STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1666

Terry Bongard,
Respondent,

vs.

Premium Tax Services, Inc.,
Appellant.

Filed April 28, 2014
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-CV-HC-12-7760

Kenneth R. Hertz, Hertz Law Offices, P.A., Columbia Heights, Minnesota (for respondent)

Daniel L. M. Kennedy, Kennedy Law Group, PLLC, Minneapolis, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Worke, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

In this eviction action involving a commercial lease, appellant tenant challenges the district court's judgment granting respondent landlord's request for a writ of recovery

and order to vacate. By notice of related appeal, respondent asks us to affirm based on an alternative theory. Because we conclude that respondent provided sufficient notice to terminate the parties' year-to-year tenancy, we affirm.

FACTS

On November 22, 2006, respondent Terry Bongard and Bret Haage, acting in his capacity as president of appellant Premium Tax Services Inc. (Premium), signed an agreement in which Bongard leased commercial property located in Minneapolis to Premium. The written lease agreement states, in relevant part:

> The monthly lease payment is $510/month. Monthly payment due on or before the 1st of each month payable to Terry Bongard . . . beginning Dec. 1, 2006. The renewal period and any subsequent renewal periods are an additional 1 (one) year (12 months), automatic renewals annually until both parties are old and grey (or older and greyer).

In a letter to Haage dated April 24, 2012, Bongard stated: "This letter is to give you formal notice that Premium . . . is required to vacate . . . by June 1, 2012, thus ending the lease dated November 22, 2006." Premium did not vacate the property, and Bongard brought an eviction action in district court in October 2012. In that case, the district court granted partial summary judgment for Premium. The district court concluded that the lease establishes a tenancy from year to year, and that under Minn. Stat. § 504B.135 (2012), termination requires three months' notice. But the district court concluded that it could not determine the end date of the lease based on the record before it and therefore scheduled a trial on that issue.

While the eviction case was pending, Bongard's attorney sent Haage a second letter dated October 29, stating:

> This letter serves as notice to you, and all other occupants of [the leased property], that your lease will not be renewed after November 30, 2012 and that you must vacate the premises by November 30, 2012 if the [c]ourt determines that the previous notice to vacate the premises by June 1, 2012 is not valid . . . .

After Premium did not vacate the property on November 30, Bongard brought a second eviction action alleging that Premium failed to quit a year-to-year tenancy as of November 30.

The district court held one trial on both eviction cases, and, on May 1, 2013, filed the same written findings, conclusions, and order in both cases. In the May 1 order, the district court incorporated from its partial-summary-judgment order its conclusions issued in the first eviction proceeding that the lease establishes a tenancy from year to year and that termination requires three months' notice. The district court found that "the tenancy from year-to-year created by the [l]ease runs from December 1 of each year through November 30 of the following calendar year, until terminated by proper notice." The district court dismissed the first eviction case, reasoning that because the complaint was filed before the end of the lease term, there could not be a hold-over and there was no basis for eviction. As to the second eviction case, the district court concluded that the April 24 notice "effectively terminated the year-to-year tenancy as of November 30, 2012," even though the notice required Premium to vacate by June 1, 2012.

The district court awarded judgment for Bongard in the second eviction case and issued a writ of recovery of premises and order to vacate. Premium appealed from the judgment in the second eviction case, and Bongard filed a notice of related appeal. Neither party appealed the district court's dismissal of the first eviction case.

D E C I S I O N

"We review a district court's findings of fact in a bench trial for clear error, and the district court's legal conclusions de novo." *Slattengren & Sons Props., LLC v. RTS River Bluff, LLC*, 805 N.W.2d 279, 281 (Minn. App. 2011) (citations omitted), *review granted* (Minn. Dec. 13, 2011). Premium argues that the district court erred by concluding that the April 24 notice requiring Premium to vacate the leased property by June 1 was sufficient to terminate the lease on November 30. By notice of related appeal, Bongard argues that the district court erred by concluding that termination of the lease required three months' notice. We address each issue in turn.

I.

Premium contends that under "current Minnesota law . . . Bongard's notice to quit on June 1, 2012 was not an effective notice to quit on November [30], 2012." Premium relies on *Hunter v. Frost*, 47 Minn. 1, 5, 49 N.W. 327, 329 (1891), which explains that a tenancy from year to year must terminate at the end of the one-year period. *Hunter* held that a notice purporting to terminate a tenancy from year to year at a time other than the end of the one-year period "was wholly ineffectual, because not terminating at the end of a year." *Id.* at 6, 49 N.W. at 329. But Premium acknowledges that "the contents of a notice to terminate a tenancy are not specified by statute, and substantial, not technical,

accuracy is all that is required." *Heinsch v. Kirby*, 223 Minn. 302, 303, 26 N.W.2d 363, 363 (1947).

