

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 15, 2026 Session

FILED

07/31/2026

Clerk of the
Appellate Courts

4000 TN, LLC v. JOHN MCCLELLAN ET AL.

Appeal from the Circuit Court for Hamilton County
No. 23C133 Kyle E. Hedrick, Judge

No. E2025-01192-COA-R3-CV

This appeal concerns a commercial lease dispute in which the lessees stopped paying rent and abandoned the property. The lessees asserted that the landlord repudiated the lease by preparing development plans that, if carried out, would interfere with the lessees' restaurant, including the parking spaces that the landlord was contractually obligated to make available for lessees' guests and invitees. The landlord sued the lessees for breach of contract, and the lessees filed counterclaims. The landlord later moved for summary judgment. The trial court granted summary judgment in favor of the landlord. On appeal, the lessees argue that genuine issues of material fact exist as to whether the landlord failed to provide the required minimum parking and whether the landlord's development plans amounted to anticipatory repudiation of the lease. We conclude, *inter alia*, that there are no genuine issues of material fact requiring trial and that the landlord is entitled to summary judgment. The judgment of the trial court is affirmed. We also grant Plaintiff's request for attorney's fees incurred on appeal and remand to the trial court for a determination of reasonable attorney's fees incurred on appeal.

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

KRISTI M. DAVIS, J., delivered the opinion of the Court, in which JOHN W. MCCLARTY, P.J., E.S., and WILLIAM E. PHILLIPS II, J., joined.

Buddy B. Presley, Jr., Chattanooga, Tennessee, for the appellants, JPM Restaurant Four, LLC, and John McClellan.

Scott E. Simmons, Meredith C. Lee, and Erin E. Steelman, Chattanooga, Tennessee, for the appellee, 4000 TN, LLC.

OPINION

BACKGROUND

On December 3, 2021, 4000 TN, LLC (“Plaintiff”) and John McClellan (“Mr. McClellan”) entered a 10-year commercial lease (the “Lease”) whereby JPM Restaurant Four, LLC (“JPM”) (together with Mr. McClellan, “Defendants”) would operate a bar and restaurant, “Mike’s Tavern,” on commercial property owned by Plaintiff. William Stuart Wood (“Mr. Wood”) is the sole owner and member of Plaintiff. Mr. McClellan is the majority owner and a member of JPM. The parties agreed that Mr. McClellan could assign the Lease to JPM. Mr. McClellan signed a personal guaranty for the amounts that JPM was required to pay under the Lease. As relevant, the Lease provides as follows:

14. PARKING. During the term of this Lease, Tenant and its guests and invitees shall use the parking lot located on the Property,^[1] subject to rules and regulations for the use thereof as prescribed from time to time by Landlord. Tenant shall have a minimum of forty-six (46) parking spaces on the Property on weekdays between the hours of 8:00 a.m. and 5:30 p.m., and a minimum of fifty-five (55) parking spaces on the Property on the weekends and after 5:30 p.m. on weekdays. . . . Landlord reserves the right to amend this designated parking area for Tenant as the case may be provided that Landlord shall not, as a result of any reduction in the number of parking spaces, cause Tenant to violate any zoning ordinance or other law which requires a specific number of parking spaces for the intended use of Tenant. . . .

17. DEFAULT. If default shall at any time be made by Tenant in the payment of Rent when due to Landlord as herein provided, and if said default shall continue for fifteen (15) days after such payment was due, . . . Landlord may declare the term of this Lease ended and terminated by giving Tenant written notice of such intention . . . Landlord shall have, in addition to the remedy above provided, any other right or remedy available to Landlord on account of any Tenant default, either in law or equity, including but not limited to the recovery of any brokerage commission paid to Landlord’s Broker and reasonable attorneys’ fees. . . .

¹ The Lease defines the “Property” as “land commonly known and numbered as 4000 Tennessee Avenue, Chattanooga, Tennessee 37409 as improved by that certain 6,530 square foot building (the “Building”) and other improvements located thereon[.]”

