

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-449**

Eldorado Commercial LLC,
Appellant,

vs.

Floyd Kohman,
Respondent,
John Doe owners I through V d/b/a Whispering Meadows; et al.,
Defendants.

**Filed November 14, 2011
Reversed and remanded
Stoneburner, Judge**

Scott County District Court
File No. 70CV0919299

Michelle L. MacDonald, MacDonald Law Firm, L.L.C., West St. Paul, Minnesota (for appellant)

Lawrence M. Rocheford, Mark K. Hellie, Jardine Logan & O'Brien, P.L.L.P., Lake Elmo, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and Worke, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant challenges summary judgment dismissing its action for interference with contractual relations, arguing that there are material-fact issues that make summary judgment inappropriate. We agree, and we reverse and remand.

FACTS

In 2005, respondent Jo's Gym, LLC (tenant) leased commercial space for a fitness center in Jordan from appellant Eldorado Commercial LLC.¹ The transaction involved two written ten-year leases, requiring tenant to pay a fixed monthly rent plus a percentage of the common-area-maintenance and real-estate-tax costs (CAM charges). From the time the first payment was due, tenant's payments were untimely and tenant was often in arrears, but, by the end of April 2006, tenant was only \$50 behind in payments.

In May 2006, the CAM charges more than doubled. Starting in June 2006, tenant began to fall further behind in payments. By January 1, 2007, tenant was more than a month and a half behind in rent. In February 2007, Eldorado met with tenant. Tenant stated that it thought that its payments were too high, and Eldorado said that it would try to work with tenant because it did not want to lose tenant. Tenant made no payments to Eldorado after March 23, 2007.

Before the first week in April, respondent Floyd Kohman, who owns commercial space located approximately one block away from the Eldorado space, began discussions

¹ Jo Erp is the sole owner of Jo's Gym, LLC. Initially, she was a named defendant in this action, but was dismissed from the lawsuit by stipulation of the parties.

with tenant's owner about moving the fitness center to the Kohman property. By the first week in April, tenant and Kohman had a "handshake" agreement that the fitness center would move to Kohman's property. Kohman extensively remodeled his space to accommodate the fitness center.

By letter dated April 13, 2007, tenant's attorney requested that Eldorado release tenant from the lease agreements in exchange for tenant's forfeiture of the \$2,500 security deposit and \$1,800, which tenant's counsel stated was the amount of the retainer fee of a bankruptcy attorney tenant would retain if not released from the leases.

Eldorado declined to release tenant from the lease agreements and initiated an eviction action on April 30, 2007. It appears that claims for rent and property damages and counterclaims were asserted in that action and the matter was scheduled for a jury trial on May 24, 2007. Tenant agreed to vacate the premises on May 24, 2007, and the district court continued the trial on the remaining issues.

On May 24, 2007, tenant vacated the Eldorado property and moved into Kohman's property. On May 25, 2007, tenant signed a 10-year lease with Kohman, drafted by tenant's attorney. The fitness center was open for business the same day that tenant signed the lease.

When Eldorado became aware of Kohman's conduct that facilitated the immediate relocation of the fitness center to Kohman's property, it sued Kohman, tenant, and defendants John Doe owners I through V d/b/a Whispering Meadows, alleging that Kohman and others "maliciously conspired together for the purpose of inducing [tenant] to cancel and/or breach her contract with Eldorado." In November 2010, tenant executed

a confession of judgment in Eldorado's eviction action in the amount of \$639,626.53, representing amounts owed to Eldorado under the leases and property damage to the Eldorado property caused by tenant.

Kohman moved for summary judgment in the interference-with-contract action. Eldorado opposed the motion, asserting that numerous fact issues made summary judgment inappropriate but also requesting summary judgment in Eldorado's favor. The district court granted summary judgment to Kohman, concluding that "there are no facts establishing that Kohman was responsible for the intentional procurement of the breach," and that "the responsibility for the breach was solely with [tenant]." The district court awarded cost and disbursements to Kohman. This appeal followed in which Eldorado challenges the grant of summary judgment and the procedure used to award costs and disbursements to Kohman.

D E C I S I O N

I. Standard of review

"On appeal from summary judgment, we must review the record to determine whether there is any genuine issue of material fact and whether the district court erred in its application of the law." *Dahlin v. Kroening*, 796 N.W.2d 503, 504–05 (Minn. 2011). We review the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). "We review a district court's summary judgment decision de novo." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). "[S]ummary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents

sufficient evidence to permit reasonable persons to draw different conclusions.”

Schroeder v. St. Louis Cnty., 708 N.W.2d 497, 507 (Minn. 2006).

A district court’s award of costs is generally reviewed for an abuse of discretion. *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 482 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006). In this case, the challenge is to the procedure followed in awarding costs. Interpretation of the rules governing such awards is reviewed de novo. *Commandeur LLC v. Howard Hartry, Inc.*, 724 N.W.2d 508, 509 (Minn. 2006) (stating that court rules are interpreted de novo).

