

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Regis, LLC,
Plaintiff,

Court File No. 27-CV-19-4674

v.

Sterling Properties LLLP, f/k/a INREIT
Properties LLLP,
Defendant.

**ORDER GRANTING PLAINTIFF'S
MOTION FOR PARTIAL JUDGMENT ON
THE PLEADINGS**

This case came before Judge Kevin S. Burke on August 28, 2019, on Regis, LLC's Motion for Partial Judgment on the Pleadings.

Peter Ihrig, Esq., and John Mack, Esq., appeared on behalf of Regis, LLC.

Jason Asmus, Esq., and Jordan Weber, Esq., appeared on behalf of Sterling Properties LLLP, f/k/a INREIT Properties LLLP.

Based upon the file, record, and proceedings,

IT IS HEREBY ORDERED that:

1. Regis, LLC's Motion for Partial Judgment on the Pleadings is **granted**.
2. Sterling, Properties LLLP shall pay Regis, LLC \$1,024,480.00 promptly.
3. The attached memorandum is incorporated.

BY THE COURT:

Dated: November 20, 2019


Kevin S. Burke
Judge of District Court

MEMORANDUM

This case arises out of a dispute over a commercial lease between Regis, LLC and Sterling Properties LLLP, formerly known as INREIT Properties LLLP. The specific dispute centers on a provision of the lease referencing a redecorating allowance. Regis, LLC brought this action against Sterling Properties LLLP for, among other things, breach of contract for failing to pay Regis LLC the redecorating allowance on June 1, 2016. Regis, LLC seeks to recover damages, including payment of the redecorating allowance.

Sterling Properties LLLP raises several affirmative defenses: that Regis, LLC's claims are barred due to a failure to satisfy conditions precedent; that Regis, LLC's claims are barred by the first breach doctrine; that Regis, LLC's Complaint fails to state a claim upon which relief may be granted; that Regis, LLC's claims are barred by ratification, waiver, accord and satisfaction, failure of consideration, payment, estoppel, unclean hands, laches, unjust enrichment and principles of equity; and, in the event that Regis, LLC sustained damages as alleged in the Complaint, that such damages are barred, in whole or in part by Regis LLC's failure to mitigate damages. In short, Sterling Properties LLLP has asserted virtually every defense a creative lawyer could think of.

In its Counterclaim, Sterling Properties LLLP alleges Regis breached the lease in May of 2016 by failing to be "solely responsible" for the "general maintenance and repair" of the premises. Before the Court is Regis, LLC's Partial Motion for Judgment on the Pleadings on its breach of contract claim. While the parties do not agree on how the Court should decide this case, the parties do agree on many of the facts.

FACTS

The pleadings consist of Regis, LLC's Complaint, Sterling LLLP's Answer, Affirmative Defenses, and Counterclaims, and Regis, LLC's Answer and Affirmative Defenses to Sterling LLLP's Counterclaims as well as the attachments to the pleadings.

A. The Lease

In May of 2005, Regis, Inc. entered a lease agreement with France Edina Property LLP for a building located at 4401 West 76th Street in Edina, Minnesota. Regis, Inc. is now known as Regis, LLC ("Regis"). Sometime in early 2009, INREIT Properties LLLP acquired the property and all interests in and obligations under the lease from France Edina Property LLP. INREIT Properties LLLP is now known as Sterling Properties LLLP ("Sterling"). The lease provides each party with rights and obligations, which include allowances owed to Regis by Sterling and rent owed to Sterling by Regis.

1. Allowances

The lease provides for three "allowances." This case is about the third: the redecorating allowance. The lease required Sterling to pay the first allowance—the "finish improvement allowance"—at the commencement of the lease. The finish improvement allowance totaled \$2,561,200.00 and was subject to conditions. For example, Section 2.02 A of the lease states that the finish improvement allowance was to be put "solely toward [Regis]'s cost of construction (the 'Finish Work')." The lease defines "Finish Work" as, among other things, construction of Regis's office finish work, restrooms, interior finishes, electric, plumbing, heating, and ventilating and air-conditioning work. The lease also requires the Finish Work be "set forth in plans and specifications to be prepared by

[Regis]'s architect, [and] approved by [Regis] and [Sterling]..." and states that "the cost of any Finish-Work which exceeds the amount of [Sterling]'s Allowance shall be paid solely by [Regis]."

