

No. 1-18-1496

**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).

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IN THE APPELLATE COURT  
OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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MARK SEBASTIAN, )  
 ) Appeal from the  
 ) Circuit Court of  
 Plaintiff and Counterdefendant-Appellant, ) Cook County  
 )  
 v. ) No. 2014 CH 9892  
 )  
 SWAN WEALTH ADVISORS, INC., ) Honorable  
 ) David B. Atkins,  
 ) Judge Presiding.  
 Defendant and Counterplaintiff-Appellee. )

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JUSTICE REYES delivered the judgment of the court.  
Presiding Justice McBride and Justice Burke concurred in the judgment.

**ORDER**

¶ 1 *Held:* Reversing (i) the grant of summary judgment in favor of an employer on its employee’s complaint for breach of his employment agreement and other causes of action, (ii) the grant of summary judgment and attorney fees in favor of the employer on its counterclaim for breach of the employment agreement, and (iii) the denial of the employee’s motion to amend his complaint.

¶ 2 Mark Sebastian (Sebastian) filed an action in the circuit court of Cook County against his former employer, Swan Wealth Advisors, Inc. (Swan), after Swan terminated his employment. Sebastian asserted that Swan improperly characterized his termination as “for cause” to avoid paying him certain amounts pursuant to his employment agreement. Swan counterclaimed, alleging that Sebastian had violated the employment agreement. On appeal, Sebastian challenges

the circuit court orders: (i) granting summary judgment in favor of Swan on Sebastian's complaint and denying his motion to reconsider; (ii) granting summary judgment in favor of Swan on its counterclaim and awarding Swan attorney fees and costs; and (iii) denying Sebastian's motion to amend his complaint. For the reasons discussed herein, we reverse and remand this matter to the circuit court for further proceedings.

¶ 3

### BACKGROUND

¶ 4 Sebastian, an Illinois resident, is a member and employee of Option Pit, LLC (Option Pit), which offers training regarding options trading. Swan is a Colorado corporation which provides clients with investment strategy and advice; Randy Swan (Randy) is its president and chief executive officer.

¶ 5 As the parties negotiated his potential employment with Swan, Sebastian signed a confidentiality and non-disclosure agreement (NDA), dated as of August 8, 2013. After a brief period where Sebastian provided services to Swan through Option Pit, Swan hired Sebastian as a portfolio manager/trader pursuant to an employment agreement dated as of October 31, 2013; the agreement is governed by Illinois law. Sebastian was employed on an at-will basis.

¶ 6 The employment agreement stated that Swan understood that Sebastian would continue to provide certain advice and services to Option Pit, but obligated him to devote substantially all of his working time, attention, and best efforts to the performance of his duties to Swan. He agreed to not engage in any other business or render professional services to any other person or entity unless explicitly approved in writing by Swan. Although he was free to work from any location, he was expected to spend approximately one week per month on average in Swan's offices in Durango, Colorado. The employment agreement acknowledged the continued validity of the NDA and Sebastian's obligations to comply with all other employee policies, as well as

the rules and regulations of the Securities and Exchange Commission (SEC) and the Financial Industry Regulatory Authority (FINRA). The employment agreement further provided that in the event of a breach or threatened breach of the employment agreement, the non-breaching party was entitled to an injunction, money damages, and reasonable attorney fees and costs.

¶ 7 Under the employment agreement, Sebastian received a monthly salary based on a percentage of Swan's net revenue. The agreement provided for a potential "incentive and/or bonus" payment based on Sebastian's achievement of certain performance milestones, as well as an additional bonus payment in the event that Swan was sold. He was also entitled to a sizeable termination payment if he was terminated other than for "cause." Termination for cause was defined to include termination of Sebastian's employment by reason of: (i) his material breach of the employment agreement or any other agreement with Swan; or (ii) his gross negligence or intentional misconduct with respect to the performance of his duties under the agreement. The employment agreement provided that no termination would be deemed to be a termination for cause unless Swan provided Sebastian with written notice of what it reasonably believed were the grounds for any termination for cause and Sebastian failed to take appropriate remedial action – determined in Swan's sole discretion – during the subsequent 30-day period. No such notice and opportunity were required for "actions that cannot by their nature be remedied."

