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IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 11, 2023 Session[1]

AZIZ KHERANI ET AL. v. RAJ PATEL ET AL.

Appeal from the Chancery Court for Knox County
No. 202914-2 Clarence E. Pridemore, Jr., Chancellor

No. E2022-00983-COA-R3-CV

This is a breach of contract action involving an agreement for purchase and sale of improved real property. Upon the sellers' motion for summary judgment and following a hearing, the trial court granted summary judgment in favor of the sellers. Following an evidentiary hearing to determine damages, the trial court entered a judgment directing the buyers to pay $45,000 in compensatory damages and $15,000 in attorney's fees. The buyers have appealed. Determining that genuine issues of material fact preclude summary judgment, we reverse.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed; Case Remanded

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which JOHN W. MCCLARTY and KENNY ARMSTRONG, JJ., joined.

Bryce W. McKenzie, Sevierville, Tennessee, for the appellants, Raj Patel and Graciela Alejandra Dominguez Lobo.

Ameesh A. Kherani, Jacksboro, Tennessee, for the appellees, Aziz Kherani and Sameera Kherani.

OPINION

I. Factual and Procedural Background

The facts underlying the formation of the parties' contract are essentially undisputed. The plaintiff sellers, Aziz Kherani and Sameera Kherani ("Sellers"), a

[1] Although counsel for both parties received notice of oral argument, only the appellants' counsel appeared. When contacted by this Court during the session, the appellees' counsel waived oral argument.

married couple, listed improved real property located on Blue Herron Way in Knoxville ("the Property") for sale on July 5, 2021, at a price of $795,000. On the same day, the defendant buyers, Raj Patel and Graciela Alejandra Dominguez Lobo ("Buyers"), submitted an offer on the Property matching the listed price, which was accepted by Sellers on July 6, 2021.[2] Later that day, the parties entered into a purchase and sale agreement ("the Agreement"), and Sellers removed the Property from the real estate market. Buyers acknowledge that they did not personally visit the Property prior to making their offer through a real estate agent.

As part of the Agreement, Buyers were to pay $5,000 in earnest money by July 11, 2021. It is uncontested that Buyers failed to do so. Concerning the earnest money and consequences for failure to pay it, the Agreement provides in pertinent part:

> 3. **Earnest Money/Trust Money**. Buyer has paid or will pay within 5 days after the Binding Agreement Date to Coldwell Banker Wallace (name of Holder) ("Holder") located at 140 Major Reynolds Place Knoxville, Tn 37919 (address of Holder), a Earnest Money/Trust Money deposit of $ 5,000.00 by check (OR ________________________) ("Earnest Money/Trust Money").
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> A. **Failure to Receive Earnest Money/Trust Money**. In the event Earnest Money/Trust Money (if applicable) is not timely received by Holder or Earnest Money/Trust Money check or other instrument is not honored for any reason by the bank upon which it is drawn, Holder shall promptly notify Buyer and Seller of the Buyer's failure to deposit the agreed upon Earnest Money/Trust Money. Buyer shall then have one (1) day to deliver Earnest Money/Trust Money in immediately available funds to Holder. In the event Buyer does not deliver such funds, Buyer is in default and Seller shall have the right to terminate this Agreement by delivering to Buyer or Buyer's representative written notice via the Notification form or equivalent written notice. In the event Buyer delivers the Earnest Money/Trust Money in immediately available funds to Holder before Seller elects to terminate, Seller shall be deemed to have waived his right to terminate, and the Agreement shall remain in full force and effect.

[2] Although the record contains an email message in which Ms. Lobo referred to Mr. Patel as her husband, it is unclear from the record whether Buyers are a married couple.

Regarding default, the Agreement further provides:

> 12. **Default.** Should Buyer default hereunder, the Earnest Money/Trust Money shall be forfeited as damages to Seller and shall be applied as a credit against Seller's damages. Seller may elect to sue, in contract or tort, for additional damages or specific performance of the Agreement, or both. Should Seller default, Buyer's Earnest Money/Trust Money shall be refunded to Buyer. In addition, Buyer may elect to sue, in contract or tort, for damages or specific performance of this Agreement, or both. In the event that any party hereto shall file suit for breach or enforcement of this Agreement (including suits filed after Closing which are based on or related to the Agreement), the prevailing party shall be entitled to recover all costs of such enforcement, including reasonable attorney's fees. In the event that any party exercises its right to terminate due to the default of the other pursuant to the terms of this Agreement, the terminating party retains the right to pursue any and all legal rights and remedies against the defaulting party following termination. The parties hereby agree that all remedies are fair and equitable and neither party will assert the lack of mutuality of remedies, rights and/or obligations as a defense in the event of a dispute.

Pursuant to the notification and one-day clause provided in Section 3A ("the One-Day Clause"), Sellers provided notice to Buyers on July 15, 2021, that Buyers would have until July 16, 2021, at 5:00 p.m. to provide earnest money in immediately available funds. At 4:26 p.m. on July 16, 2021, Mr. Patel initiated a $5,000 deposit through a "DepositLink" system ("DepositLink") provided by Buyers' realtor, Coldwell Banker Wallace, which was indicated in the Agreement as the "Holder" of the earnest money. Later that evening, Sellers sent notice that they were cancelling the Agreement due to Buyers' failure to tender the earnest money.

On July 19, 2021, Sellers filed a complaint in the Knox County Chancery Court ("trial court"), asserting a breach of contract claim against Buyers and demanding a jury trial. Sellers requested compensatory damages not to exceed $50,000 and, alleging that Buyers' conduct was "malicious, fraudulent, willful and wanton," also requested punitive damages not to exceed $100,000. Sellers also requested attorney's fees and discretionary costs pursuant to a provision of the Agreement. Coldwell Banker Wallace attempted to process Buyers' deposit, but the deposit was refused for insufficient funds on July 21, 2021.