30. LANDLORD DEFAULT. If there is a default with respect to any of Landlord’s covenants, warranties or representations under this Lease, and if the default continues more than fifteen (15) days after notice in writing from Tenant to Landlord specifying the default, Tenant may, at its option and without affecting any other remedy hereunder, cure such default and deduct the cost thereof from the next accruing installment or installments of Rent payable hereunder . . .

On January 1, 2022, the Lease term commenced, and JPM began paying rent. However, this did not continue the length of the Lease term, as JPM never paid any rent after October 2022. Ultimately, the restaurant never opened. On November 18, 2022, JPM’s attorney sent a letter to Plaintiff informing it that JPM was terminating the Lease. JPM’s stated basis for terminating the Lease was that Plaintiff’s plans for development in the vicinity were “problematic for JPM for several reasons[,]” including that “construction of large buildings [would] impair [JPM’s] right to quiet enjoyment of the property as it [would] necessarily and negatively impact access to 4000 Tennessee Avenue during the construction[;]” “[a]fter the construction, these buildings [would] negatively impact the visibility of 4000 Tennessee Avenue[;]” “any such construction [would] clearly take up parking spaces that have been promised to JPM in the [L]ease [as there] is simply no other place for construction crews to store equipment necessary[;]” and “construction dirt, debris and other refuse [would be] constantly blowing onto and covering the tables, chairs, and [yet-to-be built] deck of JPM for the foreseeable future.” In closing, JPM asserted that Plaintiff had repudiated the Lease.

On December 6, 2022, Plaintiff’s attorney replied to JPM’s attorney, rebutting JPM’s allegations and demanding that JPM pay Plaintiff \$11,418.26 in past-due rent. Plaintiff’s attorney denied that the Lease had been lawfully terminated but stated that Plaintiff was willing to negotiate a termination of the Lease. On January 11, 2023, Plaintiff sued Defendants in the Hamilton County Circuit Court (the “trial court”) for breach of contract. Plaintiff asked the trial court to award it damages resulting from the breach; its brokerage fees, attorney’s fees, costs, and expenses; and pre- and post-judgment interest.

On February 8, 2023, Defendants filed an answer asserting the affirmative defenses of failure to state a claim, set-off due to Plaintiff’s “first breach” and “constructive eviction” of Defendants, unclean hands, breach of the covenant of quiet enjoyment, and failure to mitigate. Defendants also asserted counterclaims for breach of covenant of quiet enjoyment, material breach of contract,² constructive eviction, and private nuisance.

² Specifically, Defendants alleged that Plaintiff materially breached the Lease “when, without any prior notice [to Defendants], [Plaintiff] entered into leases for the three portions of the Subject Property directly surrounding the portion rented by [Defendants], for the construction of three 4-story office/residential buildings.” Plaintiff answered the counterclaim and denied this allegation.

Defendants asked that they be awarded damages resulting from the breach along with punitive and exemplary damages.

On July 7, 2023, Plaintiff filed a motion for summary judgment asking the trial court to grant its claims and dismiss Defendants' counterclaims. Defendants responded in opposition, arguing that disputed issues of material fact existed as to whether Plaintiff breached the Lease by informing Defendants of the planned construction and "whether Plaintiff further materially breached the [L]ease by failing to provide the required number of parking spots pursuant to the Lease." Defendants made this latter argument about parking even though Mr. McClellan testified in his deposition that Defendants "never" had fewer than the required number of parking spaces and that, as of November 18, 2022, there were not fewer than the required number. Mr. McClellan also acknowledged in his deposition testimony that restriping the parking lot could potentially create up to 70 spaces. However, Defendants attached to their opposition to Plaintiff's motion for summary judgment an affidavit by Mr. McClellan in which he stated that he "misspoke" at his deposition. In his affidavit, Mr. McClellan stated, in relevant part:

5. I misspoke in my deposition as to the number of parking spaces available at the Property. The Lease contains requirements that there be 46 parking spots in the morning hours and 55 in the evening and weekends. At the current time and at the time the November letter titled Termination of Lease was sent by my counsel, there are only 52 spots available at the Property.

6. Defendants contest that they agreed that the Property would be rezoned specifically to UGC. The type of zoning was not set forth in the [L]ease other than to indicate that it would be a zoning code that would allow for a restaurant.

