

NOTICE  
Decision filed 07/13/17. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2017 IL App (5th) 150464-U

NO. 5-15-0464

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

---

CARMED KS-4, an Illinois Partnership,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 12-L-263
	)	
JOEY ALLEN,	)	Honorable
	)	A.A. Matoesian,
Defendant-Appellant.	)	Judge, presiding.

---

PRESIDING JUSTICE MOORE delivered the judgment of the court. Justices Chapman and Cates concurred in the judgment.

**ORDER**

¶ 1 *Held:* Trial court erred in granting injunction and denying defendant's motion for summary judgment related thereto; the court abused its discretion in denying defendant's motion for continuance; judgment for plaintiff reversed and case remanded for a new trial in which liquidated damages formula shall not be enforced.

¶ 2 The defendant, Joey Allen, appeals the October 1, 2015, judgment of the circuit court of Madison County in favor of the plaintiff, Carmed KS-4 (Carmed), an Illinois Partnership, on a complaint for a breach of a covenant not to compete in the partnership agreement. Joey raises several issues on appeal, including: (1) whether the circuit court erred by denying Joey's motion for a summary judgment as to Carmed's complaint for an

injunction; (2) whether the circuit erred by denying Joey's motion to continue; and (3) whether the circuit court erred in granting \$224,000 in liquidated damages to Carmed. Because we find these issues dispositive, we have elected not to address many of the remaining issues. For the following reasons, we reverse and remand with directions for the circuit court to enter an order granting Joey's motion for a summary judgment on the injunction issue and to conduct a new trial on the remaining issues in light of this order.

¶ 3

### FACTS

¶ 4 Carmed is an Illinois Partnership consisting of two Missouri corporations, an Illinois limited liability company, and an Illinois corporation. Joey is a resident of the state of Missouri. On October 7, 2014, Carmed filed an amended complaint (complaint) for a breach of contract, pursuant to a partnership agreement (Agreement) that was effective on or about March 10, 2007. The Agreement stipulated that Missouri law should apply. The complaint alleged that Carmed was formed for the purpose of providing painless dent repair services within a defined operations area and that management of the partnership was vested in Joey as the managing partner. The complaint further alleged that the Agreement contained a covenant not to compete which Joey violated on January 17, 2012, by performing dent repair services at an automobile dealership in Missouri, which was Carmed's current or past customer. Carmed requested damages in the amount of \$245,428.89, plus attorney fees and costs—pursuant to a liquidated damages clause in the Agreement—and also requested the circuit court to issue a 24-month injunction against Joey.

¶ 5 On July 28, 2015, Joey filed a motion for a summary judgment, alleging, *inter alia*, that pursuant to Missouri law, the term of an injunction issued to enforce a covenant not to compete begins with the date of termination or discharge of employment and not the date the injunction is granted. The motion further alleged that pursuant to Missouri law, the circuit court may not extend any term of a covenant not to compete. Joey contended in the motion that because he left Carmed's employ on April 10, 2010, the restrictive covenant would have expired on April 10, 2012, and it had been over five years since he left Carmed's employ at the time of the filing of the motion. Because the covenant not to compete had long since expired, Joey requested a summary judgment as to Carmed's request for an injunction. The circuit court denied the motion for a summary judgment on August 21, 2015.

¶ 6 On September 23, 2015, Joey filed a motion to continue, in which he asserted, *inter alia*, that his lead counsel was unavailable for the trial scheduled for September 28, 2015, due to surgeries that occurred on September 22 and September 23, 2015. A hearing on the motion to continue was conducted the following day. Two attorneys appeared on Joey's behalf. One worked in the lead counsel's office in Missouri and appeared in place of lead counsel—who was unavailable due to the surgeries. He indicated that lead counsel, in addition to a scheduled surgery on September 22, 2015, was required to undergo an unexpected second surgery on September 23, 2015, and would not be able to proceed at trial as originally anticipated.