On August 24, 2021, Sellers filed a motion for default judgment because Buyers had not answered the complaint. However, in an order entered on September 10, 2021, the trial court granted Buyers until September 17, 2021, to file an answer. Each of the Buyers filed a separate answer on September 16, 2021.[3] In their answers, Buyers denied that they had failed to tender the earnest money and raised several affirmative defenses. As pertinent on appeal, Buyers claimed that the only reason the $5,000 deposit bounced on July 21, 2021, was that Mr. Patel withdrew the funds from his First Horizon Bank account, which he used to make the deposit, after receiving notice that Sellers had cancelled the Agreement.

On September 20, 2021, Sellers filed a motion for summary judgment with a supporting memorandum of law, a statement of undisputed material facts, and an affidavit executed by Aziz Kherani. Buyers each respectively replied to Sellers' statement of undisputed material facts, generally denying any failure to comply with the terms of the Agreement and claiming that they had paid the earnest money before Sellers cancelled the Agreement. The parties' main factual disagreement related to whether depositing funds with the DepositLink system constituted "immediately available funds." Sellers subsequently filed a motion for judgment on the pleadings on October 21, 2021, and Ms. Lobo filed a response objecting to the motion.

Mr. Patel submitted a reply brief to the motion for summary judgment on November 19, 2021, arguing that the case should proceed to trial because there were factual disputes before the trial court. Mr. Patel additionally argued that Sellers had breached the contract on the night of July 16, 2021, when they cancelled the contract for failure to receive the earnest money because he had deposited the earnest money before the deadline.

Following an initial hearing on the motion for summary judgment conducted on November 22, 2021, the trial court granted Ms. Lobo leave to file a response upon determining that Sellers had not served her with the motion for summary judgment. Ms. Lobo then filed a response on December 13, 2021, making arguments similar to those of Mr. Patel. Ms. Lobo submitted an affidavit with her response, stating as pertinent on appeal:

> We entered into the Purchase and Sale Agreement subject of this lawsuit based upon the marketing, depiction and representations of the residence made by [Sellers] online. After determining those representations were inaccurate, i.e. the residence was not as depicted, we no longer wished to move[] forward with the purchase and advised [Sellers] through the

[3] Buyers were each represented by separate counsel in the trial court but are now represented jointly on appeal by Mr. Patel's trial counsel.

> realtor. I later learned that [Sellers] *terminated* the contract, apparently on July 16, 2021. To my knowledge, that letter was sent to the realtor only.

Ms. Lobo also asserted that she was "not involved" with the earnest money deposit and that Mr. Patel was handling it. In an agreed order entered on January 21, 2022, the trial court directed the parties to submit to mediation, which was ultimately unsuccessful.

The trial court conducted a second hearing on the motion for summary judgment on February 11, 2022. Sellers subsequently filed a motion to amend their complaint on March 7, 2022, seeking to add two additional defendants, Ajay Patel and Mukesh Patel. Sellers averred that according to Mr. Patel's response to a request for admission propounded by Sellers, the proof of funds that Buyers had provided with their offer to purchase the Property had originated with an account owned by Ajay Patel and Mukesh Patel, who were related to Mr. Patel. Sellers did not present any additional claim in their motion and did not submit a proposed amended complaint.

The trial court entered an order on April 27, 2022, granting summary judgment in favor of Sellers and setting the matter for a hearing on damages. The court did not address Sellers' motion to amend their complaint. Regarding deposit of the earnest money the trial court found:

> [Buyers] failed to make the earnest deposit by July 16, 2021, at 5:00 p.m. (See Affidavit of Aziz Kherani).
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> [Buyers] attempted to initiate an earnest money deposit on July 16, 2021. However, it was rejected and/or returned due to insufficient funds on July 21, 2021. (See Affidavit of Aziz Kherani).
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> Therefore, this Court finds that [Sellers'] Motion for Summary Judgment shall be granted and this matter be set for a hearing to determine damages.

(Paragraph numbering omitted.)

The trial court conducted a hearing concerning damages on May 18, 2022, during which Aziz Kherani was the only witness to testify. Buyers disputed whether Sellers had presented sufficient evidence of the Property's market value to establish that they were entitled to the requested amount of damages. Buyers argued that the required measure of damages should have been related to the market value of the Property at the time of the breach. Buyers further argued that aside from the eventual purchase price, Sellers had presented no evidence of market value.

As to attorney's fees, Buyers noted that Sellers were represented by Aziz Kherani's brother, attorney Ameesh A. Kherani, and questioned whether the attorney's fees claimed by Sellers had actually been paid. When questioned regarding payments made to counsel, Aziz Kherani stated that he was unsure of the amount Sellers had paid counsel but that they had paid counsel something. Sellers' counsel presented an affidavit, stating that he had charged a "fixed fee of $15,000.00" and that "significant proceedings [had] been undertaken" to warrant the fee.

The trial court entered an order on June 22, 2022, awarding to Sellers compensatory damages in the amount of $45,000 and attorney's fees in the amount of $15,000. The court explained in its order that the compensatory damages represented the difference between the Agreement price of $795,000 and the eventual sale price of $750,000, which Sellers had obtained in October 2021.

Defendants filed a notice of appeal on July 20, 2022. This Court subsequently entered an order on October 7, 2022, staying the appeal and directing Buyers to show cause why the appeal should not be dismissed due to Sellers' pending motion to amend the complaint. Buyers submitted a response on October 24, 2022, stating that Sellers had apparently abandoned their motion to amend by submitting a proposed order scheduling trial and moving forward with the damages hearing. Buyers also noted that Sellers had not filed a proposed amended complaint with their motion. Upon consideration, this Court lifted the stay in an order entered on October 31, 2022, and this appeal proceeded.