7. The Property is located in a busy intersection of St. Elmo, zoning laws require a specific number of parking spots for patrons of the restaurant, there is no on-street parking immediately adjacent to the Property, and there is no public parking within close proximity to the Property (excluding a paid public parking lot which requires patrons to cross a very busy street on foot).

8. I made it very clear to Plaintiff when negotiating the [L]ease that parking for the Property was very important to me.

9. As the construction contemplates building multiple 4 story buildings and a parking garage, it will necessarily impair Defendants[' quiet] enjoyment of the Property, will impact access to the Property during construction, will impact visibility and ability of customers to find Mike's Tavern, and would necessarily cause noise, dirt, and debris particularly on the outside patio.

10. The proposed construction will clearly take up a considerable number of parking spaces as there is no other place for large construction vehicles to park on or near the property.

11. At the time I learned of the construction in or around June of 2022, I was faced with the choice of continuing a costly build-out at the risk of Plaintiff constructively evicting us from the Property.

12. Plaintiff refused to acknowledge that its construction project would make a restaurant unusable as contemplated by the parties in the Lease[.]

13. At no time prior to the execution of the Lease did Plaintiff inform Defendants that they intended to build large 4-story office/retail buildings on three sides of the Property.

Defendants asserted that disputes of material fact existed relating to their defense of constructive eviction and whether Plaintiff was entitled to damages. In a reply, Plaintiff denied breaching the Lease and noted that Defendants' argument about a current parking shortfall was being raised for the first time during litigation. The trial court granted Plaintiff's request to bifurcate liability and damages.

On May 16, 2024, the trial court entered an order granting Plaintiff's motion for summary judgment as to liability only, finding that Defendants "breached the agreement and [are] liable for all remedies available to [Plaintiff] under the terms of the agreement" and noting that a hearing on damages would be set. In relevant part, the trial court reasoned as follows:

Ha[ve Defendants] raised a question of fact as to whether Plaintiff, in word or in conduct, demonstrated a total and unqualified refusal to perform the contract? This Court can find no such evidence in the record. While [Defendants] complain[] there was a failure to provide the agreed upon 55 parking spaces and that such failure constituted a repudiation – the undisputed proof was otherwise. First this was never even raised as a problem with the leasehold. Additionally, during his deposition, in response to multiple explicit inquiries, [Mr.] McClellan confirmed that [Plaintiff] never fell below the parking requirements stipulated in the Lease:

Question: But as of November 18, 2022 [the date the Lease purportedly was terminated], there was never less than the required number of parking spots available to you?

Answer: That is correct.

Question: You'll notice in here the first really big paragraph where you say parking is a major concern, and Mr. Wood responds, "The construction of the garage, whatever that [may be], will not change the requirements per the lease to provide those 55 spots. In other words, it is your understanding that Mr. Wood was promising that, no matter what happened, you'd still have 55 spots?"

Answer: That's what he says. I have no clue how on earth he would ever accomplish that.

Question: Okay. But that never became an issue because it never occurred, correct?

Answer: There was a real risk of that being an issue. That is clearly the biggest risk in this whole thing.

Question: Understood. But as of November 18th, when you terminated the lease –

Answer: I'll stipulate that none of these things that I was afraid of have happened.

The mere fact that [Mr. McClellan] ultimately realized the problem with his sworn deposition testimony and subsequently entered a counter-veiling affidavit to rectify the problem is unpersuasive. Moreover, there is no valid explanation for the opposing sworn statements (other than presenting a defense to summary judgment). Further, the record is clear that the parking lot had ample area to accommodate up to 65 parking spaces. A simple re-striping would have easily resolved the issue and there was ample evidence that Plaintiff would have remedied the striping issue (and no evidence that Plaintiff refused to provide an immediate resolution).

[Defendants] also argue[] that a repudiation occurred due to "future construction" plans. Indeterminate plans for future construction however, are insufficient to warrant an anticipatory repudiation. There are simply no facts that raise an issue as to whether [] Plaintiff committed a voluntary act or made any statement to suggest a total and unqualified refusal to perform the contract.