The parties do not challenge the district court's conclusion that the lease established a tenancy from year to year that ran "from December 1 of each year through November 30 of the following calendar year, until terminated by proper notice."[1] Bongard's April 24 notice purported to terminate the lease on June 1. Premium argues that "[n]o reported case has interpreted a notice to quit that is six months different from the possible termination date to be substantially accurate." Premium is right. Bongard cites a number of cases as support for his contention that the April 24 notice was sufficient to meet the substantial-compliance standard and "put [Premium] on notice that . . . the lease would not be automatically renewed." But none of the cases Bongard cites supports the proposition that a noticed termination date that is six months earlier than the end of the annual tenancy period amounts to substantial compliance. *See id.* at 303-04, 26 N.W.2d at 363-64 (holding that a notice giving tenants "'until June 30 . . . to find another place'" and explaining that the landlord "'expected to occupy the premises by July 1'" was sufficient to "evince[] an intent to occupy the premises on July 1" rather than on June 30, "which would make the notice defective, because the tenants were entitled to the premises until midnight of June 30"); *Hyman Realty Co. v. Kahn*, 199 Minn. 139, 140, 271 N.W. 248, 248 (1937) (holding that notice to vacate "'on and after May 31st, 1936,'" was legally sufficient even though tenants were entitled to premises

[1] At oral argument, Bongard argued that the lease established a tenancy from month to month. But Bongard did not make that argument in his brief. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating that issues not briefed on appeal are waived).

until midnight of May 31); *Alworth v. Gordon*, 81 Minn. 445, 452, 84 N.W. 454, 456 (1900) (rejecting a claim that "a notice to quit only a part of the premises" was void because the jury must have found that the notice "was intended to include the whole, not a part, of the demised premises").

In concluding that the April 24 notice was sufficient to terminate the lease on November 30, the district court adopted and applied the following rule from the Restatement (Second) of Property: "[I]f the date stated in the notice for termination is not the end of a period or is too short a time before the end of a period, the notice will be effective to terminate the lease at the earliest possible date after the date stated." Restatement (Second) of Property, Landlord & Tenant § 1.5 cmt. f (1977). Bongard concedes that "Minnesota has not adopted the Restatement rule," but argues that "[i]t should." Bongard argues that adoption of the Restatement rule would "prevent . . . endless litigation and insistence on strict formalism"; that "both landlords and tenants would benefit from an even-handed application of the rule"; and that adoption of the rule "would prevent draconian penalties now possible when pro se parties litigate inartfully drafted leases." Bongard states that "it is simply a 'better rule.'"

Bongard's reasons for adopting the Restatement rule are policy based. But this court is an error-correcting court, not a policy-making court. *See LaChapelle v. Mitten*, 607 N.W.2d 151, 159 (Minn. App. 2000) (stating that "[b]ecause this court is limited in its function to correcting errors it cannot create public policy"), *review denied* (Minn. May 16, 2000). It is for the legislature or the supreme court to change the law, not this court. *See Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) ("[T]he task of

extending existing law falls to the supreme court or the legislature, but it does not fall to this court."), *review denied* (Minn. Dec. 18, 1987). We therefore follow precedent and conclude that the April 24 notice to vacate by June 1 was ineffective to terminate the lease, where the lease created a year-to-year tenancy that ran through November 30.

II.

In his related appeal, Bongard argues that under Minn. Stat. § 504B.135, "the tenancy should have been terminable on one month's notice," and therefore the October 29 notice, "given more than one month before the terminal date of November 30, 2012, and fixing the termination of the tenancy at November 30, 2012, was effective to terminate the tenancy."[2] Bongard's argument raises an issue of statutory interpretation.