II. Issues Presented

Buyers present three issues on appeal, which we have restated as follows:

1. Whether the trial court erred by granting summary judgment in favor of Sellers upon finding that the manner in which Buyers purportedly deposited earnest money with the holder constituted a material breach of contract.

2. Whether the trial court erred by awarding $45,000 in compensatory damages to Sellers for breach of the Agreement.

3. Whether the trial court erred by awarding to Sellers a flat-rate attorney's fee.

Sellers list two additional issues in the table of contents of their responsive brief under a heading entitled, "Issues Presented for Review." These issues include (1)

whether this Court has subject matter jurisdiction due to a purported lack of a final judgment and (2) whether Sellers are entitled to attorney's fees on appeal. In the argument section of their briefs, Sellers include an argument related to subject matter jurisdiction and a one-sentence statement requesting attorney's fees on appeal. They have not listed these additional issues in a separate statement of the issues. Inasmuch as this Court may consider *sua sponte* whether it has subject matter jurisdiction over any matter before it and such a jurisdictional question involves a court's authority to act, *see Nandigam Neurology, PLC v. Beavers*, 639 S.W.3d 651, 660 (Tenn. Ct. App. 2021), we will address Sellers' argument concerning subject matter jurisdiction in a subsequent section of this Opinion.

However, we determine that Sellers have failed to properly raise an issue regarding attorney's fees on appeal. As our Supreme Court has explained:

> Appellate review is generally limited to the issues that have been presented for review. Tenn. R. App. P. 13(b); *State v. Bledsoe*, 226 S.W.3d 349, 353 (Tenn. 2007). Accordingly, the Advisory Commission on the Rules of Practice and Procedure has emphasized that briefs should "be oriented toward a statement of the issues presented in a case and the arguments in support thereof." Tenn. R. App. P. 27, advisory comm'n cmt.

Hodge v. Craig, 382 S.W.3d 325, 334 (Tenn. 2012); *see also Forbess v. Forbess*, 370 S.W.3d 347, 356 (Tenn. Ct. App. 2011) ("We may consider an issue waived where it is argued in the brief but not designated as an issue."); *see, e.g.*, *Barrios v. Simpkins*, No. M2021-01347-COA-R3-CV, 2022 WL 16846642, at *14 (Tenn. Ct. App. Nov. 10, 2022) (deeming the appellees' issue concerning attorney's fees on appeal to be waived when it was included in their table of contents but was not included in a separate statement of the issues). Therefore, we deem Sellers' request for attorney's fees on appeal to be waived.

III. Standard of Review

The grant or denial of a motion for summary judgment is a matter of law; therefore, our standard of review is *de novo* with no presumption of correctness. *See Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 250 (Tenn. 2015); *Dick Broad. Co. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 671 (Tenn. 2013) (citing *Kinsler v. Berkline*, *LLC*, 320 S.W.3d 796, 799 (Tenn. 2010)). As such, this Court must "make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied." *Rye*, 477 S.W.3d at 250. As our Supreme Court has explained concerning the requirements for a movant to prevail on a motion for summary judgment pursuant to Tennessee Rule of Civil Procedure 56:

> [W]hen the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense. We reiterate that a moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis. Rather, Tennessee Rule 56.03 requires the moving party to support its motion with "a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial." Tenn. R. Civ. P. 56.03. "Each fact is to be set forth in a separate, numbered paragraph and supported by a specific citation to the record." *Id.* When such a motion is made, any party opposing summary judgment must file a response to each fact set forth by the movant in the manner provided in Tennessee Rule 56.03. "[W]hen a motion for summary judgment is made [and] . . . supported as provided in [Tennessee Rule 56]," to survive summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading," but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, "set forth specific facts" *at the summary judgment stage* "showing that there is a genuine issue for trial." Tenn. R. Civ. P. 56.06. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.*, 475 U.S. [574,] 586, 106 S. Ct. 1348, [89 L. Ed. 2d 538 (1986)]. The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party. If a summary judgment motion is filed before adequate time for discovery has been provided, the nonmoving party may seek a continuance to engage in additional discovery as provided in Tennessee Rule 56.07. However, after adequate time for discovery has been provided, summary judgment should be granted if the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the existence of a genuine issue of material fact for trial. Tenn. R. Civ. P. 56.04, 56.06. The focus is on the evidence the nonmoving party comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced, despite the passage of discovery deadlines, at a future trial.

Rye, 477 S.W.3d at 264-65. Pursuant to Tennessee Rule of Civil Procedure 56.04, the trial court must "state the legal grounds upon which the court denies or grants the motion" for summary judgment, and our Supreme Court has instructed that the trial court

must state these grounds "before it invites or requests the prevailing party to draft a proposed order." *See Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303, 316 (Tenn. 2014). "Whether the nonmoving party is a plaintiff or a defendant—and whether or not the nonmoving party bears the burden of proof at trial on the challenged claim or defense—at the summary judgment stage, '[t]he nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party.'" *TWB Architects, Inc. v. The Braxton, LLC*, 578 S.W.3d 879, 889 (Tenn. 2019) (quoting *Rye*, 477 S.W.3d at 265).

IV. Subject Matter Jurisdiction

Sellers contend that this Court lacks subject matter jurisdiction because the trial court's order granting summary judgment was not a final order. They essentially ask this Court to reconsider its October 2022 order lifting the stay that had been imposed on the appeal by this Court's previous *sua sponte* show cause order. Sellers posit that Buyers filed a notice of appeal before Sellers had an opportunity to "adjudicate" their motion to amend the complaint by adding two additional defendants. Upon careful review, we determine that the summary judgment order was a final judgment and that this Court has subject matter jurisdiction to decide this appeal. We discern no error in this Court's prior decision to lift the stay on the appeal.