On July 30, 2025, after a hearing on damages, the trial court awarded Plaintiff a judgment of \$640,268.49 against Defendants, jointly and severally. Defendants timely appealed to this Court.

ISSUES

Defendants raise multiple issues on appeal, which we consolidate and restate slightly as follows:

1. Whether the trial court erred in granting summary judgment to Plaintiff on the ground that there was no genuine issue of material fact relating to Plaintiff's compliance with the Lease's minimum parking requirement.

2. Whether the trial court erred in holding at the summary judgment stage that Plaintiff's proposals for new development did not constitute anticipatory repudiation of the Lease.

3. Whether the trial court erred in rejecting Defendants' defenses and dismissing their counterclaims.

Separately, Plaintiff requests that it be awarded its attorney's fees incurred on appeal should it prevail.

STANDARD OF REVIEW

A trial court may grant summary judgment only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. The propriety of a trial court's summary judgment decision presents a question of law, which we review de novo with no presumption of correctness. *Kershaw v. Levy*, 583 S.W.3d 544, 547 (Tenn. 2019).

"The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 83 (Tenn. 2008). As our Supreme Court has instructed,

when 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.

Rye v. Women's Care Ctr. of Memphis, 477 S.W.3d 235, 264 (Tenn. 2015). "[I]f the moving party bears the burden of proof on the challenged claim at trial, that party must produce at the summary judgment stage evidence that, if uncontroverted at trial, would

entitle it to a directed verdict.” *TWB Architects, Inc. v. Braxton, LLC*, 578 S.W.3d 879, 888 (Tenn. 2019) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986)).

When a party files and properly supports a motion for summary judgment as provided in 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 [] Rule 56, set forth specific facts . . . showing that there is a genuine issue for trial.” *Rye*, 477 S.W.3d at 265 (internal quotation marks and brackets in original omitted). “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*, 578 S.W.3d at 889 (quoting *Rye*, 477 S.W.3d at 265). “At the summary judgment stage, the trial court may not weigh evidence or determine the credibility of a witness.” *In re Lieselotte H. Rogoish Revocable Living Trust*, 720 S.W.3d 28, 40 (Tenn. Ct. App. 2023). When reviewing a grant of summary judgment, we “consider the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party’s favor.” *McCullough v. Vaughn*, 538 S.W.3d 501, 505 (Tenn. Ct. App. 2017).

DISCUSSION

I. Minimum parking requirements

Defendants argue that genuine issues of material fact preclude summary judgment. According to Defendants, one such disputed material fact concerns whether Plaintiff provided the required minimum of 55 parking spaces guaranteed under the Lease. Defendants point to their assertion in their response filed in the trial court to Plaintiff’s motion for summary judgment that only 52 striped spaces existed, as well as Mr. McClellan’s affidavit in which he explained that he “misspoke” about the number of striped spaces in his deposition testimony and that there were, in fact, only 52 striped spaces. Defendants argue further that the trial court improperly made credibility determinations at the summary judgment stage by describing Mr. McClellan’s affidavit as “unpersuasive” and finding “no valid explanation” for the discrepancy between Mr. McClellan’s deposition testimony and his affidavit. In addition, Defendants contend that they were entitled to the minimum number of parking spaces during specified periods, so the prospect that the parking lot could be restriped in the future to add more spaces cannot rectify Plaintiff’s past non-compliance with the Lease.

In response, Plaintiff points to Mr. McClellan’s deposition testimony that he “never” had fewer than the required parking spaces and that, in any case, restriping could create 65 to 70 parking spaces. Plaintiff also observes that Defendants never mentioned an existing parking shortfall in their termination letter. Plaintiff argues further that, even if it provided

less than the required minimum number of parking spaces, Defendants never gave Plaintiff a chance to remedy the shortfall as contemplated under the Lease. While interpretation of a written contract is a question of law, *Fisher v. Revell*, 343 S.W.3d 776, 779 (Tenn. Ct. App. 2009), whether a breach of contract has occurred ordinarily is a question of fact. *Carter v. Krueger*, 916 S.W.2d 932, 934–35 (Tenn. Ct. App. 1995).