The supreme court recently summarized the principles that govern statutory interpretation as follows:

> The objective of statutory interpretation is to ascertain and effectuate the Legislature's intent. *City of Brainerd v. Brainerd Invs. P'ship*, 827 N.W.2d 752, 755 (Minn. 2013) (citing Minn. Stat. § 645.16 (2012)). If the Legislature's intent is clear from the statute's plain and unambiguous language, then we interpret the statute according to its plain meaning without resorting to the canons of statutory construction. *See id.*; *see also Laase v. 2007 Chevrolet Tahoe*, 776 N.W.2d 431, 435 (Minn. 2009) (distinguishing

[2] Even though Bongard's related appeal challenges a ruling on an issue that was originally considered and decided in a case that is not before us (i.e., the partial-summary-judgment order in the first eviction case, which was dismissed and not appealed), we conclude that the ruling is effectively before us because the district court functionally incorporated the ruling into its order for judgment in this case and based its trial conclusions on the ruling. *See* Minn. R. Civ. App. P. 103.02, subd. 2 ("After one party timely files a notice of appeal, any other party may seek review of a judgment or order in the same action by serving and filing a notice of related appeal.").

> between "canons of interpretation," which are used to determine if a statute is ambiguous, and "canons of construction"). But, if a statute is susceptible to more than one reasonable interpretation, then the statute is ambiguous and we may consider the canons of statutory construction to ascertain its meaning. *See Lietz v. N. States Power Co.*, 718 N.W.2d 865, 870-71 (Minn. 2006); *see also* Minn. Stat. § 645.16 (listing canons of construction used to determine legislative intent for an ambiguous statute).

State v. Rick, 835 N.W.2d 478, 482 (Minn. 2013).

Under section 504B.135, "[a] tenancy at will may be terminated by either party by giving notice in writing. The time of the notice must be at least as long as the interval between the time rent is due or three months, whichever is less." Minn. Stat. § 504B.135(a). A tenancy from year to year is "substantially a tenancy at will, except that such will cannot be determined by either party without due notice to quit, terminating at the end of a year." *Hunter*, 47 Minn. at 5, 49 N.W. at 329. "For purposes of notice to quit, [a tenancy from year to year] is a general tenancy at will." *Id*.

Neither party argues that the language in section 504B.135 is ambiguous. The plain, unambiguous language states that notice to terminate "must be at least as long as the interval between the time rent is due or three months, whichever is less." Minn. Stat. § 504B.135(a). In this case, the lease states that rent is due on or before the first of each month. Because the interval between the time rent is due under the lease is one month, Bongard was required to provide only one month's notice to terminate the lease. *See id.*; *see also Rick*, 835 N.W.2d at 482 (stating that "[i]f the Legislature's intent is clear from the statute's plain and unambiguous language, then we interpret the statute according to its plain meaning"). Premium's arguments to the contrary are unavailing.

Premium argues that there is "long-standing Minnesota law that a notice to terminate a lease from year to year must be given three months in advance." In support of that argument, Premium cites *State Bank of Loretto v. Dixon*, 214 Minn. 39, 7 N.W.2d 351 (1943). Although *Loretto* states in dictum that the length of notice to quit a tenancy from year to year "may now be three months instead of the six months as formerly required at common law," it incorrectly relies on *Hunter* for this proposition. *Loretto*, 214 Minn. at 43, 7 N.W.2d at 353.

Hunter does not hold that three months' notice is required to terminate a tenancy from year to year. The issue in *Hunter* was

> defendant's contention . . . that tenancies from year to year have been abolished by the statutes of this state, and converted into tenancies at will, which may be terminated *at any time* by either party by giving the length of notice provided by Gen. St. 1878, c. 75, § 40 [now codified at Minn. Stat. § 504B.135], which, in this case, would be one month, the rent reserved being payable monthly.[3]

[3] The statute at issue in *Hunter* stated, in relevant part:

> Estates at will may be determined by either party, by three months' notice in writing for that purpose, given to the other party; and when the rent reserved is payable at periods of less than three months, the time of such notice shall be sufficient, if it is equal to the interval between the times of payment . . . .

Minn. Gen. Stat. ch. 75, § 40 (1878). The use of the term "determined" in the statute is synonymous with the contemporary term "terminated." *See Annex Props., LLC v. TNS Research Int'l*, 712 F.3d 381, 383 (8th Cir. 2013) ("Prior to enactment of this language in 1999, the same substantive limitation on the right to terminate an at-will lease was part of every codification of Minnesota landlord-tenant law since territorial days, with the earlier statutes using a synonym for termination that today seems rather archaic[.]").