¶ 8 Within a matter of months, Swan was dissatisfied with Sebastian's work performance. In an email sent to Sebastian on March 11, 2014, Randy referenced "significant gaps" between Swan's expectations and Sebastian's results, as well as "several recent non-remediable violations of our contract." Randy offered two options: (i) to mutually terminate the employment agreement – waiving the termination payment and certain other financial terms – and enter into a new employment agreement by which Sebastian would continue in his position as a revenue

sharing partner of Swan but at a lower compensation level than previously negotiated; or (ii) to terminate the agreement and “go our separate ways.” Approximately two weeks later, Swan sent Sebastian a proposed “new agreement” which lowered his compensation level. The document set forth a list of purported issues with Sebastian’s work, including: tardiness in his preparation of trading manuals and a trading program; his failure to travel to Durango for approximately one week a month and to provide training for Swan employees; and deficiencies in his sales and branding efforts. Randy also opined that Sebastian’s loyalty to Option Pit posed a conflict of interest with Swan and expressed frustration that Sebastian had asked Swan to pay Option Pit for consulting services which Randy believed were part of Sebastian’s job responsibilities at Swan. Randy characterized Sebastian as “often unorganized” and stated that Sebastian “often let projects go unfinished.”

¶ 9 In a response emailed in early April 2014, Sebastian addressed Randy’s criticisms. Among other things, Sebastian offered reasons for the delay with respect to the trading manual but recognized that it was late. He detailed his sales efforts but indicated that he had encountered more difficulty than he had anticipated. As to Option Pit, Sebastian stated that he had essentially removed himself from the running of the company and was working fewer than five hours per week for Option Pit at that point.<sup>1</sup> He acknowledged he was “sometimes [c]haotic” and needed to improve the timeliness of his projects. Sebastian accepted the compensation reduction.

¶ 10 Sebastian submitted work product in May 2014 which contained errors. In an email dated May 22, 2014, Randy informed Sebastian that he was taking over the project and that he could “no longer tolerate these types of problems.” Sebastian responded that he wished to see the project through to completion and that he understood and shared Randy’s frustration. He

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<sup>1</sup> During oral argument before this Court, Sebastian’s counsel confirmed that his client was still currently involved with Option Pit.

explained that he made a “poor decision” and a “massive strategic mistake” by relying on automated processes and flawed information. Sebastian acknowledged that he had “over promised and under delivered” and that he was “humbled” and “embarrassed.” He apologized and offered to take a retroactive pay reduction “assuming I am not fired.”

¶ 11 In early June 2014, Swan terminated Sebastian for cause. A week later, Sebastian filed a complaint against Swan in the circuit court of Cook County. He alleged that (i) there was no cause for his termination and (ii) Swan had paid him only a portion of his accrued compensation and had wrongfully refused to make the termination payment. Sebastian sought an accounting and asserted claims for breach of the employment agreement and violation of the Illinois Wage Payment and Collection Act (Act) (820 ILCS 115/1, *et seq.* (West 2014)).

¶ 12 On August 20, 2014, Swan filed (i) an answer and affirmative defenses and (ii) counterclaims against Sebastian. Sebastian filed a motion pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)) to dismiss Swan’s counterclaims and to strike its affirmative defenses. After Sebastian’s section 2-615 motion was granted in part and denied in part, Swan filed amended affirmative defenses and counterclaims.

¶ 13 In count I of its amended counterclaims, Swan alleged that Sebastian had breached the NDA by disclosing the terms of his employment agreement to another Swan employee. In count II, Swan alleged that Sebastian had breached the employment agreement by: (i) disclosing confidential information regarding his employment agreement, as well as confidential information regarding an employment offer made by Swan to a prospective employee; (ii) failing to spend one week per month on average in Swan’s offices in Durango; (iii) working for Option Pit in excess of the agreed-upon parameters; (iv) violating federal regulations and Swan’s code of ethics regarding public communications, *e.g.*, failing to report certain communications to

Swan's chief compliance officer (CCO) and publishing a white paper despite the CCO's refusal to approve such publication; (v) violating SEC and FINRA regulations by personally trading securities and making trade recommendations regarding securities on Swan's restricted securities list; and (vi) failing to disclose his affiliation with other business ventures. Swan further alleged that Sebastian committed gross negligence by, among other things: (i) failing to timely create a training manual and training program; (ii) failing to publicly promote Swan and its products; and (iii) failing to bring in new clients or to improve his client-development efforts.