As an initial matter, Defendants argue repeatedly throughout their brief that the trial court improperly made credibility determinations and drew negative inferences against them at the summary judgment stage. However, when reviewing a trial court’s grant of summary judgment, our standard of review is de novo without any presumption of correctness. *See Kershaw*, 583 S.W.3d at 547. Under this standard, the slate is clean, and we “must make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been satisfied.” *McCullough*, 538 S.W.3d at 505 (emphasis added). Given this, Defendants’ repeated assertions about the trial court’s errors are unavailing; Defendants must make their arguments anew.

On the matter of minimum parking, Defendants’ argument hinges on the materiality of the number of striped parking spaces allotted to them. The parties argue whether the shortfall could be remedied by restriping or whether Mr. McClellan’s affidavit was effective in contradicting his earlier deposition testimony.³ However, this argument is not dispositive. We disagree with Defendants’ presumption that the number of spaces is a material fact in dispute. “A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed.” *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993). Defendants only asserted an existing shortfall in parking during litigation. They did not raise this at all in their termination letter, which was rooted in concerns about the impact of future development.⁴ This Court has explained that “once a contracting party has given reasons for its actions, it cannot attempt to justify its conduct

³ In general, parties may not manufacture their own genuine issue of material of fact to stave off summary judgment simply by contradicting themselves. *See Daffron v. Mem’l Health Care Sys., Inc.*, 605 S.W.3d 11, 22 (Tenn. Ct. App. 2019) (“When a party introduces an affidavit contradicting her earlier deposition testimony, ‘[i]n the absence of a satisfactory explanation for this change in testimony, we are justified in ignoring the affidavit.’”) (quoting *Sampson v. Wellmont Health System*, 228 S.W.3d 124, 138 (Tenn. Ct. App. 2007)). Here, Mr. McClellan’s explanation was that he misspoke.

⁴ At the August 2023 summary judgment hearing, the following exchange occurred:

THE COURT: And so what you have done is you have said, we went ahead and paid some lease payments because we kept thinking you were going to re-stripe and you didn’t, so we’re now calling this a breach of contract and we’re voiding the Lease Agreement?

MR. JONES [Counsel for Defendants]: Well, Your Honor, this was not an issue, and frankly may never have been an issue had this suit not been brought, but we have to raise defenses or lose them, so we’re raising the defense. There was a breach on day one of the contract. We did not have the required number of parking spots.

on new and different grounds after suit is filed.” *Nashville Marketplace Co. v. First Cap. Institutional Real Est., Ltd.*-2, No. 89-144-11, 1990 WL 33373, at *6 (Tenn. Ct. App. Mar. 28, 1990).

In *GuestHouse Int’l, LLC v. Shoney’s N. Am. Corp.*, 330 S.W.3d 166 (Tenn. Ct. App. 2009), a case addressing the termination of a licensing agreement by the new owner of Shoney’s Inn in response to a bid by GuestHouse to relaunch the motel brand, this Court stated in part:

While the revised position by New Shoney’s in its counterclaim is interesting, it is simply not the basis on which New Shoney’s terminated the Amended and Restated License Agreement in the August 17, 2007 termination letter. As pointed out by GuestHouse, “[w]here a party gives a reason for his conduct and decision touching anything involved in the controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and different consideration.” *Louisville & N.R. Co. v. Klyman*, 108 Tenn. 304, 67 S.W. 472, 475 (1902). Therefore, we analyze the ground for termination as stated by New Shoney’s in its termination letter.

Id. at 199.

