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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-2102**

Maple Bank,
Appellant,

vs.

St. Louis Park Public School District No. 283, et al.,
Defendants and Third Party Plaintiffs,
Respondents,

vs.

Rea Properties, LLC, et al.,
Third Party Defendants.

**Filed June 30, 2014
Reversed and remanded
Hudson, Judge**

Hennepin County District Court
File No. 27-CV-13-1813

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Considered and decided by Halbrooks, Presiding Judge; Hudson, Judge; and
Smith, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

On appeal from summary judgment in this commercial-lease dispute, appellant argues that the district court erred by concluding that Rea Properties materially breached its lease with respondents. Appellant also argues that the district court abused its discretion by denying its motion to strike some of respondents' evidence and by denying its motion for a discovery continuance under Minn. R. Civ. P. 56.06. Because we conclude that there are fact questions that should not have been resolved on summary judgment, we reverse and remand.

FACTS

On May 6, 2008, respondent school districts St. Louis Park, Minnetonka, and Hopkins entered into a ten-year lease with Rea Properties for a building in St. Louis Park. The districts used the building to operate their Transitions Plus program for disabled adults ages 18–21. Pursuant to the lease, Rea Properties agreed to make improvements to the building at its own expense, including repairs to the “building roof, structure and building parking lot.” To fund these improvements, Rea Properties obtained two loans from appellant Maple Bank, and roofing work was completed. The districts' own contractors had to make some holes in the new roof to accommodate plumbing work, but those holes were subsequently repaired.

During the 2008–09 school year, the districts reported problems with the building including sewage backup, water intrusion, and mold. The districts hired the Institute for Environmental Assessment (IEA) to conduct an assessment of the building's condition.

In an October 2008 report, IEA found that there was wet carpet and wet sheetrock in several rooms, visible fungal growth, and the presence of *E. coli* and other bacteria in some places. IEA recommended replacing the wet carpet and sheetrock and thoroughly cleaning and sanitizing all areas affected by the sewage backup.

At the beginning of the 2009–10 school year, the districts were again concerned about water in the building. Infrared Consulting Services, which the districts hired to conduct a roof moisture survey, reported in August 2009 that roof insulation was 70% wet. That same month, IEA conducted a second assessment of the building to determine the extent of water damage. IEA found numerous stained and damp ceiling tiles in rooms used by the districts, wet sheetrock with visible fungal growth, and wet carpet in a hallway. IEA recommended that the affected ceiling tiles be replaced, roof leaks be identified and repaired, wet carpet be removed, and that the mold issues be professionally remediated. As a result of these findings, the districts delayed the start of the Transitions Plus school year by around three weeks. Roof repairs were completed by Rea Properties' roofer under the supervision of the districts, and mold remediation was performed.

Throughout the 2009–10 school year, the districts' students and staff complained of sneezing, headaches, congestion, nausea, and an increased use of inhalers. At some point, drip pans were placed above the ceiling tiles to catch water leaking from the roof. In February 2010, the districts notified Rea Properties that, because problems with the building had disrupted the program, they would be considering legal remedies, including early termination of the lease. IEA completed an air-quality assessment in May 2010. That inspection revealed water-stained ceiling tiles, walls, and sheetrock in various

rooms, but no actual moisture on those surfaces. Fungal counts in the air were low relative to the outdoors, but the air in two rooms contained low levels of *aspergillus* and *penicillium*, which are fungi associated with “growth on moisture-impacted building materials,” suggesting an interior source. In addition, carpets in four rooms tested positive for moderate levels of *aspergillus* and *penicillium* suggesting an interior source of fungal growth. IEA recommended that the roof be inspected for leaks, water-stained ceiling tiles be removed, and that the entire building be cleaned and any mold remediated. A moisture survey of the roof showed that it was up to 60% wet in certain spots. None of IEA’s May 2010 recommendations were ever completed.

On May 14, 2010, Rea Properties met with district officials and agreed to repair the roof again and to do further mold remediation. The districts moved the Transitions Plus program out of the building around May 15, 2010. The districts gave a deadline of August 1 for the work to be completed in time for them to prepare for the next school year. Rea Properties claims that the districts insisted that one of their contractors oversee the work, but repeated phone calls to the contractor were not returned for four weeks. Rea Properties also claimed that the districts were supposed to provide reports detailing what roof repairs needed to be made, but that the necessary reports, which were completed in May, were not delivered to Rea Properties until July 8 and July 14. Rea Properties requested copies of the reports on June 7, June 16, June 21, and July 6. After receiving the reports, Rea Properties sent the districts a letter on July 16 stating that they were ready to begin work. It does not appear that the districts responded. The districts hired an engineer to inspect the building around July 27. That report concluded that the

building was unfit for school use until mold remediation and repairs to the roof were completed.