¶ 14 Swan filed a motion for summary judgment with respect to Sebastian's complaint in July 2016. The exhibits included: the employment agreement; Sebastian's deposition; excerpts from Swan's code of ethics and Sebastian's agreement to comply with the code; correspondence between Randy and Sebastian; and the affidavit of Ethan Bates (Bates), Swan's chief financial officer (CFO). Bates averred, in part, that in order to timely compensate Sebastian and other employees whose compensation was based on a percentage of net revenue, Swan would pay them prior to revenue being finalized; certain expenses incurred by Swan were not included in the calculation of payments to these individuals. Swan also received revenue in advance for work performed in a given quarter, which would be "evened out" over the three months of the quarter to reflect the completion of the work that was prepaid. Due to this "evening out" process, Sebastian was overpaid in April and May when he did not work through June of 2014. After accounting for prior overpayments, Bates determined that Swan did not owe Sebastian any amount and that Sebastian owed \$223 to Swan.

¶ 15 While Swan's summary judgment motion was pending, Sebastian filed a motion for leave to file an amended complaint in August 2016, seeking to join Randy as an additional defendant and to add counts to the complaint. The proposed amended complaint included five counts:

(i) breach of the employment agreement (against Swan); (ii) violation of the Act (against Swan); (iii) violation of the Act, *i.e.*, asserting a claim against Randy personally pursuant to section 13 of the Act (820 ILCS 115/13 (West 2014)); (iv) breach of the implied duty of good faith and fair dealing (against Swan); and (v) accounting. Swan objected to the motion, arguing that the information alleged in the new claims was available at the time of Sebastian's original complaint. In a memorandum opinion and order entered on October 4, 2016, the circuit court denied Sebastian's motion to amend. The circuit court noted that the case had already proceeded through extensive discovery and motion practice and that the proposed amendments did not cure any defects, but merely alleged alternative theories of recovery that did not depend on any facts obtained during discovery and could have been raised during the prior two-year period.

¶ 16 Sebastian subsequently filed a response to Swan's motion for summary judgment, arguing that his alleged violations of the employment agreement were "just excuses" that Randy utilized to justify asking Sebastian to lower his base salary. Sebastian asserted that Randy attempted to renegotiate the employment agreement in late May 2014, but it was only after Sebastian refused to forfeit the protections of his agreement – including the termination payment – that the negotiations failed and he was terminated. Sebastian argued that he did not commit a material breach or gross negligence and that he had not received notice because the employment agreement did not provide that notice by email was proper.

¶ 17 The circuit court granted Swan's motion for summary judgment in a memorandum opinion and order entered on May 26, 2017. After rejecting Sebastian's argument regarding notice, the circuit court found that there was cause for termination. The circuit court noted Sebastian's failure to comply with the requirements in the employment agreement regarding his work in Durango. The circuit court further observed that Sebastian was advised repeatedly

throughout his employment regarding his unsatisfactory work and that he had recognized in an email that his poor performance could result in his firing. Finally, the circuit court rejected Sebastian's arguments regarding his alleged underpayment.

¶ 18 Sebastian filed a motion to reconsider the grant of summary judgment in Swan's favor. He argued, among other things, that it was inappropriate to make a determination regarding the materiality of a breach on a motion for summary judgment because such determination involves factual issues. Swan responded that Sebastian had not identified any newly discovered evidence, changes in the existing law, or errors in the circuit court's application of existing law.

¶ 19 In the meantime, Swan filed a motion for summary judgment on count II of its amended counterclaims – alleging breach of the employment agreement – and sought attorney fees and costs.<sup>2</sup> Sebastian responded that neither Swan nor the circuit court had identified any specific breach of the employment agreement by Sebastian. He also argued that the only fees that Swan may possibly be entitled to recover would be those spent in its prosecution of its counterclaim, *i.e.*, not any fees incurred in defending against Sebastian's complaint.