Sellers filed their motion to amend the complaint on March 7, 2022, in the interim between the February 2022 hearing on Sellers' motion for summary judgment and entry of the trial court's April 2022 order granting summary judgment in favor of Sellers. In their motion to amend, filed pursuant to Tennessee Rule of Civil Procedure 15, Sellers sought to add two additional defendants, Ajay Patel and Mukesh Patel ("Additional Defendants"), who were both relatives of Mr. Patel. *See* Tenn. R. Civ. P. 15.01 (providing that with an exception not applicable here, "a party may amend the party's pleadings only by written consent of the adverse party or by leave of court; and leave shall be freely given when justice so requires."). Citing Mr. Patel's response to Sellers' request for admissions, Sellers averred that the proof of funds provided by Buyers with their offer to purchase the Property had originated with an account owned by Additional Defendants.

On March 14, 2022, the trial court entered an "Order Scheduling Trial," noting that the court had heard "several pending Motions" during the February 11, 2022 hearing, which included the summary judgment motion. The court stated that the parties were in agreement that the matter needed to be set for trial. Setting a bench trial date of May 18, 2022, the court stated that "all other matters [were] held in abeyance pending further adjudication." The next document to be filed following entry of the summary judgment order was Sellers' "Notice for Determination of Damages" wherein Sellers requested that

a damages hearing be scheduled for May 18, 2022, the same date the trial had been scheduled. In their notice, Sellers did not request a hearing on their motion to amend the complaint.

Following the May 2022 hearing, the trial court entered its June 2022 order awarding to Sellers $45,000 in compensatory damages and $15,000 in attorney's fees. Sellers did not mention their motion to amend during the damages hearing, and the trial court did not refer to the motion in its order. Buyers then timely filed a notice of appeal.

More than two months after the filing of the notice of appeal, this Court, upon reviewing the record received from the trial court, entered a *sua sponte* order on October 7, 2022, questioning the finality of the trial court's judgment because the motion to amend had not been resolved. As this Court explained in its Order:

> A party is entitled to an appeal as of right only after the trial court has entered a final judgment. Tenn. R. App. P. 3(a). A final judgment is a judgment that resolves all the claims between all the parties, "leaving nothing else for the trial court to do." *In re Estate of Henderson*, 121 S.W.3d 643, 645 (Tenn. 2003) (quoting *State ex rel. McAllister v. Goode*, 968 S.W.2d 834, 840 (Tenn. Ct. App. 1997)). An order that adjudicates fewer than all the claims between all the parties is subject to revision at any time before the entry of a final judgment and is not appealable as of right. Tenn. R. App. P. 3(a); *In re Estate of Henderson*, 121 S.W.3d at 645.

In their response to the show cause order, Buyers averred that Sellers had abandoned their motion to amend when they submitted the "Order Scheduling Trial" as a proposed order, filed the "Notice for Determination of Damages," and proceeded with the damages hearing. Buyers also attached to their response proof of a notice issued by the trial court advising that Sellers' motion to amend would be heard on May 2, 2022. Buyers averred that Sellers had failed to appear for this hearing and had not attempted to reschedule it. On appeal, Sellers do not deny that they failed to appear for or reschedule this hearing.

The parties do not have authority to confer subject matter jurisdiction through waiver. *See Save Our Fairgrounds v. Metro. Gov't of Nashville & Davidson Cnty.*, No. M2019-00724-COA-R3-CV, 2019 WL 3231381, at *5-7 (Tenn. Ct. App. July 18, 2019) (noting the "well-settled proposition" that "'parties cannot confer subject matter jurisdiction on a trial or an appellate court by appearance, plea, consent, silence, or waiver'" (quoting *Dishmon v. Shelby State Cmty. Coll.*, 15 S.W.3d 477, 480 (Tenn. Ct. App. 1999))). However, this Court has previously "indicated that a judgment may be rendered final by the waiver or abandonment of unadjudicated claims." *Mosley v. City of*

Memphis, No. W2019-00199-COA-R3-CV, 2019 WL 6216288, at *5 (Tenn. Ct. App. Nov. 21, 2019) (citing *Save Our Fairgrounds*, 2019 WL 3231381, at *5-7). In the instant action, Buyers bear the burden of proving that Sellers abandoned or waived their motion to amend the complaint. *See Jenkins Subway, Inc. v. Jones*, 990 S.W.2d 713, 722 (Tenn. Ct. App. 1998) ("The law will not presume a waiver, and the party claiming the waiver has the burden of proving it by a preponderance of the evidence.").

Upon careful review of the record, we determine that Buyers met their burden to demonstrate that Sellers waived their motion to amend the complaint by abandoning it in the trial court. At the time they filed their motion to amend, Sellers did not attach a proposed amended complaint, set forth any new claim, or explain how the existing breach of contract claim would apply to Additional Defendants as nonparties to the Agreement. Although Sellers may have been able to perfect their amended complaint with subsequent filings, they did not do so. Instead, they actively pursued the setting of a damages hearing against Buyers while failing to appear at a hearing scheduled on the motion to amend. Moreover, Sellers failed to mention the motion to amend during the damages hearing. At no point did Sellers object to the finality of the trial court's judgment until this Court raised a question during the pendency of the appeal.