The second allowance is also provided for in Section 2.02 A of the lease. This provision states that Sterling shall provide Regis an "additional allowance." The lease specifically allocates certain amounts of the "additional allowance" for specific expenditures laid out in a chart:

New roof; materials, installation, warranty;	\$272,962.00
Equipment and installation of packaged rooftop units;	\$140,000.00
Chip coating and striping of lot; If Tenant elects to seal coat at a lesser price then Tenant will reimburse savings to Landlord.	\$19,500.00
Fourteen (14) 12'x7' 6 panel windows per plan documents by Welman Demolition, installation and clean up. If Landlord can provide a bid acceptable to Tenant, which is lower than 247,363.00, then Tenant shall reimburse savings to Landlord.	\$247,363.00

Collectively, these specific items are referred to in the lease as the "Base Property Finish."

The lease also states that Regis "agrees to apply such funds to completion of the Base Property Finish with specifications not less than those provided to [Regis] by [Sterling]..."

The third allowance described in the lease is provided for in Section 16.12(B)(1), which reads in full:

The Lease rate throughout the first renewal term shall be \$11.00 per usable sf [square foot], with \$0.25 annual escalations, with the payment from Landlord to Tenant of a \$10.00 psf [per square foot] redecorating allowance, and no real estate commission to any party, at the commencement of the first renewal term.

During the renewal term, the premises contained 102,448 usable square feet, meaning the redecorating allowance amounts to \$1,024,480.00. Section 16.12(B)(1) is the only reference in the lease to the redecorating allowance. The lease does not define the term “redecorating allowance,” the lease does not require Regis to submit plans or specifications to Sterling for approval of the use of the \$1,024,480.00, and the lease does not prescribe that specific amounts of the redecorating allowance be used for specific expenditures.

2. Rent

Under the lease, Regis is responsible for monthly rent. In addition to the monthly rental installments, Regis is responsible for “Additional Rent” under the lease. Additional Rent is described in Section 3.02 of the lease, which reads, in part,

Tenant will be **solely responsible** for all aspects of the operation and management of the Property, including the management and payment of all items described in Section 3.02 and all items of capital expense, repair and replacement, collectively referred to as ‘Operating Expenses’[...] ‘Operating Expense’ shall mean any costs or expenses paid or incurred for operation, repair, maintenance, and management of the Property...

(Emphasis added). Under section 3.02, ‘Operating Expenses’ include “general maintenance and repair of the Property.”

4. Default and Remedies

Section 13.01(a) of the lease states that Regis is in default if it “fails to pay any Monthly Rental Installment or Additional Rent within five (5) days after the same is due, or [Regis] fails to pay any other amounts due [Sterling] from [Regis] (10) days after the same is due.” Additionally, Regis is in default if it “fails to perform or observe any other term, condition, covenant or obligation required under the Lease for a period of thirty (30) days after notice thereof from [Sterling]...”

A default of the lease by Sterling is defined in section 13.02 of the lease, as follows:
“[Sterling] shall be in default if it fails to perform any term, condition, covenant or obligation required under this Lease for a period of thirty (30) days after written notice thereof from [Regis] to [Sterling]...”

Section 13.04 of the lease provides that either party’s failure or delay in exercising rights or remedies does not constitute a waiver or affect its right to enforce or remedy.

The lease provides for attorneys’ fees to the party who successfully obtains a judgment against a defaulting party.

B. Renewal and Alleged Defaults

The lease’s original term was 128 months, from October 1, 2005, through May 31, 2016, and provided Regis the option to extend the lease for two additional five-year terms. In order to exercise its option to extend the lease, Regis was required to give Sterling notice of its intent to renew the lease at least one year before the lease’s original 128-month term ended on May 31, 2016. On **May 27, 2015**, Regis exercised its first option to extend the lease by sending Sterling a formal written notice of its decision to extend the lease term for five years.

Sterling alleges that on **May 12, 2016**, an independent third party issued property condition assessment reports concerning the physical condition and maintenance of the property, which identified items of deferred maintenance and/or physical deficiencies of the premises for which Regis is responsible. Sterling attached a copy of the alleged report to its Answer, Affirmative Defenses, and Counterclaims, and alleges the Regis failed to remedy these alleged deferred maintenance and physical deficiencies. Therefore, Sterling argues, Regis breached Section 2.02 A of the lease by failing to be “solely

responsible” for the general maintenance and repairs of the property. Regis denies these allegations.