¶ 20 In a memorandum opinion and order entered on December 5, 2017, the circuit court ruled on both Sebastian's motion to reconsider and Swan's motion for summary judgment on its counterclaim. In denying the motion to reconsider, the circuit court noted, in part, that it was inappropriate for Sebastian to raise a new factual argument for the first time in the motion, *i.e.*, that he was entitled to the termination payment because Swan had terminated the original agreement and entered into a new agreement. The circuit court further stated that Sebastian's misconduct constituted both a material breach and gross negligence under the employment agreement. As to Swan's motion for summary judgment on its counterclaim, the circuit court

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<sup>2</sup> In the motion, Swan represented that it voluntarily dismissed count I of the amended counterclaims, alleging breach of the NDA.



granted the motion “only in that the Court finds [Sebastian] materially breached the Employment Agreement,” but otherwise denied the motion because there were factual issues regarding the extent of damages.

¶ 21 Swan subsequently filed a petition seeking fees and costs in connection with its counterclaim. Sebastian responded, in part, that the location of the remedies provision within the employment agreement indicated that the contractual remedies were available only for the breach of certain provisions. On June 18, 2018, the circuit court entered an order granting the fee petition and entering judgment against Sebastian on count II of Swan’s counterclaims in the amount of \$1, plus attorney fees and costs in the amount of \$164,891.81. Sebastian timely filed this appeal.

¶ 22 ANALYSIS

¶ 23 Sebastian raises three primary arguments on appeal. First, he contends that the circuit court erred in granting summary judgment in favor of Swan on his complaint and in denying his motion to reconsider. Second, he challenges the grant of summary judgment in favor of Swan on its counterclaim and the award of fees and costs to Swan. Third, Sebastian asserts that the trial court abused its discretion in denying his motion for leave to amend his complaint. We address each argument in turn.

¶ 24 Summary Judgment for Swan on Sebastian’s Complaint

¶ 25 In his complaint, Sebastian sought an accounting and asserted claims for breach of the employment agreement and violation of the Act; Swan filed a motion for summary judgment with respect to Sebastian’s complaint. For the reasons discussed below, we conclude that summary judgment on the complaint in favor of Swan was not proper.

¶ 26 Summary judgment is appropriate if the pleadings, depositions, and admissions on file,

together with the affidavits, demonstrate that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law. *Oswald v. Hamer*, 2018 IL 122203, ¶ 9. “Although summary judgment is encouraged in order to aid the expeditious disposition of a lawsuit, it is a drastic means of disposing of litigation.” *Monson v. City of Danville*, 2018 IL 122486, ¶ 12. “Consequently, a court must construe the evidence in the record strictly against the movant and should grant summary judgment only if the movant’s right to judgment is clear and free from doubt.” *Id.* We review the grant of summary judgment *de novo*. *Oswald*, 2018 IL 122203, ¶ 9.

¶ 27 The elements of a cause of action for breach of contract include the existence of a valid and enforceable contract, performance by the plaintiff, breach of the contract by the defendant, and resultant injury or damages to the plaintiff. *Razor Capital v. Antaal*, 2012 IL App (2d) 110904, ¶ 30. Sebastian contends that Swan breached the employment agreement by wrongfully terminating him for cause, which allowed Swan to avoid making the termination payment. Swan asserts that Sebastian materially breached the agreement, and therefore this termination for cause was justified. As noted above, “cause” is defined in the employment agreement to include termination due to Sebastian’s material breach of the employment agreement or any other agreement with Swan or his gross negligence with respect to the performance of his duties under the employment agreement.

¶ 28 Construing the evidence in the record strictly against Swan (*Monson*, 2018 IL 122486, ¶ 12), we find that there are genuine issues of material fact regarding whether Sebastian committed gross negligence or materially breached the employment agreement. For example, there are factual questions regarding the significance of the Durango travel requirement and Sebastian’s compliance therewith. The employment agreement provided that Sebastian “shall be