In *Mosley*, this Court determined that the petitioners had abandoned a request for attorney's fees made in their petition for judicial review of a motion to disqualify a city attorney when the petitioners "did not properly support their request for attorney's fees and [had] abandoned it on appeal." *Mosley*, 2019 WL 6216288, at *6. Likewise, Sellers in this action did not properly support their motion to amend the complaint and failed to pursue it in the trial court. Although Sellers have raised the issue of this Court's subject matter jurisdiction on appeal, they have done so only when prompted by this Court's order and have not offered any plausible explanation for why they did not pursue the motion to amend before the trial court. Considering Sellers' failure to properly support their motion to amend the complaint and abandonment of the motion in the trial court, we conclude that this appeal should be allowed to proceed.

V. Summary Judgment

Buyers contend that the trial court erred when it granted summary judgment in favor of Sellers by (1) finding some genuine issues of material fact to be undisputed by Buyers when Buyers had disputed them, (2) failing to satisfy the requirements of Tennessee Rule of Civil Procedure 56.04 in its summary judgment order, and (3) failing to consider the materiality of Sellers' alleged breach of contract. Sellers respond that the trial court properly found that the undisputed facts demonstrated Buyers' material breach of contract and that the trial court's reasoning can be easily gleaned from a combination of the court's order and the record. We agree with Buyers that the trial court's judgment

was insufficient to meet the requirements of Rule 56.04 inasmuch as the court failed to state its legal reasoning for the grant of summary judgment. Furthermore, upon thorough review of the record, we determine that genuine issues of material fact remain in this case that render summary judgment inappropriate.

As this Court has previously explained concerning a motion for summary judgment:

> When a motion for summary judgment is made, the moving party has the burden of showing that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Tenn. R. Civ. P. 56.04. "A fact is material 'if it must be decided in order to resolve the substantive claim or defense at which the motion is directed.'" *Akers v. Heritage Med. Assocs., P.C.*, No. M2017-02470-COA-R3-CV, 2019 WL 104130, at *5 (Tenn. Ct. App. Jan. 4, 2019), *perm. app. denied* (Tenn. May 16, 2019) (quoting *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993)). Further, "[a] 'genuine issue' exists if 'a reasonable jury could legitimately resolve that fact in favor of one side or the other.'" *Akers*, 2019 WL 104130, at *5 (quoting *Byrd*, 847 S.W.2d at 215).
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> The trial court may grant summary judgment only if "'both the facts and the conclusions to be drawn from the facts permit a reasonable person to reach only one conclusion.'" *Helderman v. Smolin*, 179 S.W.3d 493, 500 (Tenn. Ct. App. 2005) (quoting *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995)).

Davis v. Ellis, No. W2019-01367-COA-R3-CV, 2020 WL 6499559, at *3-4 (Tenn. Ct. App. Nov. 5, 2020). We note that in the instant action, Buyers, as the defendants and the nonmoving parties, would not bear the burden of proof at trial. In *TWB Architects*, our Supreme Court clarified that "[w]hether the nonmoving party is a plaintiff or a defendant—and whether or not the nonmoving party bears the burden of proof at trial on the challenged claim or defense—at the summary judgment stage, '[t]he nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party.'" 578 S.W.3d at 889 (quoting *Rye*, 477 S.W.3d at 265).

In their complaint, Sellers asserted a breach of contract claim against Buyers. "In a breach of contract action, claimants must prove the existence of a valid and enforceable contract, a deficiency in the performance amounting to a breach, and damages caused by

the breach." *A & P Excavating & Materials, LLC v. Geiger*, 622 S.W.3d 237, 248 (Tenn. Ct. App. 2020) (quoting *Fed. Ins. Co. v. Winters*, 354 S.W.3d 287, 291 (Tenn. 2011)). While contract interpretation is "generally treated as a question of law," *see Planters Gin Co. v. Fed. Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 890 (Tenn. 2002), "[w]hether a party has fulfilled its obligations under a contract or is in breach of the contract is a question of fact," *Forrest Constr. Co., LLC v. Laughlin*, 337 S.W.3d 211, 225 (Tenn. Ct. App. 2009).

However, the fact that one party has breached a contract is not "sufficient to relieve the non-breaching party of its contractual obligations" unless the initial breach was "material." *M & M Elec. Contractor, Inc. v. Cumberland Elec. Membership Corp.*, 529 S.W.3d 413, 423 (Tenn. Ct. App. 2016) (quoting *DePasquale v. Chamberlain*, 282 S.W.3d 47, 53 (Tenn. Ct. App. 2008)). "If the breach of contract 'was slight or minor, as opposed to material or substantial, the nonbreaching party is not relieved of his or her duty of performance, although he or she may recover damages for the breach.'" *M & M Elec. Contractor*, 529 S.W.3d at 423 (quoting *Anil Constr. Inc. v. McCollum*, No. W2014-01979-COA-R3-CV, 2015 WL 4274109, at *12 (Tenn. Ct. App. July 15, 2015)). As this Court has explained:

> [I]n determining whether a breach of contract is material such that the non-breaching party can avoid performance, Tennessee courts have adopted the criteria established in section 241 of the Restatement (Second) of Contracts (1981), which enumerates the following factors to consider:
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> (1) The extent to which the injured party will be deprived of the benefit which he reasonably expected;
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> (2) The extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
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> (3) The extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (4) The likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and

(5) The extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Cooper v. Patel, 578 S.W.3d 40, 46 (Tenn. Ct. App. 2018) (quoting factors as stated in *Adams TV of Memphis, Inc. v. ComCorp of Tenn., Inc.*, 969 S.W.2d 917, 921 (Tenn. Ct. App. 1997)).

