied judgments and over \$100,000 in federal tax liens, and was involved in a bankruptcy proceeding. Carlson nonetheless agreed to meet with the investors, but the meeting went poorly and the investors refused to proceed with the deal.

A similar assignment proposal followed shortly thereafter, in mid-2009. Holmers contacted investor Kevin Vickers, who agreed to provide financial backing for a new restaurant. But Holmers's continued involvement in the project concerned Carlson, as

did Vickers's improbable professional credentials and failure to provide a letter of credit from a reliable source. Greenwood rejected the fourth proposal.

On September 3, 2009, Greenwood gave appellants notice that it was terminating the lease effective December 3, 2009.

Appellants initiated this action, alleging that Greenwood breached the lease by unreasonably withholding consent to the proposed subleases and assignments. Greenwood denied the allegations and asserted multiple breach-of-contract counterclaims. Greenwood moved for summary judgment dismissing appellants' claims, which the district court granted in September 2010. The district court also awarded Greenwood its attorney fees pursuant to a lease provision. Thereafter, the parties stipulated to Greenwood's amendment of its counterclaim to seek \$25,702.36 in unpaid rent for March-December 2010. Greenwood agreed to dismiss its other counterclaims and moved for summary judgment on its rent claim. The district court granted the motion and awarded related attorney fees. This appeal follows.

## **D E C I S I O N**

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

Resolution of the breach-of-contract claims at issue in this appeal turns on the interpretation of the lease. The interpretation of a contract is a question of law that we review de novo. *Bus. Bank v. Hanson*, 769 N.W.2d 285, 288 (Minn. 2009). “The plain

and ordinary meaning of the contract language controls, unless the language is ambiguous.” *Id.* “The cardinal purpose of construing a contract is to give effect to the intention of the parties as expressed in the language they used in drafting the whole contract.” *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997). The language of the contract must be read as a whole and in a manner that gives meaning to all of its provisions. *Brookfield Trade Ctr., Inc. v. Cnty. of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). The contract terms may not be construed to yield a harsh or absurd result. *Id.*

**I. Appellants’ breach-of-contract claims against Greenwood fails as a matter of law.**

“A claim of breach of contract requires proof of three elements: (1) the formation of a contract, (2) the performance of conditions precedent by the plaintiff, and (3) the breach of the contract by the defendant.” *Thomas B. Olson & Assocs., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. App. 2008), *review denied* (Minn. Jan. 20, 2009). The district court concluded that the undisputed facts demonstrate a failure of two of these elements—satisfaction of conditions precedent and breach. Because appellants focus primarily on their claim regarding the first transfer proposal, we begin our analysis there.

**First transfer proposal**

Appellants assert that Greenwood breached the lease by unreasonably withholding consent to the proposed sublease to TMG. While reasonableness generally is a fact question for the jury, the lease defined as reasonable the following reasons for

withholding consent to a transfer proposal: (1) “any concern [Greenwood] may have regarding the use to which the proposed transferee may put the Premises,” (2) “concerns related to possible lack of harmony between [the] proposed use of transferee and other uses or occupants in the Complex,” or (3) “concerns related to the financial strength, character, quality or reputation of the transferee.” Undisputed evidence indicates that Greenwood had concerns about the financial strength and character of TMG because TMG was a start-up company with no financial history and appellants did not provide any financial information for Bliss, the primary investor behind TMG.

Appellants argue that these concerns were unreasonable because Fritz “guaranteed” the rent so any failure of TMG would not impact Greenwood. We disagree. First, what appellants characterize as a rent guarantee is simply a standard sublease condition. The lease expressly recognized that Greenwood had “legitimate concerns” about the financial stability of any entity taking possession of the building, regardless of whether appellants remained liable for rent as sublessors or transferred that obligation to an assignee. Second, the lease did not require that Greenwood’s concerns about a transferee’s financial status be reasonable but defined financial concerns as a reasonable basis for denying consent to a transfer. Because it is undisputed that Greenwood denied consent to the first transfer proposal at least partially based on financial concerns, Greenwood’s withholding of consent was reasonable as a matter of law.

Moreover, we agree with the district court that appellants’ failure to perform conditions precedent independently supports dismissal of the claim related to the TMG sublease proposal. A condition precedent is any fact or condition, subsequent to the

formation of a contract, that must be satisfied before a duty of immediate performance arises under the contract. *Nat'l City Bank of Minneapolis v. St. Paul Fire & Marine Ins. Co.*, 447 N.W.2d 171, 176 (Minn. 1989). A breach-of-contract claim does not accrue until the breached obligation's conditions precedent occur. *Wolff v. Rhude & Fryberger, Inc.*, 275 Minn. 52, 55, 145 N.W.2d 299, 301 (1966). The lease imposed several procedural requirements that appellants needed to satisfy before Greenwood was obligated to reasonably consider a transfer proposal. The district court determined that appellants failed to perform two of these conditions: providing "the transferee's then current financial information" and paying the \$500 administrative fee.