Upon commencement of the first renewal term, **June 1, 2016**, Sterling did not pay Regis a redecorating allowance. Sterling alleges that the reason it never paid Regis a redecorating allowance is

because Regis refused, despite demand, to acknowledge and agree that the redecorating allowance must be used by Regis during the renewal term for expenditures that constitute redecorating or other physical improvements to the premises and not for expenditures relating to non-decorating purposes such as deferred maintenance, repairs, payment of rent or the like.

Essentially, Sterling’s defense is premised, in part, on an allegation that Regis refused to acknowledge a provision of the lease. To repeat, the only time the lease mentions the redecorating allowance is in Section 16.12(B)(1): “The Lease rate throughout the first renewal term shall be[...] **with payment from Landlord to Tenant of a \$10,000 psf redecorating allowance**, and no real estate commission to any party, **at the commencement of the first renewal term.**” (Emphasis added.)

Obviously, something happened over a prolonged period of time, but the pleadings do not provide allegations regarding what transpired from June 1, 2016, to April 2, 2018.

On **April 2, 2018**, Regis sent Sterling a written notice demanding payment of the redecorating allowance and notifying Sterling that Sterling’s failure to pay Regis the redecorating allowance was a default under the lease. As of the August 28, 2019, hearing, Sterling had not paid Regis the redecorating allowance.

Sterling alleges that on **April 27, 2018**, the independent third party issued another property condition assessment report concerning the physical condition and maintenance of the property, which—again—identified items of deferred maintenance and/or physical

deficiencies of the premises for which Regis is responsible. Sterling attached a copy of the 2018 alleged report to its Answer, Affirmative Defenses, and Counterclaims. Regis generally denies these assertions.

On **May 7, 2018**, Sterling sent Regis a letter stating:

The purpose of this letter is to place Regis Corporation on notice of default of our Lease agreement currently in place for failure to maintain and repair the Property pursuant to deficiencies highlighted in two separate property condition assessment reports...To date, and after numerous requests to perform from Landlord, Regis Corporation has failed to perform pursuant to section 3.02 of the Lease...

Sterling alleges further that Regis has failed or refused to remedy the deferred maintenance or physical deficiencies identified in the reports and other deferred maintenance and/or physical deficiencies for which Regis is responsible. The 2018 report states "that the subject property and its improvements have been less than adequately maintained." It also states that "[t]he [2016] report noted five (5) items of Deferred Maintenance recommended for repair within one year of the date of the report. None of the listed repairs were observed to have been completed and continuing maintenance does not appear to have been completed." Regis does not dispute that is what the report says, but appears to deny the accuracy of the statements.

Sterling also alleges that Regis intends to vacate the premises after the renewal term. Sterling alleges that because of this, and because Regis has refused to acknowledge and agree that it will use the redecorating allowance only for redecorating expenditures under Section 16.12(B)(1) of the lease, despite demand, Regis intends to use the redecorating allowance for purposes unrelated to the premises. Regis denies this allegation.

Finally, Sterling alleges, and Regis denies, that the use of the redecorating allowance for any purpose other than for redecorating expenditures during the renewal term, including to pay for deferred maintenance and repairs under Section 3.02 of the lease or for any purpose unrelated to the premises, would constitute an improper use of the redecorating allowance. To be clear, and concededly repetitive, there is no definition of “redecorating allowance” in an otherwise comprehensive commercial lease. The provision of the lease regarding the redecorating allowance does not require Regis to submit plans or specifications for use of the redecorating allowance. Nor does the lease grant Sterling the power to approve the specific amounts of the redecorating allowance used for specific expenditures.

I. ANALYSIS

Rule 12.03 of the Minnesota Rule of Civil Procedure allows any party to move for judgment on the pleadings once the pleadings are closed. On a motion for judgment on the pleadings a court must accept the factual allegations as true, and construe those allegations in the non-movant’s favor. *Hoffman v. Northern States Power Co.*, 764 N.W.2d 34, 42 (Minn. 2009), *Ryan v. Lodermeier*, 387 N.W.2d 652, 652 (Minn. Ct. App. 1986). A court should not grant a motion for judgment on the pleadings if the pleadings present material factual issues. *Id.* A material fact is one that will affect the result or outcome of the case, depending upon its resolution. *Zappa v. Fahey*, 245 N.W.2d 258, 259–60 (Minn. 1976).