A. Compliance with Tennessee Rule of Civil Procedure 56.04

At the outset, we address whether the trial court's order granting summary judgment in favor of Sellers complies with Tennessee Rule of Civil Procedure 56.04 in a manner sufficient to facilitate appellate review. Although Buyers have asserted that the summary judgment order does not comport with Rule 56.04 within their argument challenging the trial court's grant of summary judgment, they have not expressly raised an issue concerning Rule 56.04 in their statement of the issues. *See Forbess*, 370 S.W.3d at 356 ("We may consider an issue waived where it is argued in the brief but not designated as an issue."). However, a trial court's compliance with Rule 56.04 may be raised *sua sponte* "even if neither party specifically designates it as an issue on appeal." *Calzada v. State Volunteer Mut. Ins. Co.*, No. M2020-01697-COA-R3-CV, 2021 WL 5368020, at *6 (Tenn. Ct. App. Nov. 18, 2021). Furthermore, because the trial court's adherence to Rule 56.04 involves "our ability to reach the merits of the issues the parties raise," this is a threshold matter for our review of the trial court's order. *See id.* at *4.

Tennessee Rule of Civil Procedure 56.04 provides that in granting a motion for summary judgment, "[t]he trial court shall state the legal grounds upon which the court denies or grants the motion, which shall be included in the order reflecting the court's ruling." Our Supreme Court has instructed that Rule 56.04, as amended in 2007 to its current form, "made the statement of grounds [in a trial court's order] mandatory rather than optional and expanded the application of the rule to circumstances in which the trial court denies a motion for summary judgment." *See Lakeside*, 439 S.W.3d at 313. As the *Lakeside* Court further explained:

> The changes to Tenn. R. Civ. P. 56.04 were intended to address two concerns. First, they reflect the growing awareness of both the Advisory Commission and this Court that explanations of the basis for judicial decisions promote respect for and acceptance of not only the particular decision but also for the legal system. Second, skeletal orders containing no explanation of the reasons for granting the summary judgment were complicating the ability of the appellate courts to review the trial court's decision. *See, e.g.*, *Church v. Perales*, 39 S.W.3d 149, 157 (Tenn. Ct. App.

> 2000) (noting that skeletal orders lacking a statement of grounds required appellate courts to "perform the equivalent of an archeological dig [to] endeavor to reconstruct the probable basis for the [trial] court's decision") (quoting *Camilo-Robles v. Hoyos,* 151 F.3d 1, 8 (1st Cir.1998)).

Id. at 313-14. The *Lakeside* Court held that Rule 56.04 "requires the trial court, upon granting or denying a motion for summary judgment, to state the grounds for its decision before it invites or requests the prevailing party to draft a proposed order." *Id.* at 316 (footnote omitted).

In this case, the trial court's order granting summary judgment in favor of Sellers stated in full:

> This cause came on to be heard before this Court on February 11, 2022, upon [Sellers'] Motion for Summary Judgment. After argument of respective counsel and a review of the record as a whole, this Court finds the following material facts to not be in dispute:
>
> 1. The parties entered into a Purchase Sale Agreement (hereinafter Agreement) on July 6, 2021, for the sale of property located at . . . Blue Herron Road, Knoxville, TN (Exh. No. 1 to Complaint).
>
> 2. The Agreement required [Buyers] to deposit earnest money within five (5) days of the date of the Agreement.
>
> 3. The Earnest money was not paid by [Buyers] within five (5) days of the binding Agreement date.
>
> 4. [Sellers], through counsel, issued a letter to [Buyers] and/or their Agent, Cassady Varner, requesting earnest money to be deposited on or before July 16, 2021, at 5:00 p.m. (See Affidavit of Aziz Kherani).
>
> 5. [Buyers] failed to make the earnest deposit by July 16, 2021, at 5:00 p.m. (See Affidavit of Aziz Kherani).
>
> 6. [Buyers] attempted to initiate an earnest money deposit on July 16, 2021. However, it was rejected and/or returned due to insufficient funds on July 21, 2021. (See Affidavit of Aziz Kherani).

> Therefore, this Court finds that [Sellers'] Motion for Summary Judgment shall be granted and this matter be set for a hearing to determine damages.

Apart from Buyers' argument that the trial court mischaracterized certain facts as undisputed in its order, which we will address in the following section of this Opinion, the court here simply failed to explain the legal basis for its grant of summary judgment to Sellers. Referring to the Agreement as "binding," the court appears to have determined that the Agreement was valid and enforceable. *See A & P Excavating & Materials*, 622 S.W.3d at 248. However, the court made no findings regarding whether Buyers were in default according to the Agreement or whether the "reject[ion] or return due to insufficient funds" constituted a breach of the Agreement. *See id.* Importantly, and as Buyers point out, the trial court proffered no express consideration in its order of whether such a breach would have been material to the parties' Agreement.[4] *See Cooper*, 578 S.W.3d at 46. We conclude that the trial court's summary judgment order failed to comply with the requirements of Tennessee Rule of Civil Procedure 56.04.

When a trial court's order does not set forth the court's legal basis for granting or denying summary judgment, we are left with two alternatives: vacate the order and remand for further consideration by the trial court or conduct an "archeological dig[]" if "the basis for the trial court's decision can be readily gleaned from the record." *See Lakeside*, 439 S.W.3d at 314. In *Lakeside*, our Supreme Court noted that at the time of its 2014 decision, this Court had "been reticent to vacate summary judgment orders that plainly do not comply with Tenn. R. Civ. P. 56.04 and to remand them to the trial court for further consideration." *Id.* The High Court instructed:

> We readily agree that judicial economy supports the Court of Appeals' approach to the enforcement of Tenn. R. Civ. P. 56.04 in proper circumstances when the absence of stated grounds in the trial court's order does not significantly hamper the review of the trial court's decision. However, in the future, the resolution of issues relating to a trial court's compliance or lack of compliance with Tenn. R. Civ. P. 56.04 should also take into consideration the fundamental importance of assuring that a trial court's decision either to grant or deny a summary judgment is adequately explained and is the product of the trial court's independent judgment.