¶ 7 The other counsel appearing for Joey was a local attorney who had served as co-counsel in the case. He explained that his "role in this has been nothing. I just was asked

to come in to handle whenever there was a court date or status conference just to be here to make sure someone was here." He further stated that "I took no part in discovery or the issues or the motion. \*\*\* I'm at a disadvantage because my only function was to show up whenever there's a status conference. \*\*\* [M]y role was just to be local and show up on court dates." The circuit court stated that "this case has been dragging on for quite a while \*\*\*" and instructed the attorneys to attempt a settlement negotiation, which proved unsuccessful. Co-counsel emphasized that "[I]f I walked in here and tried this case on Monday that would be the first time I have seen anything involved in this case." The circuit court denied the motion to continue because co-counsel was listed as an attorney of record throughout the case. Co-counsel promptly requested permission to file a motion to withdraw, which the circuit court also denied.

¶ 8 Subsequent to the trial, the circuit court entered a judgment on October 1, 2015, in which it found, *inter alia*, that Joey breached the covenant not to compete and awarded \$224,000 in liquidated damages to Carmed. Joey filed a timely notice of appeal. Additional facts will be set forth as necessary to our analysis of the dispositive issues on appeal.

¶ 9 ANALYSIS

¶ 10 The three issues we address on appeal are: (1) whether the circuit erred by denying Joey's motion for a summary judgment as to Carmed's complaint for an injunction; (2) whether the circuit court erred by denying Joey's motion to continue; and (3) whether the circuit court erred by granting \$224,000 in liquidated damages to Carmed.

¶ 11

*I. Summary Judgment*

¶ 12 The first issue on appeal is whether the circuit court erred by denying Joey's motion for a summary judgment as to Carmed's complaint for an injunction. "A trial court's decision to grant summary judgment should only be made where there is no genuine issue of material fact." *Hernandez v. Alexian Brothers Health System*, 384 Ill. App. 3d 510, 518 (2008). "The summary judgment procedure allows trial courts to determine whether a genuine issue of material fact exists but is not designed for the trial court to try a question of fact." *Id.* "Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal 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." *Id.* (quoting *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 305 (2005)). "In order to survive a motion for summary judgment, the nonmoving party must present a factual basis that would arguably entitle him \*\*\* to a judgment." *Id.* "[W]e apply a *de novo* standard of review to the trial court's grant or denial of a summary judgment motion." *Id.* at 519.

¶ 13 In this case, we find the circuit court erred by denying Joey's motion for a summary judgment on the injunction issue. Missouri law is clear that "[w]hen an injunction is granted to enforce a non-competition or non-solicitation agreement, the term of the injunction begins with the date of termination, not the date of the judgment." *Mihlfeld & Associates, Inc. v. Bishop & Bishop, L.L.C.*, 295 S.W.3d 163, 177 (Mo. Ct. App. 2009). Moreover, "[t]he trial court cannot extend the duration of the covenant or

alter the fact that the non-compete period runs even during the pendency of litigation." *Id.*

¶ 14 Here, the covenant not to compete set forth in section 6.4 of the Agreement provides that it is effective for the duration of what is referred to as the "Restrictive Period." The "Restrictive Period" is defined in the appendix of the Agreement as follows:

"the period of time extending from the Effective Date through the entire term of the Agreement and for the period of 24 months following *the earlier of* termination of this Agreement or termination of the Managing Partner's Interest plus any period of time during which Managing Partner has violated the non-compete or non-solicitation provisions of Section 6.4." (Emphasis added.)