expected to spend approximately one week per month on average at [Swan's] offices, which are currently in Durango, Colorado," for purposes of training Swan's personnel and communicating with Swan management. Although Sebastian spent only approximately 10 days in Durango during the course of his employment, he testified that Randy's brother Robert Swan (Robert) – another Swan executive – had excused him from the Durango travel requirement on at least one occasion. Robert testified that he was not authorized to excuse Sebastian from the requirement but acknowledged that he may have commented to Sebastian on one occasion that "we don't necessarily need you to come out to Durango just to come out to Durango." When responding in April 2014 to Randy's correspondence regarding his compensation adjustment, Sebastian wrote: "I think Rob and I have worked out my travel now that I am flying to PR as well, that should be a non-issue." "PR" appears to refer to Puerto Rico, where Randy was primarily residing at that time. To the extent that Sebastian may have relied on Robert's ostensible authority to modify the travel requirement, there is a genuine issue of material fact regarding Sebastian's non-compliance with the travel provision.

¶ 29 Given the flexible contractual language which stated he was required to spend "approximately" one week per month in Durango "on average" – and the disagreement between Swan and Sebastian regarding any purported relaxation of such requirement – we cannot determine, as a matter of law, that Sebastian *materially* breached the employment agreement based on his failure to spend sufficient time in Durango. See *e.g.*, *Rohr Burg Motors, Inc. v. Kulbarsh*, 2014 IL App (1st) 131664, ¶ 57 (stating that the issue of whether a material breach of the contract has been committed is a question of fact); *Gayheart v. Wilson UTC, Inc.*, 1999 WL 184167, \*4 (N.D. Ill. March 29, 1999) (finding that the determination of whether the employee's failure to relocate was a "material" breach which excused the employer's performance of its

obligations under the employment agreement was a “factual question not appropriate for resolution on summary judgment”).

¶ 30 Other evidence in the record suggests genuine issues of material fact as to whether Sebastian was properly terminated for cause. For example, Swan’s willingness to continue to retain Sebastian in some professional capacity – despite his performance issues – is arguably contradictory to his termination for cause based on gross negligence or a material breach of their agreement.

¶ 31 Following their communications regarding Sebastian’s submission of work product containing errors, Randy sent an email in late May 2014 informing Sebastian that he had “not earned a right to be a RSP,” *i.e.*, a revenue sharing principal. Randy presented different options: “We can either end this relationship on good terms and use you as a consultant (special projects, trading advice, introductions, etc.) or have you become an employee that has the upside that everyone else has (including the ability to earn RSP status at some point in the future) and redefine your duties and responsibilities.” After Sebastian balked at the proposed new compensation plan, Robert sent an email referencing performance issues and providing Sebastian with two choices, *i.e.*, accept a new contract with no “special provisions” like the termination payment provision or resign and receive no termination payment.

¶ 32 Sebastian’s subsequent termination based on his gross negligence and/or material breach of the employment agreement could be viewed as incompatible with Swan’s openness to a professional relationship with Sebastian. In other words, to the extent that Sebastian was not merely terminated, but was terminated “for cause” under the agreement, it seems anomalous that Swan would have wanted Sebastian to continue to serve Swan in *any* capacity. During his deposition, Randy admitted that he was “confused, too, in retrospect” as to why he wanted to

continue to employ Sebastian after his poor work performance. At a minimum, Swan's communications regarding a revamped role for Sebastian suggest an issue of material fact.

¶ 33 We also note that Swan's designation of the termination as "voluntary" in a mandatory regulatory filing appears contradictory to Sebastian's termination for cause. When Sebastian was terminated, the CCO instructed that the Form U5 Uniform Termination Notice for Securities Industry Registration reflect that the termination was "voluntary." The CCO testified that he thought he was being "nice" by not disclosing that Sebastian was terminated for cause and describing the causes in the form. Regardless of the CCO's stated intent, however, the completed form appears inconsistent with Sebastian's termination for cause by Swan.

¶ 34 In addition to his claim for breach of the employment agreement, Sebastian asserted a cause of action for violation of the Act. The Act provides, in part, that "[e]very employer shall pay the final compensation of separated employees in full \*\*\* in no case later than the next regularly scheduled payday for such employee." 820 ILCS 115/5 (West 2014). Under the Act, an employee who is not timely paid wages, final compensation, or wage supplements by his employer as required under the Act is entitled to recover the amount of such underpayments plus certain damages, costs, and reasonable attorney fees. 820 ILCS 115/14 (West 2014).