II. Tortious Interference with Contract

“It is the settled law of this state that wrongful interference with the contract relations of others causing a breach is a tort . . . and that wrongful and malicious interference by a stranger with contract relations existing between others, causing one to commit a breach thereof, amounts to an actionable tort and that an action against a party to the contract for a breach thereof is not the exclusive remedy but the wrongdoer may be pursued.” *Wolfson v. Northern States Management Co.*, 210 Minn. 504, 507, 299 N.W. 676, 678 (1941) (citations omitted). “A cause of action for wrongful interference with a contractual relationship requires: ‘(1) the existence of a contract; (2) the alleged wrongdoer’s knowledge of the contract; (3) intentional procurement of its breach; (4) without justification; and (5) damages.’” *Kjesbo v. Ricks*, 517 N.W.2d 585, 588 (Minn. 1994) (citing *Furlev Sales and Assoc., Inc. v. North American Automotive Warehouse, Inc.*, 325 N.W.2d 20, 25 (Minn. 1982)). The parties and the district court acknowledge that the undisputed facts establish the first two elements: (1) existence of tenant’s leases

with Eldorado and (2) Kohman's knowledge of the leases. But the district court stated that there are "no facts establishing that Kohman was responsible for the intentional procurement of the breach."

A. Inducement

Eldorado asserts that the district court ignored evidence that establishes, or at least creates a genuine issue of fact about whether Kohman acted to procure tenant's breach of the leases. We agree. The record contains evidence of numerous contacts between tenant and Kohman, resulting in tenant's agreement to move to Kohman's property while the Eldorado leases were in place and after Eldorado had offered to work with tenant regarding payments due under the lease. Kohman testified in his deposition that he had a "handshake" agreement with tenant by the first week in April 2007 when he hired contractors to make substantial improvements to his property that would allow tenant to quickly open the fitness center in the Kohman property. Tenant's attorney's letter to Eldorado seeking release from the Eldorado leases was sent after tenant and Kohman reached their "handshake" agreement, and tenant's attorney drafted the Kohman lease that was signed the day after tenant moved out of Eldorado's property and into Kohman's property. Tenant was immediately open for business in Kohman's property.

Kohman argues that because the breach of contract in this case was tenant's failure to pay rent, which occurred before Kohman began to discuss tenant's move to his property, he cannot, as a matter of law, have acted to procure the breach. But "[i]nterference with Contract Relations includes not merely the procurement of a breach of contract, but all invasion of contract relations . . . it may be said that, the interest in a

contract being a property right, a party thereto has a right of action against persons who are by their conduct substantially interfering with the performance thereof.” *Johnson v. Gustafson*, 201 Minn. 629, 633, 277 N.W. 252, 254 (1938). The record establishes that tenant had been in arrears on the rent for some time and that Eldorado had expressed a willingness to work with tenant to keep tenant in the Eldorado property. Only after Kohman facilitated tenant’s immediate move to Kohman’s property did tenant seek to be released from the Eldorado leases and threaten to file for bankruptcy if not released.

Reasonable persons could conclude that Kohman’s conduct constituted interference with Eldorado’s contractual relationship with tenant. Therefore the evidence is sufficient to raise a genuine issue of material fact about whether Kohman intentionally induced tenant to abandon the Eldorado leases, making summary judgment inappropriate.

B. Justification

The district court did not reach the issue of whether Eldorado alleged sufficient facts on elements four (without justification) and five (damages) to prevent summary judgment. On appeal, Eldorado asserts that Kohman had the burden to prove that his conduct was justified. We agree. *See Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 362 (Minn. 1998) (stating that “[w]hether interference is justified is ordinarily a factual determination of what is reasonable conduct under the circumstances,” and “the burden of proving justification is on the defendant”). In this case Eldorado has alleged that the interference was not justified, and Kohman has not asserted or produced any evidence of justification that would preclude submitting this issue to the fact finder. Kohman’s argument, asserted during oral argument on appeal, that he was merely pursuing his own

legitimate business interests does not constitute justification for interference with contract relations. *See Johnson*, 201 Minn. at 634, 277 N.W. at 255 (stating that “[i]t is not justification for knowingly procuring the breach of a contract that defendant acted without improper purpose, and sought only to further his own interests”).

C. Damages

Kohman argues that Eldorado cannot establish damages because tenant’s confession of judgment fully compensated Eldorado for all damages arising from tenant’s breach of contract. But case law establishes that Eldorado can pursue both tenant for the breach and Kohman for interference with contract relations. *See Wolfson*, 210 Minn. at 508, 299 N.W. at 678; Restatement (Second) of Torts § 774A (2) (1979) (stating that in an action for interference with a contract, the fact that the breaching party is liable for the breach does not affect the amount of damages awardable against the person who interfered with the contract, “but any damages in fact paid by the [breaching party] will reduce the damages actually recoverable on the judgment”).² Plainly, Eldorado established damages resulting from breach of the lease.

Because Eldorado has presented evidence on all elements of a claim of interference with contract sufficient to raise material fact issues, summary judgment was

² Although not yet asserted in this case, case law also establishes that pecuniary damages incurred in pursuing claims against tenant are recoverable in an action for tortious interference with contract relations. *See Kallok*, 573 N.W.2d at 363 (stating that the third-party litigation exception to the American rule that prevents a party from shifting its attorney fees to its adversary absent a specific contract or statutory authorization “permits a court to award attorney fees as damages if the defendant’s tortious act thrusts or projects the plaintiff into litigation with a third party”).

inappropriate. We reverse and remand.³ Because we reverse the district court's grant of summary judgment, Eldorado's challenge to the award of costs and disbursements to Kohman is moot.

Reversed and remanded.

³ Our decision is not intended to be any reflection on the merits of the claims asserted.