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[4] We note that in their issue statement regarding the trial court's grant of summary judgment, Buyers have stated the issue in part as whether "[t]he trial court erred by granting summary judgment when it found that the Defendants committed a material breach," apparently interpreting the trial court's judgment as implying that the breach was material despite their argument that the court "failed to provide any legal reasoning whatsoever finding that the facts constituted a material breach of contract."

Id.

In a pre-*Lakeside* decision under the same Rule 56.04 requirements, this Court in *Burse v. Hicks*, No. W2007-02848-COA-R3-CV, 2008 WL 4414718, at *2 (Tenn. Ct. App. Sept. 30, 2008), determined that the case presented a "rare instance" when the trial court's "fail[ure] to state the legal basis for its grant of summary judgment" did "not compel a remand to the trial court" because "[t]he record present[ed] a clear legal issue . . . that was almost certainly the basis for the trial court's decision to grant summary judgment." *Cf. Potter's Shopping Ctr., Inc. v. Szekely*, 461 S.W.3d 68, 72 (Tenn. Ct. App. 2014) (vacating summary judgment when appellate review would have required "speculat[ion] on the legal theories upon which the trial court may have ruled and the legal conclusions the trial court may have made" (quoting *Winn v. Welch Farm, LLC*, No. M2009-01595-COA-R3-CV, 2010 WL 2265451, at *6 (Tenn. Ct. App. June 4, 2010))).

Similarly, here, one claim, breach of contract, was at issue on summary judgment. We can therefore discern from the trial court's order that the court determined that Buyers had breached the Agreement based on the facts the court found to be material and undisputed. Although it is not clear from the trial court's order whether it considered the materiality factors for the breach it found, *see Cooper*, 578 S.W.3d at 46, in this instance, we find examination of the facts relied upon by the trial court in determining a breach to be dispositive. Therefore, for the sake of judicial economy and in the interest of justice, we will proceed with review of the trial court's summary judgment order despite the order's insufficiency under Rule 56.04.

B. Propriety of Grant of Summary Judgment

Buyers assert that in the summary judgment order, the trial court "wholly ignored" contested facts and adopted Mr. Kherani's affidavit. As Sellers note, it is undisputed that the Agreement constituted a valid and enforceable contract. *See A & P Excavating & Materials*, 622 S.W.3d at 248. The facts that Buyers maintain were contested primarily coalesce around the DepositLink transfer Buyers attempted on July 16, 2021, through Coldwell Banker Wallace as the holder of the deposit designated in the Agreement ("Holder"). Sellers essentially argue that Buyers' actions constituted a material breach of the Agreement no matter how the facts surrounding the DepositLink transfer are presented or interpreted. We disagree with Sellers on this point and determine that genuine issues of material fact exist that must be decided at trial.

In particular, Sellers allege that Buyers breached the provision of the Agreement providing for an earnest money deposit. In the opening paragraph of Section 3, titled, "Earnest Money/Trust Money," the Agreement sets forth:

> Buyer has paid or will pay within 5 days after the Binding Agreement Date to Coldwell Banker Wallace (name of Holder) ("Holder") located at 140 Major Reynolds Place Knoxville, Tn 37919 (address of Holder), a Earnest Money/Trust Money deposit of $5,000.00 by check (OR __________________) ("Earnest Money/Trust Money").

Section 3A then provides:

> **Failure to Receive Earnest Money/Trust Money**. In the event Earnest Money/Trust Money (if applicable) is not timely received by Holder or Earnest Money/Trust Money check or other instrument is not honored for any reason by the bank upon which it is drawn, Holder shall promptly notify Buyer and Seller of the Buyer's failure to deposit the agreed upon Earnest Money/Trust Money. Buyer shall then have one (1) day to deliver Earnest Money/Trust Money in immediately available funds to Holder. In the event Buyer does not deliver such funds, Buyer is in default and Seller shall have the right to terminate this Agreement by delivering to Buyer or Buyer's representative written notice via the Notification form or equivalent written notice. In the event Buyer delivers the Earnest Money/Trust Money in immediately available funds to Holder before Seller elects to terminate, Seller shall be deemed to have waived his right to terminate, and the Agreement shall remain in full force and effect.

In responding to Sellers' statement of undisputed material facts, Buyers attached correspondence from their real estate agent, Cassady Varner, wherein she attached a link to DepositLink as a method through which Holder accepted payment. Although at one point, Ms. Varner told Buyers that they could drop off a check for the earnest money at her office, she did repeatedly urge Buyers to initiate the "DepositLink process."

In reviewing the facts surrounding the attempted DepositLink transfer, it is helpful to construct a brief timeline of facts based on the record:

July 6, 2021: The parties entered into the Agreement.

July 11, 2021: The earnest money deadline passed without Buyers submitting a payment.

July 15, 2021: Pursuant to the One-Day Clause, Sellers provided notice to Buyers that they would have until July 16, 2021, at 5:00 p.m. "to deliver the earnest money/trust money immediately to [Holder] as outlined in the Purchase and Sale Agreement . . . ."

July 16, 2021:	At 4:26 p.m., Mr. Patel initiated a $5,000 deposit through the DepositLink system utilized by Holder.
July 16, 2021:	**Sellers issued a notice of termination of the Agreement, executed at approximately 9:00 p.m. and stating that Holder had advised them that the earnest money had not been timely received.**
Interim	**Buyers cancelled the $5,000 transfer to DepositLink.**
July 19, 2021:	Sellers filed the complaint in the instant action.
July 21, 2021:	Buyers' $5,000 deposit was refused for insufficient funds.