¶ 35 Sebastian contends that there are genuine issues of material fact regarding the salary amounts he was purportedly owed. We agree. During his deposition, Randy testified that he "did not pay [Sebastian] for June" because he thought that Sebastian "stole hundreds of thousands of dollars" from him by performing work for entities other than Swan. CFO Ethan Bates calculated Sebastian's "earned compensation for the four days he worked" for Swan in June 2014; Bates averred that Sebastian owed Swan \$223 based on overpayments prior to June 2014. In the regulatory filing described above, Sebastian's termination date was listed as June 5,

2014, suggesting he worked five (not four) days in June. The inconsistencies regarding the exact end date of Sebastian's employment and Swan's payment for his June 2014 work – coupled with the question of whether he was entitled to the termination payment under the employment agreement – preclude summary judgment.

¶ 36 For the foregoing reasons, we reverse the grant of summary judgment against Sebastian on Sebastian's complaint and remand this matter to the circuit court for further proceedings. In light of this conclusion, we need not address the parties' arguments regarding the circuit court's denial of Sebastian's motion for reconsideration.

¶ 37 Summary Judgment for Swan on its Counterclaim

¶ 38 Swan alleged in its amended counterclaim that Sebastian had breached the employment agreement. The circuit court granted summary judgment in favor of Swan on its counterclaim awarding \$1, plus \$164,891.81 in attorney fees and costs. Sebastian argues on appeal that the circuit court erred in granting summary judgment on the counterclaim and in granting Swan's fee petition. For the reasons discussed herein, we reverse and remand for further proceedings.

¶ 39 As noted above, we review the grant of summary judgment *de novo*. *Oswald*, 2018 IL 122203, ¶ 9. Under paragraph 21 of the employment agreement, in the event of a breach or threatened breach of the agreement, the non-breaching party is entitled to an injunction, money damages, and reasonable attorney fees and costs. The parties interpret this contractual language differently. Swan contends that it was entitled to relief under paragraph 21, *e.g.*, attorney fees, based on any breach of the agreement. As discussed further below, Sebastian contends that the scope of paragraph 21 is significantly narrower than what Swan suggests. Although we question Sebastian's characterization of paragraph 21 as a "fee-shifting provision," we agree that our review of this contractual provision is *de novo*. See *Regency Commercial Associates, LLC v.*

*Lopax, Inc.*, 373 Ill. App. 3d 270, 275 (2007) (providing that “[c]onstruction of contractual language is subject to *de novo* review”).

¶ 40 Sebastian asserts that given the fact of where paragraph 21 is placed within the employment agreement this is indicative of its meaning. Paragraphs 14 through 20 of the agreement address: nondisclosure of confidential information; development of intellectual property; acknowledgement of Swan’s goodwill; nonsolicitation of customers; nonsolicitation of vendors/employees; noncompetition; and reasonable restrictions on Sebastian’s future employment. According to Sebastian, the “remedies” provision (paragraph 21) “was clearly meant to enforce the previously stated provisions” which the circuit court did not find that Sebastian breached.

¶ 41 On its face, paragraph 21 is clear: if one party breaches the agreement, the non-breaching party is entitled to attorney fees and other relief. We find, however, that paragraph 21 may contain a latent ambiguity. A latent ambiguity does not readily appear in the language of a document, but instead arises from a collateral matter when the terms of the document are executed or applied. *Hoglund v. State Farm Mutual Automobile Insurance Co.*, 148 Ill. 2d 272, 279 (1992); *Bank of America, N.A. v. Judevine*, 2015 IL App (1st) 140532, ¶ 21.

¶ 42 The language of paragraph 21, when applied, authorizes extremely broad relief, *e.g.*, Swan could terminate Sebastian for a *de minimis* infraction under the employment agreement and then pursue an injunction, money damages, attorney fees, and other remedies. As discussed during oral arguments, neither Swan’s counsel nor this Court is familiar with any Illinois decision sanctioning such expansive relief for a terminating employer. While we recognize that Illinois public policy strongly favors freedom of contract and “broadly allows parties to determine their contractual obligations” (*Hussein v. LA Fitness International, L.L.C.*, 2013 IL

App (1st) 121426, ¶ 11), we are reluctant to impose an arguably severe result when there may be a question as to the parties' intent. As the scope of paragraph 21 may have been intended to be limited to the immediately preceding provisions regarding intellectual property and related matters, we reverse the grant of summary judgment in Swan's favor on its remaining counterclaim and remand the matter for further proceedings.