“[T]he judicial function of drawing legal conclusion[s] from the admitted or proven facts [] remains with the court. If, after construing the pleading liberally, there are no facts to be proved, nothing remains to be done but to draw legal conclusions from such facts.” *Nationwide Corp. v. Nw. Nat. Life Ins. Co.*, 87 N.W.2d 671, 681 (1958). Therefore, the

Court's first task is to determine whether the disputed facts stated above are material to Regis's breach of contract claim.

The elements of a breach of contract claim are "(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) (citing *Briggs Transp. Co. v. Ranzenberger*, 299 Minn. 127, 129, 217 N.W.2d 198, 200 (1974)), *Lyon Fin. Servs., Inc. v. Illinois Paper & Copier Co.*, 848 N.W.2d 539, 543 (Minn. 2014).

There is no dispute over the first element, formation of a contract. The pleadings show that both Regis and Sterling agree a valid contract exists.

The analysis of the second element, performance by Regis of any conditions precedent to its right to demand payment of the redecorating allowance by Sterling is less straightforward. "A condition precedent has been defined as 'any fact except mere lapse of time which must exist or occur before a duty of immediate performance by the promisor can arise.' " *Carl Bolander & Sons, Inc. v. United Stockyards Corp.*, 215 N.W.2d 473, 476 (1974) (citations omitted). Regis argues that because Sterling admitted in its Answer, Affirmative Defenses, and Counterclaims, that it "was required to pay Regis a Redecorating Allowance of \$1,024,480.00 at the commencement of the Renewal Term," Sterling necessarily admitted all conditions precedent were performed. A fair reading of the pleadings in Sterling's favor shows that Sterling did not admit the performance of all conditions precedent.

The specific paragraphs in the Complaint and Answer relating to conditions precedent are important. Paragraphs 21 and 27 of the Complaint and Answer, state as follows:

Complaint ¶ 21: During the entire Renewal Term the Premises contained 102,448 usable square feet, and Defendant was **therefore** required to pay Plaintiff a Redecorating Allowance of \$1,024,480 "at the commencement of the first renewal term" on June 1, 2016.

Answer ¶ 21: With respect to the allegations in paragraph 21, Sterling admits **only** that (a) during the Renewal Term, the Premises contained 102,448 usable square feet and (b) Sterling was required to pay Regis a Redecorating Allowance of \$1,024,480 at the commencement of the Renewal Term. **Sterling further states that it has not paid Regis the Redecorating Allowance because Regis has refused despite demand to acknowledge and agree that the Redecorating Allowance must be used by Regis during the Renewal Term for Redecorating Expenditures and not for expenditures relating to non-redecorating purposes such as deferred maintenance, repairs, payment of rent or the like. Sterling denies the remaining allegations of paragraph 21.**

Complaint ¶ 27: Plaintiff has materially complied with all of its obligations under the Lease. Plaintiff made all rent payments to Defendant during the Lease's original term and during the Renewal Term. Plaintiff provided Defendant written notice to extend the lease term. And Plaintiff provided Defendant written notice that Defendant's failure to pay the Redecorating Allowance was a default under the Lease.

Answer ¶ 27: With respect to the allegations in paragraph 27, Sterling admits **only** that (a) Regis made all rent payments to Sterling during the Lease's original term and Renewal Term, (b) Regis provided Sterling with written notice to extend the lease term, and (c) Regis provided Sterling with written notice that Sterling's failure to pay the Redecorating Allowance was a default under the Lease. **Sterling denies the remaining allegations in paragraph 27.**

(Emphasis added).

Sterling's answers to paragraphs 21 and 27 indicate, first, that Sterling denies Regis's assertion that *because* the premises contained 102,448 usable square feet, Sterling was required to pay the \$1,024,480.00 redecorating allowance on June 1, 2016. Sterling's answers indicate that Sterling denies Regis's allegation that it "has materially complied with all of its obligations under the Lease" *despite* (a) Regis making all rent payments to Sterling during the Lease's original term and Renewal Term¹, (b) Regis providing Sterling with written notice to extend the lease term, and (c) Regis providing Sterling with written notice that Sterling's failure to pay the Redecorating Allowance was a default under the Lease.