In their termination letter, Defendants referenced their concerns about the impact of Plaintiff’s plans for future development nearby; they did not assert an existing shortage of minimum parking under the Lease. There is no evidence that Defendants addressed any concern about a current parking shortfall to Plaintiff so that Plaintiff had an opportunity to remedy the shortfall as contemplated under the Lease. Indeed, the restaurant was not even operational during the underlying events of this case, further demonstrating the non-materiality of the parking issue. Defendants’ argument about a parking shortfall was a post hoc, after-the-fact basis for terminating the Lease only propounded by Defendants during litigation. Viewing the record in the light most favorable to Defendants as the standard requires, no reasonable trier of fact could regard the number of striped parking spaces as material when Defendants never raised a parking shortfall before abandoning the Lease. Rule 56 does not require a trial on factual disputes that, however they were to be resolved, would not alter the outcome of the breach of contract claims as a matter of law; Defendants may not rely on their parking shortfall theory retroactively. In sum, the number of parking spaces allotted to Defendants at the time of the termination letter is not a disputed fact that must be decided to resolve the substantive claims or defenses at issue; it is not a material fact in dispute. We therefore conclude that there is no genuine issue of material fact for trial concerning the number of parking spaces allotted to Defendants.

II. Anticipatory repudiation

Defendants argue next that there is a genuine issue of material fact as to whether Plaintiff's development plans were sufficiently advanced to constitute anticipatory repudiation, essentially rendering it impossible for Defendants to perform under the Lease and proceed with their intended restaurant. The Tennessee Supreme Court has explained anticipatory repudiation as follows:

A party to a contract can take certain actions or make certain statements that repudiate it. Such a repudiation can occur when a party "commit[s] a voluntary act which renders the party unable or apparently unable to perform the contract," *Wright v. Wright*, 832 S.W.2d 542, 545 (Tenn. Ct. App. 1991); see *Restatement (Second) of Contracts* § 250 (1979), or when "the words and conduct of the contracting party . . . amount to a total and unqualified refusal to perform the contract." *Wright*, 832 S.W.2d at 545; see *Ky. Home Mut. Life Ins. Co. v. Rogers*, 196 Tenn. 641, 270 S.W.2d 188, 194–95 (1954); *Brady v. Oliver*, 125 Tenn. 595, 147 S.W. 1135, 1139 (Tenn. 1911); *Wilkins v. Third Nat. Bank in Nashville*, 884 S.W.2d 758, 761 (Tenn. Ct. App. 1994). An indication that more negotiations are sought is not a total and unqualified refusal to perform. See *Palmiero v. Spada Distr. Co.*, 217 F.2d 561, 565 (9th Cir. 1954) (holding that "an anticipatory breach of contract is not established by a negative attitude or one which indicates that more negotiations are sought").

When a repudiation occurs before the time that a contract requires a party to perform, the repudiating party has committed an "anticipatory repudiation" or an "anticipatory breach" of the contract. See *Church of Christ Home for Aged v. Nashville Trust Co.*, 184 Tenn. 629, 202 S.W.2d 178, 183 (1947); 23 Samuel Williston, *Treatise on the Law of Contracts* § 63.29 (Richard A. Lord ed., 4th ed. 2002).

UT Med. Grp., Inc. v. Vogt, 235 S.W.3d 110, 120 (Tenn. 2007). Following a party's anticipatory repudiation, the non-breaching party may "treat the repudiation as an immediate breach by bringing suit or changing position in some way[.]" *Id.*

This Court has explained further:

"[T]he principal policy for the anticipatory repudiation doctrine is that following the renunciation, the other party should not be required to proceed with the formal, economically wasteful, and useless act of further performance." Steven W. Feldman, 22 Tenn. Prac. Contract Law and Practice § 11:16; see 13 Williston on Contracts § 39:39 (4th ed.) ("If the promisor is not going to keep its promise in any event, it is useless to perform

the condition, and the promisor becomes liable without the promisee's performance or tender."'). "The law does not require a futile gesture." *Coulson v. Schroer*, No. 01-A-01-9312-CH00539, 1994 WL 228790, at *3 (Tenn. Ct. App. May 27, 1994). Accordingly, "[a]nticipatory breach is a recognized defense to a breach of contract action." *Hicks v. Cheers*, No. M2019-01428-COA-R3-CV, 2021 WL 3200830, at *5 (Tenn. Ct. App. July 29, 2021) (citing *Mid-S. Indus., Inc. v. Martin Mach. & Tool, Inc.*, 342 S.W.3d 19, 25–26 (Tenn. Ct. App. 2010)).