Appellants argue that the district court erred as to the first condition because TMG had no financial information and the lease did not require appellants to provide financial information with respect to TMG's primary investor, Bliss. And appellants point out that Greenwood did not request Bliss's information. We are not persuaded. While the lease stated only that appellants must provide the financial information of "the transferee," appellants' narrow interpretation of that requirement is inconsistent with the lease as a whole. The lease required appellants to identify a transferee's "controlling persons" and expressly permitted Greenwood to withhold consent to a transfer if it had concerns about the transferee's financial information. If a transferee had no independent financial information, Greenwood would have to have some way under the lease of addressing that fact; either appellants were required to provide the financial information of the transferee's controlling persons, or Greenwood could reasonably deny consent based on the failure to demonstrate the transferee's financial stability. Appellants' failure to

provide Bliss's financial information—the only financial information that could potentially alleviate Greenwood's reasonable concerns about TMG's financial stability—constitutes failure of a condition precedent to Greenwood's reasonable consideration of the proposed transfer.

As to the second condition precedent, appellants acknowledge that they did not pay the required administrative fee, but argue that because Greenwood never requested payment it therefore waived that condition. We disagree. A party to a contract may waive a condition precedent by conduct inconsistent with the intent to assert its right to performance of the condition. See *Flaherty v. Indep. Sch. Dist. No. 2144*, 577 N.W.2d 229, 232 (Minn. App. 1998), *review denied* (Minn. June 17, 1998); *Steinhilber v. Prairie Pine Mut. Ins. Co.*, 533 N.W.2d 92, 93 (Minn. App. 1995). But this record does not indicate waiver. The lease did not require Greenwood to ask for the fee, so Greenwood's failure to do so was not inconsistent with its right to expect payment of the fee. Moreover, appellants' failure to supply the necessary financial information means that the proposal never was properly before Greenwood such that Greenwood could have been expected to demand the fee. The failure of this condition precedent therefore supports the district court's dismissal of appellants' breach-of-contract claim regarding the first proposal.

### **Subsequent transfer proposals**

The three other transfer requests present similar issues but fail for a more basic reason: each required Greenwood to extend the duration of the lease by ten years. A party to a lease is entitled to enforcement of its reasonable expectation as to the term of

the lease. *Starlite Ltd. P'ship v. Landry's Rests., Inc.*, 780 N.W.2d 396, 398 (Minn. App. 2010) (stating that a “fundamental purpose of contract law is to protect the reasonable expectations of the parties who enter into the bargain”). Although the lease limited Greenwood’s discretion to withhold consent to a proposed transfer, it did not restrict Greenwood’s authority to reject other modification requests or compel Greenwood to extend the lease term. Accordingly, the district court did not err by concluding that Greenwood did not breach the lease by denying consent to proposed transfers that would have extended the assigned lease term beyond that of the original lease.

Appellants’ failure to satisfy conditions precedent also independently justifies dismissal of the claims based on the second, third, and fourth transfer proposals. As discussed above, appellants did not pay the administrative fee for any of the proposed transfers or provide required financial information. The second, third, and fourth transfer proposals all involved assignment of the lease to a group of investors, apparently acting through a corporation that they would form for that purpose. Because the corporations, like TMG, had no financial track record, the lease required appellants to provide the financial information of the investors behind those corporations so that Greenwood could reasonably evaluate the financial stability of the proposed transferees. And the undisputed evidence indicates that appellants failed to provide the financial information for some of the investors in each group. Appellants do not identify any authority for the proposition that difficulties in satisfying conditions precedent excuse nonperformance. The undisputed failure of multiple conditions precedent supports the district court’s dismissal of appellants’ remaining claims.

## **II. Greenwood is entitled to summary judgment on its counterclaim for unpaid rent.**

Appellants next argue that disputed material facts preclude summary judgment on Greenwood's counterclaim for unpaid rent. They do not dispute that the lease required them to pay rent for March through December 2010 but assert that Greenwood took "constructive possession" of the building in mid-2009, which excused them from the rent obligation. We are not persuaded.

It is undisputed that appellants stopped operating the restaurant in fall 2008 and removed all equipment and furnishings by the end of that year. And appellants agree that they did not use the building during 2009. Accordingly, Greenwood's alleged act of taking possession and changing the locks in July 2009 did not deprive appellants of the possession and enjoyment of the premises. *See Leifman v. Percansky*, 186 Minn. 427, 429, 243 N.W. 446, 447 (1932) (stating that constructive eviction requires that a tenant be deprived of the possession and enjoyment of the premises).<sup>2</sup>

Moreover, even if Greenwood effectively evicted appellants, or terminated the lease, in July 2009, that action did not affect appellants' obligation under the lease to pay rent for March through December 2010. Under the lease-termination provision added to the lease in July 2008, Greenwood's termination of the lease did not excuse appellant's obligation to pay rent; it terminated appellants' possessory rights and reduced appellants'

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<sup>2</sup> We note that appellants failed to identify any authority for their argument until the oral argument for this appeal, when they cited *Leifman*. This failure independently justifies rejection of their argument. *See State by Humphrey v. Modern Recycling*, 558 N.W.2d 770, 772 (Minn. App. 1997) (stating that an assignment of error in a brief based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious).

rent obligation by half for the remainder of the term. Whether Greenwood terminated the lease in July 2009 by constructively evicting appellants or in December 2009 by written notice is immaterial to appellants' obligation for rent in 2010. We conclude that the district court did not err by granting summary judgment on Greenwood's claim for unpaid rent.<sup>3</sup>

**Affirmed.**

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<sup>3</sup> Appellants conditionally challenge the attorney-fee award, arguing that reversal of the summary-judgment decisions would require reversal of the attorney-fee award. Because appellants agree that the lease provides for an award of attorney fees and do not challenge the amount of fees awarded, we also affirm the attorney-fee award.