Sterling's explanation in paragraph 21 of its Answer spells out a condition precedent Sterling asserts Regis failed to perform: acknowledge and agree, upon demand, "that the Redecorating Allowance must be used by Regis during the Renewal Term for Redecorating Expenditures and not for expenditures relating to non-redecorating purposes such as deferred maintenance, repairs, payment of rent or the like." Therefore, Sterling did not necessarily admit, as Regis claims, any and all conditions precedent to Regis's right to demand payment of the decorating allowance by admitting it "was required to pay Regis a Redecorating Allowance of \$1,024,480 at the commencement of the Renewal Term."

¹ Although Sterling states Regis made all rent payments to Sterling during the lease's original term and renewal term, a liberal reading of the allegations in Sterling's favor shows that Sterling does not admit Regis made all rent payments. Sterling alleges in its Counterclaim that Regis failed to perform its obligations under Section 3.02 of the lease by failing to maintain the premises. Since Section 3.02 is the section on "Additional Rent," by alleging Regis failed in performing its obligations under Section 3.02, the pleadings show that Sterling does not admit Regis paid all "Additional Rent."

Although it is clear from the pleadings that the second element of Regis's breach of contract claim is disputed, the existence of a dispute does not preclude the Court from finding the second element has been established. If the admitted facts support the legal conclusion that all condition's precedent have been met, and the dispute does not affect that conclusion, the Court must find the second element has been met.

In order to determine whether the pleadings establish that all conditions precedent have occurred, the law requires the Court to analyze the lease. Contract interpretation is an issue of law for the Court. See *Linn v. BCB SM, Inc.*, 905 N.W.2d 497, 504 (Minn. 2018). "The primary goal of contract interpretation is to determine and enforce the intent of the parties." *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004). In a written contract, the intent of parties is gathered "from the plain language of the instrument itself." *Id.* In determining the meaning of words, Courts look to dictionary definitions. See *Hubred v. Control Data Corp.*, 422 N.W.2d 308, 311 (Minn. 1989). "[T]he terms of a contract must be read in the context of the entire contract..." *Employers Mut. Liab. Ins. Co. of Wis. v. Eagles Lodge of Hallock*, 165 N.W.2d 554, 556 (Minn. 1969).

If a contract is unambiguous, its effect "may be decided by the district court as a question of law..." *Apitz v. Hopkins*, 863 N.W.2d 437, 439 (Minn. App. 2015). However, if a contract is ambiguous because it "is reasonably susceptible of more than one interpretation," its interpretation is a question of fact for a jury to decide. *Current Tech. Concepts, Inc. v. Irie Enter., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995); *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346-47 (Minn. 2003) (noting that "the interpretation of an ambiguous contract is a question of fact for the jury"). Whether a contract is ambiguous is a question for the Court. *Denelsbeck*, 666 N.W.2d 346.

The lease unambiguously lays out only two conditions precedent to Regis's right to demand payment of the redecorating allowance from Sterling. The first condition precedent is that Regis renew the lease, which it did. Sterling admits that Regis was required to give Sterling notice of its intent to renew the lease at least one year before the lease's original 128-month term ended on May 31, 2016, and that Regis provided such notice to Sterling by letter on May 27, 2015.

The second condition precedent to Regis's right to demand payment from Sterling is provided in Section 13.02 of the lease: "Landlord shall be in default if it fails to perform any term, condition, covenant or obligation required under this Lease for a period of thirty (30) days after written notice thereof from Tenant to Landlord..." Regis provided written notice to Sterling on April 27, 2018; thirty days passed without payment. Therefore, the second condition precedent has been fulfilled.

The dispute over Regis's alleged failure to acknowledge and agree, upon demand, to only use the redecorating allowance for certain things, and not others, is not material to the second element of Regis's breach of contract claim because the lease does not condition payment of the redecorating allowance on Regis fulfilling such a demand. Unlike with the finish improvement allowance, the lease does not require Regis to submit plans and specifications for its use of the redecorating allowance for approval by Sterling. The lease also does not require portions of the redecorating to be allocated toward pre-determined expenditures, like it does with the additional allowance. If the parties wanted to condition payment of the redecorating allowance on Regis acknowledging and agreeing, upon demand, to only use the redecorating allowance for specific purposes and not for others, they could have done so. The parties could have agreed that Regis could

not use purple or pink paint when decorating. They did not. Therefore, the only two conditions precedent for Regis to demand payment from Sterling of the redecorating allowance have been met.