In this case, Joey's employment with Carmed ceased on April 10, 2010. Accordingly, pursuant to section 6.4 of the Agreement, and considering the allegation that Joey violated the covenant not to compete for one day, we find that the covenant not to compete expired, at the latest, on April 11, 2012. Pursuant to Missouri law, no injunction could issue past that date. See *Mihlfeld*, 295 S.W.3d at 177. When looking at these facts in a light most favorable to Carmed, we find no genuine issue of material fact existed on July 28, 2015—the date on which Joey filed his motion for summary judgment—and that Joey was entitled to judgment as a matter of law. See *Hernandez*, 384 Ill. App. 3d at 518. Accordingly, the circuit court erred by denying Joey's motion for a summary judgment on the injunction issue. *Id.*

¶ 15

## II. Motion to Continue

¶ 16 "The granting or denial of a motion for continuance is within the sound discretion of the trial court[,] \*\*\* and the exercise of such discretion will not be interfered with by the appellate tribunals unless there has been a manifest abuse of such discretion." *Reecy v. Reecy*, 132 Ill. App. 2d 1024, 1026-27 (1971). "The broad discretion conferred on a trial court in allowance or denial of continuances must be exercised judiciously and not arbitrarily and capriciously and the [trial] court should not refuse a continuance where the ends of justice clearly require it and an abuse of discretion in so doing will justify a reversal." *Id.* at 1027. Moreover, even a previous continuance does not reveal an intent to delay the administration of justice. *Id.* Nor does a case set for trial by agreement estop a litigant from seeking a continuance for just cause. *Id.* "While the courts are cognizant that continuances will be sought merely to delay the administration of justice[,] they have zealously guarded the right of a party to a day in court with counsel \*\*\* when it has been conscientiously sought." *Id.* at 1027-28. "A litigant has no absolute right to have a case continued." *Merchants Bank v. Roberts*, 292 Ill. App. 3d 925, 927 (1997). "A decisive factor is whether the party asking for the continuance has shown diligence in proceeding with the cause." *Id.*

¶ 17 In this case, we find the circuit court abused its discretion by denying, in an arbitrary and capricious manner, Joey's motion to continue. See *Reecy*, 132 Ill. App. 2d at 1026-27. Joey's lead counsel had originally planned to proceed with the trial on September 28, 2015, notwithstanding the fact that he was scheduled to undergo surgery on September 22, 2015. However, as indicated, lead counsel was unexpectedly required

to undergo a second surgery on September 23, 2015, thereby resulting in his being unable to proceed with the trial as originally expected and hence the reason for the filing of the motion to continue.

¶ 18 Given the fact that Joey had filed no motions to continue other than the one at issue here and that lead counsel originally planned to proceed with the trial as originally scheduled notwithstanding his surgery on September 22, 2015, we find this to be due diligence on the part of lead counsel to proceed in this case. See *Merchants Bank*, 292 Ill. App. 3d at 927. We further find the unexpected second surgery to be just cause for Joey to seek the motion to continue, despite the fact that the case was set for trial. See *Reecy*, 132 Ill. App. 2d at 1027. Indeed, ensuring Joey's right to his day in court with counsel as it has been conscientiously sought is properly applied to the circumstances surrounding the motion to continue here. *Id.* at 1027-28. We reiterate that Joey sought no motions to continue other than the one at issue, but even assuming, *arguendo*, that he did, a previous continuance does not indicate an intent to delay the administration of justice. *Id.* at 1027. There is no evidence to show any such intent on the part of Joey's counsel. We find the circuit court abused its discretion by denying Joey's motion to continue, and therefore, we reverse and remand for a new trial on liability and damages.

¶ 19 *III. Liquidated Damages*

¶ 20 "When appropriate, a reviewing court may address issues that are likely to recur on remand in order to provide guidance to the lower court and thereby expedite the ultimate termination of the litigation." *Pielet v. Pielet*, 2012 IL 112064, ¶ 56. The final issue on appeal is whether the circuit court erred by awarding \$224,000 in liquidated



damages to Carmed. Because we find this to be an issue likely to recur on remand, we address this particular issue to further guide the circuit court. "The validity of a liquidated damages provision is a question of law and, therefore, is reviewed *de novo*." *Jameson Realty Group v. Kostiner*, 351 Ill. App. 3d 416, 424 (2004).