¶ 43 We further note that Swan's motion for summary judgment on its remaining counterclaim was based almost exclusively on the circuit court's prior grant of summary judgment in its favor on Sebastian's complaint. Swan argued in the summary judgment motion:

“Because this Court has concluded that Mr. Sebastian breached the Employment Agreement, Swan asks that this Court enter summary judgment for Swan on Count II of its amended counterclaims. This issue has been fully briefed and resolved by this Court. It requires no further discussion.”

To the extent that Swan's summary judgment motion with respect to its counterclaim was premised on the circuit court's earlier conclusions regarding Sebastian's complaint, then the reversal on the grant of summary judgment with respect to the complaint militates in favor of reversal on this issue as well.

¶ 44 Sebastian also challenges the award of certain fees and costs included in Swan's fee petition. He contends that the fee petition included certain time spent defending against his complaint, not prosecuting Swan's counterclaim. We need not consider his arguments regarding the calculation of fees and costs, however, where the circuit court on remand will be evaluating the underlying merit of the award of *any* fees and costs.

¶ 45 Denial of Sebastian's Motion to Amend

¶ 46 Sebastian's final contention on appeal is that the circuit court erred in denying his motion



to amend his complaint to include a count against Randy for individual liability under the Act.<sup>3</sup> Section 13 of the Act provides: “In addition to an individual who is deemed to be an employer pursuant to Section 2 of this Act, any officers of a corporation or agents of an employer who knowingly permit such employer to violate the provisions of this Act shall be deemed to be employers of the employees of the corporation.” 820 ILCS 115/13 (West 2014).

¶ 47 The decision whether to grant leave to amend a pleading generally rests within the sound discretion of the circuit court and will not be disturbed on review absent an abuse of discretion. *Clemons v. Mechanical Devices Co.*, 202 Ill. 2d 344, 355 (2002). See 735 ILCS 5/2-616 (West 2016). “The factors to be considered in determining whether or not to permit an amendment to the pleadings are whether: (1) the proposed amendment would cure a defect in the pleadings; (2) the proposed amendment would prejudice or surprise other parties; (3) the proposed amendment is timely; and (4) there were previous opportunities to amend the pleading.” *Id.* at 355-56. Accord *Loyola Academy v. S & S Roofing Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992).

¶ 48 Sebastian filed a motion for leave to amend the complaint to add the count against Randy in August 2016. The case had been filed in June 2014, and Randy was deposed in March 2016. During his deposition, Randy testified that Sebastian received a paycheck “for the prior month” on June 10, 2014, *i.e.*, the regularly scheduled payday following his termination. Randy further testified that he did not pay Sebastian in July 2014 (for June) “for a lot of reasons,” including the lawsuit and his belief that Sebastian owed him money. While we do not opine herein on whether Swan’s conduct violated the Act, we observe that Sebastian possibly may not have known of the basis for a potential claim against Randy personally until Randy was deposed. We further note

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<sup>3</sup> Although Sebastian also included an additional count against Swan in his proposed amended complaint, his arguments on appeal are limited solely to his proposed count against Randy individually. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) (noting that points not argued are forfeited).

that Sebastian retained new counsel shortly before the filing of the motion to amend the complaint and that discovery was ongoing at the time the circuit court denied the motion. As the section of the Code governing amendments is to be liberally construed and “any doubts should be resolved in favor of allowing amendments” (*Sunderland v. Tri-City Community Unit School District No. 1*, 193 Ill. App. 3d 266, 270 (1990); 735 ILCS 5/2-616 (West 2016)), we reverse the order of the circuit court denying Sebastian’s motion for leave to amend the complaint.

¶ 49

#### CONCLUSION

¶ 50 For the reasons discussed herein, the judgment of the circuit court is reversed and this matter is remanded for further proceedings consistent with this order.

¶ 51 Reversed and remanded.