The third element of a breach of contract claim, breach, has also been met because Sterling has not, at least at the time of the August 28 hearing, paid Regis the redecorating allowance. Sterling was required to pay the \$1,024,480.00 redecorating allowance on June 1, 2016, but did not. Regis gave Sterling written notice that Sterling was in default by not paying the redecorating allowance. More than thirty days passed after Regis's written notice without payment by Sterling. Therefore, Sterling breached the lease.

Because all three elements of a breach of contract claim have been established by the pleadings, judgment on the pleadings is warranted in Regis's favor, unless Sterling's affirmative defenses defeat Regis's claim.

Affirmative Defenses

Sterling raises a plethora of affirmative defenses in its Answer, Affirmative Defenses, and Counterclaim. However, in its memorandum in opposition to Regis's motion for judgment on the pleadings, Sterling only addresses one—the first breach doctrine. It is not clear whether Sterling intended to waive the other affirmative defenses with respect to Regis's breach of contract claim, but, as this is a motion for judgment on the pleadings, the Court will examine all affirmative defenses raised in the pleadings.

The purpose of an affirmative defense is to defeat another claim, rather than seek damages. But assertion of an affirmative defense nonetheless requires the defendant to maintain the assertion by proffering evidence to satisfy the burden of proof, because “an

affirmative defense is akin to a plaintiff's original claim or a defendant's counterclaim, because it involves a defendant's affirmative assertion of facts and arguments.” *BankCherokee v. Insignia Development, LLC*, 779 N.W.2d 896, 902 (Minn. Ct. App. 2009).

1. First Breach Doctrine

Sterling argues that the first breach doctrine bars Regis’s breach of contract claim. “Under general contract law, a party who first breaches a contract is usually precluded from successfully claiming against the other party.” *Carlson Real Estate Co. v. Soltan*, 549 N.W.2d 376, 379–80 (Minn. Ct. App. 1996) (citing *Space Ctr, Inc. v. 451 Corp.*, 298 N.W.2d 443, 451 (Minn.1980)).

Sterling argues that Regis first breached the lease in two ways. The first alleged breach is not laid out clearly in Sterling’s pleadings. Rather, Sterling argues in its opposition memorandum that Regis breached the lease by refusing, despite demand, to acknowledge and agree to only use the redecorating allowance in a specific way.² The second alleged breach is laid out clearly in Sterling’s Counterclaims. In its Counterclaims, Sterling alleges that Regis breached the lease by failing to be “solely responsible” for general maintenance and repairs identified in the 2016 and 2018 reports.

Sterling’s argument for Regis’s first alleged breach is framed as an anticipatory breach argument. Anticipatory breach occurs only when there is “a definite and unequivocal manifestation of intention on the part of the repudiator that he will not render

² Regis argues that Sterling’s anticipatory first breach affirmative defense fails because it was not specifically pleaded in the Answer. Minnesota is a notice-pleading state and “does not require absolute specificity in pleading, but rather requires only information sufficient to fairly notify the opposing party of the claim against it.” *Walsh v. U.S. Bank*, 851 N.W.2d 598, 605 (Minn. 2014). A complaint must “give fair notice to the adverse party of the incident giving rise to the suit with sufficient clarity to disclose the pleader’s theory upon which his claim for relief is based.” *N. States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963). Arguably, Sterling’s pleadings met this notice pleading standard.

the promised performance when the time fixed for it in the contract arrives[,]” or when there is an inability by one party to perform under the contract. *Bell v. Olson*, 424 N.W.2d 829, 832 (Minn. Ct. App. 1988); see also *Sheet Metal Workers Local No. 76 Credit Union v. Hufnagle*, 295 N.W.2d 259, 263 (Minn. 1980). Sterling argues that by refusing, despite demand, to acknowledge and agree to use the redecorating allowance “during the renewal term for expenditures that constitute redecorating or other physical improvements to the premises and not for expenditures relating to non-decorating purposes such as deferred maintenance, repairs, payment of rent or the like,” Regis manifested an “unequivocal intent” not to perform its obligations under the lease. Sterling argues that because Regis did not acknowledge and agree to the above, Regis intended to use the redecorating allowance for purposes unrelated to the premises.