On August 2, 2010, the districts notified Rea Properties of their intent to vacate and surrender the premises as of August 31, 2010, citing several breaches of the lease including (1) failure to provide a building fit for its intended purpose; (2) failure to repair the roof; and (3) failure to provide exterior building maintenance and keep the property in good condition. After the districts vacated the building and ceased paying rent, Rea Properties defaulted on its loans to Maple Bank and executed a quitclaim deed transferring ownership of the building to the bank. Maple Bank filed this lawsuit against the districts for breach of lease. The districts asserted the defense of constructive eviction and filed a counterclaim for breach of lease. The districts also filed a third-party complaint against Rea Properties alleging that they are entitled to contribution or indemnity from Rea Properties for any judgment entered in favor of Maple Bank. The districts moved for summary judgment. Maple Bank made a motion to strike several of respondents' exhibits, arguing that they were inadmissible and should not be considered on summary judgment. Maple Bank also argued that it should be granted a continuance to conduct further discovery.

The district court denied Maple Bank's motions and granted summary judgment to the districts after concluding that they were justified in terminating the lease because Rea Properties' failure to repair the roof constituted a material breach of the lease. The complaint was dismissed with prejudice and the districts' third-party complaint against

Rea Properties was dismissed as moot. The district court did not decide the constructive-
eviction issue. Maple Bank appeals.

DECISION

A district court's decision to grant summary judgment is reviewed de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). On review, this court “determine[s] whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment.” *Id.* We view the evidence in the light most favorable to the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Termination or rescission of a lease is only justified by a material breach or a substantial failure in performance. *Cloverdale Foods of Minn., Inc. v. Pioneer Snacks*, 580 N.W.2d 46, 49 (Minn. App. 1998). “[F]orfeitures are disfavored.” *Id.* To justify rescission or termination, the injury must be “irreparable” or damages must be “inadequate or difficult or impossible to determine.” *Johnny’s, Inc. v. Njaka*, 450 N.W.2d 166, 168 (Minn. App. 1990). A breach is material if “one of the primary purposes” of the contract is violated. *Steller v. Thomas*, 232 Minn. 275, 282, 45 N.W.2d 537, 542 (1950). A breach is also material if it “goes to the root or essence of the contract.” *BOB Acres, LLC v. Schumacher Farms, LLC*, 797 N.W.2d 723, 728 (Minn. App. 2011) (quotation omitted). When a material breach has occurred, the non-breaching party is excused from further performance and may sue for damages. *Id.* Generally, the materiality of a breach is a question of fact. *See Cloverdale*, 580 N.W.2d at 49–50.

The districts argue that, even though material breach is generally a question of fact, the undisputed facts here support summary judgment. The district court found that it was undisputed that the roof was not repaired by the start of the 2010–11 school year and concluded that failure to repair the roof constituted a material breach because the condition of the roof went to the essence of the contract. The district court based its conclusion on the fact that the districts specifically negotiated the roof provision in the lease. But Maple Bank identifies several factual questions that were not addressed by the district court. First, Maple Bank argues that failure to repair the roof could not be material because there was no proof that the moisture problems actually interfered with the districts’ programming in the building. Maple Bank’s expert presented evidence that the mold levels identified in the May 2010 IEA reports were not hazardous to human health and that the water damage to the building was minimal. It is undisputed that the roof was not repaired in the summer of 2010, but the extent of damage to the roof is disputed. Second, the district court never addressed whether the condition of the roof actually had any effect on the day-to-day operation of the Transitions Plus program, or whether the districts were warranted in concluding that the mold and water posed a hazard to the building occupants. In addition, termination of a lease for material breach is only justified if damages are “inadequate or difficult or impossible to determine” or the injuries are “irreparable.” *Johnny’s, Inc.*, 450 N.W.2d at 168. The district court made no findings regarding the inadequate nature of damages or the irreparable nature of the districts’ injuries.

Maple Bank also argues that it was impossible for Rea Properties to complete the roof repair before the districts' August 1 deadline because the districts' chosen contractor was unavailable for four weeks, and because the districts did not provide copies of the May 2010 building and roof inspections to Rea Properties until mid-July. It is not clear from the record whether Rea Properties could have begun roof repair before receiving the reports. Because several fact questions exist as to whether failure to repair the roof constituted a material breach of the parties' lease, we reverse summary judgment and remand to the district court for trial. Because we reverse and remand, we do not address Maple Bank's remaining arguments.

Reversed and remanded.