Kokko v. Moore, No. M2024-00898-COA-R3-CV, 2025 WL 2953694, at *14 (Tenn. Ct. App. Oct. 20, 2025), *perm. app. denied* (Tenn. Mar. 30, 2026).

In support of their argument on anticipatory repudiation, Defendants point to several pieces of evidence in the record, including a November 4, 2021 email from Mr. McClellan to his Director of Operations, Kane Weathers, stating that development was a "big problem" and that the parking clause was added "to hedge the parking" against new structures; a proposed amendment to the Lease put forward by Plaintiff that would reduce Defendants' guaranteed on-site parking to 35 spaces; and developmental planning materials including a "[k]ick-off" meeting on redevelopment, build-out studies, drawings, and emails concerning a parking deck. Defendants assert that under Tennessee Rule of Civil Procedure 56, any competing inferences stemming from this evidence may not be resolved against them at the summary judgment stage.

In response, Plaintiff relies on the high threshold needed to establish anticipatory repudiation—total and unqualified refusal to perform. Plaintiff states that the evidence cited by Defendants shows only hypothetical scenarios and that nothing had been finalized. Plaintiff notes that it assured Mr. McClellan that it would continue to provide the necessary minimum parking, pointing to emails in October 2022 promising to maintain the 55-space minimum. Plaintiff also emphasizes that it had the right to develop its property.

Based upon our careful review of the record, we discern no genuine issue of material fact concerning whether Plaintiff anticipatorily repudiated the Lease. Plaintiff correctly cites the steep threshold of total and unqualified refusal to perform needed to establish anticipatory repudiation. Defendants have pointed to nothing remotely approaching that high bar. While Defendants urge that this is a dispute that should be put to the trier of fact, we disagree. Defendants rely on preliminary development plans, a proposed parking amendment, maps, and drawings.⁵ These are all hypothetical or tentative in nature. Even if construction went ahead as proposed, it is uncertain precisely how it would impact Defendants. It is not enough to suppose or predict; for anticipatory repudiation, the evidence must be clear and definite. Additionally, there is no evidence that Plaintiff or any

⁵ We observe, and Defendants concede, that the Lease does not bar Plaintiff from pursuing development plans on its property.

of its representatives ever made a categorical statement to Defendants that it would not honor the Lease.

For Defendants to demonstrate a genuine issue of material fact as to whether Plaintiff anticipatorily repudiated the Lease, they would have to point to some evidence at the summary judgment stage that Plaintiff committed a voluntary act making it unable or apparently unable to perform, or a clear and unconditional statement that it would not perform. The record contains no such words or actions by Plaintiff. Collectively, the development plans fall into the realm of a hypothetical future project rather than a clear and definite declaration by Plaintiff repudiating the Lease. The preliminary and hypothetical plans cited by Defendants cannot, as a matter of law, constitute anticipatory repudiation. Even drawing all inferences in Defendants' favor, there simply is no basis in this record upon which a rational trier of fact could find a total and unqualified refusal to perform on Plaintiff's part. We conclude that there is no genuine issue of material fact for trial concerning whether Plaintiff anticipatorily repudiated the Lease.

III. Defendants' defenses and counterclaims

Defendants contend that the trial court erred in rejecting their defenses of first material breach/set-off, breach of quiet enjoyment, constructive eviction, unclean hands, and failure to mitigate, and in dismissing their counterclaims for breach of quiet enjoyment, material breach of contract, constructive eviction, and private nuisance. Defendants insist that their theories arise out of Plaintiff's conduct as of the date of the termination letter, not on Plaintiff's hypothetical future conduct. In response, Plaintiff argues that Defendants waived any argument pertaining to their counterclaims by not identifying such an issue in their brief. Plaintiff also asserts that Defendants' counterclaims are unripe since they rest on hypothetical plans for development. Finally, Plaintiff argues that because it never interfered with Defendants' parking or usage of the premises, there is no basis on which to support breach of quiet enjoyment, material breach of contract, constructive eviction, or private nuisance.