Sterling’s payment to Regis of the redecorating allowance was not conditioned upon Regis fulfilling a demand by, or making an additional promise to, Sterling. There is no other conduct by Regis alleged in the pleadings and pointed to by Sterling to support Sterling’s theory that Regis manifested an unequivocal intent not to perform its obligations under the lease. Thus, the only allegation in the pleadings that could possibly support Sterling’s theory of anticipatory breach is Regis’s failure to satisfy a nonexistent condition precedent.

Even assuming, as the Court must on a motion for judgment on the pleadings, that Regis did refuse to acknowledge and agree to Sterling’s demand, and that such a refusal means Regis intended to use the redecorating allowance for deferred maintenance, repairs, payment of rent, or the like, Sterling’s theory of anticipatory breach fails.

Sterling's argument for anticipatory breach relies on its position that the redecorating allowance cannot be used for "deferred maintenance, repairs, payment of rent or the like." As stated above, contract interpretation is a matter of law for the court and the intent of the parties is gathered from the plain language of the instrument itself, read in the context of the entire contract. Only when a contract is reasonably susceptible of more than one interpretation—when it is ambiguous—is its interpretation a question of fact for a jury.

"Redecorating allowance" is not defined in the lease, so the Court looks to its plain and ordinary meaning. The term "redecorate" is defined as meaning "to freshen or change in appearance." Redecorate, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/redecorating>.

"Allowance" is defined as meaning "a sum granted as a reimbursement or bounty or for expenses," "a fixed or available amount," or "a share or portion allotted or granted." Allowance, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/allowance>. It is also defined as "the amount of something available or needed for a particular purpose." Allowance, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/allowance>. Section 16.12(B)(1) indicates *when* the allowance is due: "with payment from Landlord to Tenant of a \$10,000 psf redecorating allowance [...] **at the commencement of the first renewal term**" (emphasis added), and states what must be redecorated—the premises—by tying the redecorating allowance to the square-footage of the property. Thus, in the context of this particular provision of the lease, "redecorating allowance" means the amount granted to freshen or change the appearance of the premises.

Read in the context of the entire lease, the term “redecorating allowance” and the Section 16.12(B)(1) does not exclude the redecorating allowance from being used on deferred maintenance or repairs, although it may exclude payment of rent. Deferred maintenance and repairs fall into the category of “freshening or changing the appearance of the premises.” As explained above, there are three allowances provided for in the lease. The two other allowances besides the redecorating allowance provide explicit instructions and exclusions for the use of the allowances. The lease does not provide any such restrictions or exclusions to the redecorating allowance. Thus, as long as the redecorating allowance is used to freshen or change the appearance of the premises—which includes maintenance and repairs to the premises—Regis does not breach the lease. No fact finder could conclude that Regis’s refusal to agree to not use the redecorating allowance on expenditures on which the lease does not preclude the redecorating allowance be spent, to amount to a manifested intent to not perform its contractual obligations. Therefore, Sterling’s anticipatory first breach defense fails.

Sterling’s second first breach defense—that Regis breached the lease by being “solely responsible” for deferred maintenance and repairs of the premises—likewise fails. The first breach doctrine “should not apply in every case to prevent the initial breaching party from seeking a remedy for another party’s subsequent breach.” *MTS Co. v. Taiga Corp.*, 365 N.W.2d 321, 327 (Minn. 1985). The breach by the first party must be material and uncured to excuse the second party from performance. *Nutrisoya Foods, Inc. v. Sunrich, LLC*, 626 F.Supp.2d 985, 992 (D.Minn. 2009). Minnesota courts have found a prior breach to excuse, and bar a subsequent claim for breach, when the prior breach

was continuing at the time of, and directly caused, the subsequent breach. *See MTS Co.* 365 N.W.2d 321.

In this case, there is not even an allegation that Regis's alleged first breach caused Sterling's subsequent breach. There is likewise no allegation that would support a finding that Regis's breach by failing to be "solely responsible" for general maintenance and repairs, identified in the 2016 and 2018 reports, caused Sterling not to pay Regis the redecorating allowance on June 1, 2016. Therefore, Sterling's first breach defense fails in its entirety.