The two bolded actions above are particularly at issue. The trial court did not make any finding regarding Buyers' action in cancelling the transfer once they had received notice that Sellers were cancelling the Agreement. The court reiterated the undisputed fact that the earnest money deposit was "rejected and/or returned due to insufficient funds on July 21, 2021," apparently finding this conclusive in demonstrating a breach by Buyers. However, the trial court did not take note of Buyers' claim that Mr. Patel "had funded the transfer, however, after learning that [Sellers] were terminating the agreement . . . [Mr. Patel] cancelled the transfer thus removing available funds." This claim was made through Mr. Patel's responses to interrogatories and was attached to his response to Sellers' statement of undisputed facts. Additionally, although Sellers' notice of termination stated that Holder had advised Sellers that the earnest money had not been timely received, Mr. Patel had attached to his responses to interrogatories a July 21, 2021 email from Beth Bradley, a representative of Holder, indicating otherwise. Ms. Bradley stated that following consultation with Holder's counsel the day before, Holder had been of the opinion that Sellers did not have the right to cancel the Agreement on July 16, 2021, and that because Holder had accepted the earnest money, "we were still under contract." In the same email, however, Ms. Bradley informed Mr. Patel that as of the morning of July 21, 2021, with notification of insufficient funds, Holder was no longer "holding the earnest money and the contract [was] cancelled."

On appeal, Sellers assert that "[e]ven if the transfer had not failed due to insufficient funds, there was no way that the earnest money would have been available in 'immediately available funds' because the funds were designated to be received and cleared on July 19, 2021, three (3) days after the deadline of July 16, 2021 . . . ." In support of this assertion, Sellers cite the transaction record showing insufficient funds on July 21, 2021. This record indicates that the funds were "Pending" when Mr. Patel initiated the transfer on July 16, 2021, with the notation of "Funds Arriving" on July 19,

2021, and ultimately "Payment Failed: R01 – Insufficient Funds" on July 21, 2021. However, given the provision in the Agreement for the earnest money deposit to be paid through Holder and the documentation that Holder had provided the DepositLink method of deposit, we determine that there is a genuine issue of material fact as to whether Buyers complied with the Agreement when Mr. Patel initiated the transfer through DepositLink on July 16, 2021.

Furthermore, in Sellers' notice invoking the One-Day Clause, they instructed that Buyers were to pay the earnest money "immediately to [Holder] as outlined in the Purchase and Sale Agreement" (emphasis added). The Agreement does not mention DepositLink, but it is clear from the record that Holder utilized this system. Whether Buyers breached the Agreement by attempting to make a deposit with Holder through DepositLink late in the last day they could make the deposit is a material question of fact that must be adjudicated at trial. Likewise, we determine that whether Sellers were within their rights under the Agreement to terminate the Agreement a few hours after the deposit had been initiated through DepositLink is a genuine issue of material fact to be decided at trial. In their notice of termination, Sellers stated that Holder had "advised that the Earnest Money/Trust Money [had] not been timely received." However, the communication from Holder to Buyers regarding the situation at the time that Sellers terminated the contract did not comport with this statement.

Sellers also rely on Ms. Lobo's email communication with Ms. Cassady, representing on July 15, 2021, that Mr. Patel and she had agreed not to go "forward with the purchase of the house," and Ms. Lobo's response to an interrogatory stating that Buyers had decided not to proceed with the purchase because they felt the "home was inferior to what had been reflected in the marketing and listing." Ms. Lobo made a similar statement in her affidavit submitted in response to Sellers' motion for summary judgment. Sellers assert that "[i]f a full-throated admission that [Buyers] had no intent to comply with a binding agreement is not a material breach; it is hard to image what would be." We disagree with Sellers' interpretation.

Ms. Lobo and Mr. Patel were represented by different counsel before the trial court and presented separate responses to interrogatories. It is not clear that the intent expressed by Ms. Lobo not to go forward with the purchase equated to a decision not to comply with the Agreement at the time that Mr. Patel attempted to deposit the earnest money under the One-Day Clause on July 16, 2021. Ms. Lobo's responses are certainly relevant, but the trial court could not hear testimony at the summary judgment stage to weigh the credibility of Mr. Patel and Ms. Lobo. Again, we determine that a genuine issue of material fact exists as to Buyers' intention when Mr. Patel initiated the DepositLink transfer and when he cancelled the transfer. This is a matter for adjudication by the trial court.

Upon a thorough review of the record, we conclude that Buyers, as the nonmoving party, have "demonstrate[d] the existence of specific facts in the record which could lead a rational trier of fact to find in favor" of them. *See TWB Architects*, 578 S.W.3d at 889. Genuine issues of material fact exist regarding whether Buyers substantially complied with the One-Day Clause prior to Sellers' cancellation of the Agreement and whether Sellers were within their rights under the Agreement to cancel it a few hours after Buyers initiated the deposit. We therefore reverse the trial court's grant of summary judgment to Sellers and remand for further proceedings consistent with this Opinion.

VI. Remaining Issues

Buyers have also raised issues regarding whether the trial court erred in its awards to Sellers of $45,000 in compensatory damages and a flat-rate attorney's fee of $15,000. Having determined that the trial court's grant of summary judgment in favor of Sellers should be reversed and the case remanded, we further determine that any award of damages or attorney's fees must be reconsidered following trial. We therefore reverse the court's judgment awarding damages and attorney's fees. Any further analysis of Buyers' remaining issues is moot.

VII. Conclusion

For the foregoing reasons, we reverse the trial court's grant of summary judgment in favor of Sellers and reverse the accompanying order awarding damages and attorney's fees. This case is remanded to the trial court, pursuant to applicable law, for further proceedings consistent with this Opinion and collection of costs below. Costs on appeal are assessed to the appellees, Aziz Kherani and Sameera Kherani.

s/ Thomas R. Frierson, II
THOMAS R. FRIERSON, II, JUDGE