Initially, we disagree with Plaintiff's contention that Defendants waived any arguments about their counterclaims. Defendants adequately challenged the dismissal of their counterclaims under the umbrella of their other issues. Indeed, this issue is inextricably tied to Defendants' previous issues. Each of Defendants' defenses and counterclaims is bound up in their core arguments regarding minimum parking and future development.

Nonetheless, the record reveals no genuine issue of material fact as to any action by Plaintiff interfering with Defendants' performance on the Lease or their beneficial use of the premises. Defendants' argument about an existing parking shortfall was first asserted during litigation; it was not a contemporary basis for Defendants' termination letter. It is notable that the restaurant never opened, which makes Defendants' concerns about parking

even more hypothetical. Beyond parking, Defendants generally cite evidence of future development and their fears about what this would mean for their intended restaurant. However, when Defendants sent their termination letter, construction under the new development plans had not begun. Its scope and adverse impact on Defendants, if any, was still to be determined. Defendants have raised a litany of defenses and counterclaims, but they all depend squarely on Plaintiff having acted against their beneficial use of the premises. Defendants have failed to point to any specific act by Plaintiff during the relevant times that would sustain any of their counterclaims or defenses. *See, e.g., Hixson v. Am. Towers, LLC*, 593 S.W.3d 699, 712 (Tenn. Ct. App. 2019) (breach of quiet enjoyment requires a landlord act interfering with use); *NWI XVII, L.P. v. Tom James Co., Inc.*, No. 01-A-01-9303CV00083, 1993 WL 286018, at *3 (Tenn. Ct. App. July 30, 1993) (constructive eviction occurs when landlord renders the premises unfit for occupancy or deprives tenant of beneficial enjoyment of the premises); *ARC LifeMed, Inc. v. AMC-Tenn., Inc.*, 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005) (breach of contract requires proof of nonperformance amounting to a breach); *Lane v. W.J. Curry & Sons*, 92 S.W.3d 355, 364–65 (Tenn. 2002) (private nuisance requires interference with reasonable use and enjoyment of property). The common denominator undermining Defendants’ counterclaims and associated defenses is the absence of evidence at the summary judgment stage of conduct by Plaintiff interfering with or obstructing Defendants’ use of the property in any way.

Whether couched as first material breach, breach of quiet enjoyment, constructive eviction, private nuisance, or set-off, each of Defendants’ myriad defenses and counterclaims depends on accepting their assertion that Plaintiff did something that interfered with their beneficial use of the premises or their performance under the Lease. The evidence shows no such actions by Plaintiff. Without justification, Defendants stopped paying rent and abandoned the premises. Thus, Defendants breached the Lease, and their defenses and counterclaims fail. We affirm the trial court’s grant of summary judgment to Plaintiff.

IV. Plaintiff’s request for attorney’s fees incurred on appeal

Plaintiff requests its attorney’s fees incurred on appeal pursuant to Paragraph 17 of the Lease. Tennessee adheres to the “American Rule” regarding attorney’s fees. *Eberbach v. Eberbach*, 535 S.W.3d 467, 474 (Tenn. 2017). The American Rule provides that “a party in a civil action may recover attorney fees only if: (1) a contractual or statutory provision creates a right to recover attorney fees; or (2) some other recognized exception to the American Rule applies, allowing for recovery of such fees in a particular case.” *Cracker Barrel Old Country Store, Inc. v. Epperson*, 284 S.W.3d 303, 308 (Tenn. 2009). When a contract mandates an award of attorney’s fees, courts lack discretion to deny such an award. *Eberbach*, 535 S.W.3d at 478. Plaintiff has prevailed on appeal. Therefore, we grant Plaintiff’s request for attorney’s fees incurred on appeal, and we remand to the trial court for a determination of reasonable attorney’s fees incurred on appeal to be awarded to Plaintiff pursuant to the Lease.

CONCLUSION

The judgment of the Circuit Court for Hamilton County is hereby affirmed, and this case is remanded for further proceedings consistent with this opinion. Costs on appeal are assessed jointly and severally to the appellants, JPM Restaurant Four, LLC, and John McClellan, for which execution may issue if necessary.

KRISTI M. DAVIS, JUDGE