2. Other Affirmative Defenses

This is a serious case in which a significant amount of money is at stake. Sterling is represented by very good lawyers. Very good lawyers should know that their credibility as an advocate is potentially fractured by asserting frivolous pleadings. Regis seeks a legal remedy under the lease for Sterling's breach of contract: immediate payment of the redecorating allowance. "[E]quitable relief cannot be granted where the rights of the parties are governed by a valid contract." *U.S. Fire Ins. v. Minn. State Zoological Bd.*, 307 N.W.2d 490, 497 (Minn. 1981). In this case, it is undisputed that the lease was a valid contract. Therefore, Sterling's affirmative defenses based in equity do not apply as a bar to Regis's breach of contract claim. Accordingly, Sterling's unclean hands, unjust enrichment, estoppel, and principles of equity defenses fail against Regis's breach of contract claim, leaving only the defenses of ratification, waiver, accord and satisfaction, failure of consideration, payment, laches, failure to satisfy conditions precedent, failure to mitigate, and failure to state a claim upon which relief may be granted.

a. Ratification and Waiver

Ratification is a theory of agency law; a principal ratifies an agent's unauthorized acts when the principal "with full knowledge of all material facts, confirms, approves, or sanctions the other's acts." *Fox v. Morse*, 255 Minn. 318, 324, 96 N.W.2d 637, 641 (1959). Waiver is the intentional relinquishment of a known right. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 367 (Minn. 2009). Knowledge and intent are essential elements of waiver and waiver is generally a question of fact. *Id.* The lease has a non-waiver clause. There are no allegations, which, if true, would support a finding that Regis either ratified an act by one of its agents that somehow indicated Regis relinquished its right to payment of the redecorating allowance. Similarly, there is no allegation, which, if true, would support a finding that Regis knew it was entitled to the redecorating allowance and manifested an intent not to receive it. Therefore, these affirmative defenses fail as a bar to Regis's breach of contract claim.

b. Accord and Satisfaction

"An enforceable accord and satisfaction arises when a party against whom a claim of breach of contract is asserted proves that (1) the party, in good faith, tendered an instrument to the claimant as full satisfaction of the claim; (2) the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim; (3) the amount of the claim was unliquidated or subject to a bona fide dispute; and (4) the claimant obtained payment of the instrument." *Nelson v. Am. Family Ins. Grp.*, 651 N.W.2d 499, 512 (Minn. 2002) (citation omitted). There are no allegations in the pleadings that, if true, could support any element of accord and satisfaction. This defense fails with respect to the breach of contract claim.

c. Failure of Consideration

A failure of consideration occurs when “a contract valid when formed becomes unenforceable because the performance bargained for has not been rendered” *Franklin v. Carpenter*, 244 N.W.2d 492 (Minn. 1976). Sterling does not allege that it did not receive what was bargained for. Sterling accepted Regis’ renewal of the lease and continues to accept Regis’s rent payments. Therefore, this affirmative defense fails.

d. Payment

It is undisputed that at the time of the hearing on this motion, Sterling had not paid Regis the redecorating allowance. Therefore, this affirmative defense fails.

e. Laches

“Where a party is seeking a legal remedy upon a legal right, [the Minnesota supreme court has] held that the doctrine of laches has no application and that the remedy will be barred only by the statute of limitations.” *Aronovitch v. Levy*, 56 N.W.2d 570, 573–74 (Minn. 1953). The statute of limitations for a breach of contract claim is six years. Minn. Stat. § 541.05 subd. 1. The alleged breach occurred in 2016. Therefore, the statute of limitations has not run. Accordingly, Sterling’s laches defense fails.

f. Failure to Satisfy Conditions Precedent

As explained above, all conditions precedent to Regis’s right to demand payment of the redecorating allowance from Sterling have been met. Therefore, this affirmative defense fails.

g. Damages Barred by Failure to Mitigate

The Court agrees with Regis that, as it applies to damages, this defense also fails to create a fact issue because Regis couldn’t have mitigated the damages Sterling caused

by failing to pay Regis the redecorating allowance, since the only damages Regis seeks (at this stage) is the payment of the redecorating allowance.

h. Failure to State a Claim Upon Which Relief May be Granted

Based on all of the above, Regis's breach of contract claim states a claim for which relief may be granted. This affirmative defense fails.

None of Sterling's affirmative defenses bar Regis's breach of contract claim. Regis is entitled to payment of the \$1,024,480.00 by Sterling. Sterling shall pay Regis \$1,024,480.00 promptly.