Hunter, 47 Minn. at 2, 49 N.W. at 328 (emphasis added). In other words, the issue was whether tenancies from year to year were still recognized in Minnesota. The court held that "[t]enancies from year to year still exist in this state, as at common law, except so far as the length of notice required to terminate them has been changed by statute," and that "this statute changes only the *length* of notice, and not the time when it should terminate. Hence, in the case of a tenancy from year to year, the notice to quit must still terminate at the end of a year." *Id*. at 1, 49 N.W. at 327. The supreme court also held that the notice in that case "was wholly ineffectual, because not terminating at the end of a year" where the tenancy was from year to year. *Id*. at 6, 49 N.W. at 329. The supreme court did not address any issue related to the length of notice required under statute. Nonetheless, the supreme court observed, in dictum, that "the length of notice provided by [the statute] . . . in this case, would be *one month*, the rent reserved being payable monthly" and that "the notice given by the defendant in this case was sufficient as to length [i.e., one month]." *Id*. at 2, 6, 49 N.W. at 328-29 (emphasis added). In sum, *Hunter* does not hold that the applicable statute (now codified at Minn. Stat. § 504B.135) required three months' notice to terminate a tenancy from year to year.

Premium also argues that Minn. Stat. § 504B.135 does not apply because "Minnesota courts . . . contrast a tenancy for years with a tenancy at will." But Premium does not dispute that the lease in this case created a tenancy from year to year. And *Hunter* explicitly held that a tenancy from year to year "is comprehended in the term 'estates at will,' as used in chapter 75, § 40 [now codified at Minn. Stat. § 504B.135]" for the purpose of determining "the *length* of notice." *Id*. at 6, 49 N.W. at 329. The supreme

court explained that "the provisions of chapter 75, § 40, in relation to notices to quit, were intended to apply to all estates which do not terminate themselves without notice, and that for the purposes of such notices a tenancy from year to year is a tenancy at will." *Id*. at 5, 49 N.W. at 329. Moreover, because the lease in this case provides for "automatic renewals annually until both parties are old and grey," it is consistent with the current statutory definition of a tenancy at will. *See* Minn. Stat. § 504B.001, subd. 13 (2012) ("'Tenancy at will' means a tenancy in which the tenant holds possession by permission of the landlord but without a fixed ending date.").

Lastly, Premium argues that "[a]pplication of Bongard's theory to the thousands of leases in Minnesota with options would be disastrous for landlords and tenants alike, as their expectations of longer-term leases are destroyed upon arrival of a 30-day notice of termination." *See* Minn. Stat. § 645.16(6) (2012) (providing that "[w]hen the words of a law are not explicit, the intention of the legislature may be ascertained by considering . . . the consequences of a particular interpretation"). But because the notice provisions of section 504B.135(a) are unambiguous, there is no basis to resort to the canons of statutory construction. *See Rick*, 835 N.W.2d at 482 ("If the Legislature's intent is clear from the statute's plain and unambiguous language, then we interpret the statute according to its plain meaning without resorting to the canons of statutory construction."). The plain language of the statute evinces a legislative intent in favor of the shorter notice period. *See* Minn. Stat. § 504B.135(a) ("The time of the notice must be at least as long as the interval between the time rent is due or three months, *whichever is less*.") (emphasis added)).

In sum, the district court erred by concluding that three months' notice is required to terminate the lease in this case. Because "the interval between the time rent is due" is one month, only one month's notice is required. *See id.* The record in this case contains an October 29 notice from Bongard directing Premium to vacate the leased premises by November 30, which is the end of the annual tenancy period. We conclude, as a matter of law, that the October 29 notice terminated the lease. We therefore affirm the judgment of the district court. *See Katz v. Katz*, 408 N.W.2d 835, 839 (Minn. 1987) ("[W]e will not reverse a correct decision simply because it is based on incorrect reasons.").

Because we affirm based on the October notice, Premium's argument that Bongard waived his April 24 notice to vacate by June 1 is moot, and we do not address it any further. *See Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005) (explaining that if a court cannot grant effective relief, the matter is generally dismissed as moot). It is also unnecessary to address Premium's assignment of error to an evidentiary ruling that certain statements are attorney-client privileged and therefore inadmissible. Premium does not explain how the alleged error is prejudicial. Premium merely contends that "[t]he attorney-client privilege issue is important if the case is remanded." Because we are not remanding and because it is not apparent how the purported evidentiary error prejudiced Premium, it does not provide a basis for reversal and we do not analyze the merits of the privilege ruling. *Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (stating that to prevail on appeal, an appellant must show both error and prejudice resulting from the error).

Affirmed.