¶ 21 Under Missouri law, " '[l]iquidated damages are a measure of compensation which, at the time of contracting, the parties agree shall represent damages in a case of breach.' " *Arcese v. Daniel Schmitt & Co.*, 504 S.W.3d 772, 777 (Mo. Ct. App. 2016) (quoting *Paragon Group, Inc. v. Ampleman*, 878 S.W.2d 878, 880 (Mo. Ct. App. 1994)). "Conversely, 'a penalty [clause] is not a measure of compensation for contract breach, but rather, a punishment for default or a security for actual damages sustained due to non-performance which incorporates the idea of punishment.' " *Id.* (quoting *Goldberg v. Charlie's Chevrolet, Inc.*, 672 S.W.2d 177, 179 (Mo. Ct. App. 1984)). Missouri courts have consistently held that the party requesting enforcement of the liquidated damages provision must show at least some actual harm caused by the breach. *Id.* at 781.

¶ 22 "Ordinarily, 'penalty clauses' are disguised as liquidated damages clauses." *Id.* at 777. "The mere branding of a provision in a contract as one of 'liquidated damages' does not, however, make it so." *Id.* at 778. "If, in fact, said provision is a penalty, the labeling of the clause is of no consequence." *Id.* "Accordingly, the import of construing purported liquidated damages provisions cannot be overstated, in that, generally, liquidated damages clauses are valid and enforceable, whereas 'penalty clauses' are invalid and unenforceable." *Id.*

¶ 23 " 'There is no bright line separating a liquidated damages clause from a penalty clause.' " *Id.* (quoting *Burst v. R.W. Beal & Co.*, 771 S.W.2d 87, 90 (Mo. Ct. App. 1989)). Missouri law looks to "the rules of the Restatement of Contracts for determining whether a liquidated damages clause is in fact a penalty." *Grand Bissell Towers, Inc. v. Joan Gagnon Enterprises, Inc.*, 657 S.W.2d 378, 379 (Mo. Ct. App. 1983). These rules are:

" '(1) An agreement, made in advance of breach, fixing the damages therefor, is not enforceable as a contract and does not affect the damages recoverable for the breach, unless

(a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and

(b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation.' " *Id.* (quoting Restatement of Contracts § 339 (1932)).

¶ 24 In this case, we find the liquidated damages formula to be an unenforceable penalty. The formula at issue is in section 6.4(e) of the Agreement and states in relevant part as follows:

"(e) \*\*\* the Partners agree that the Class A Partners shall be entitled to the following remedies: \*\*\* (2) the Managing Partner shall pay to the Class A Partners upon a violation of this Section 6.4 as liquidated damages and not as a penalty \*\*\* an aggregate amount equal to two (2) times the annualized adjusted net income before interest and taxes of the Partnership based on the adjusted net

income before interest and taxes of any three consecutive months during the existence of the Partnership that the Partnership generated the greatest adjusted net income before interest and taxes compared to any other consecutive three-month period, plus two (2) times the annualized salary of the Managing Partner based on the same three-month period. \*\*\*"

¶ 25 Notwithstanding the language of the provision labeling this formula "as liquidated damages and not as a penalty," we find this portion of the clause to be an unenforceable penalty under the facts of this case. See *Arcese*, 504 S.W.3d at 778. This is because the formula in the provision—which in this case equals \$224,000—was an unreasonable forecast of just compensation for the harm that was caused by the breach. See *Grand Bissell Towers*, 657 S.W.2d at 379. The complaint alleges only one date that Joey was observed violating the covenant. Under the facts alleged in the complaint, we find that, under Missouri law, this formula amounts to a penalty. See *Arcese*, 504 S.W.3d at 777. Accordingly, this formula shall not be considered on remand.

¶ 26 CONCLUSION

¶ 27 For the foregoing reasons, we reverse the October 1, 2015, judgment of the circuit court of Madison County and remand with directions for the circuit court to enter an order granting Joey's motion for a summary judgment as to Carmed's request for an injunction and to conduct a new trial on issues of liability and damages consistent with this order.

¶ 28 Reversed and remanded with directions.