2019 IL App (1st) 181689-U

SIXTH DIVISION
June 14, 2019

No. 1-18-1689

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GAIDAS-DAIMID FUNERAL DIRECTORS, LTD.,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellee,	)	
v.	)	No. 13 CH 22362
ALLIANCE FUNERAL HOLDINGS, INC., STANISLAW KROZEL, ALBERT BOBEK, NON-RECORD CLAIMANTS AND UNKNOWN OWNERS,	)	Honorable John C. Griffin and Daniel J. Kubasiak,
Defendants-Appellees.	)	Judges Presiding.

JUSTICE HARRIS delivered the judgment of the court
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: The determination of the circuit court is affirmed where the agreement not to compete was unenforceable, and the affirmative defense of anticipatory repudiation did not apply. The court's award of attorney fees to plaintiff is also affirmed.

¶ 2 Defendants, Alliance Funeral Holdings, Inc. (Alliance), Stanislaw Krozel, Albert Bobek, non-record claimants and unknown owners, appeal the order of the circuit court granting

summary judgment in favor of plaintiff, Gaidas-Daimid Funeral Directors, Ltd. and awarding $321,719.23 as the amount due and owing on the promissory note and guaranty. On appeal, defendants contend the trial court erred in granting summary judgment where the parties' "Non-Compete Agreement" was reasonable and enforceable, and thus plaintiff's repudiation of the agreement excused defendants' performance on the note and guaranty. Defendants also contend that the trial court erred in awarding attorney fees where plaintiff did not request such fees in its summary judgment motion. For the following reasons, we affirm.

¶ 3 JURISDICTION

¶ 4 The trial court granted summary judgment in favor of plaintiff on April 2, 2018, and denied defendants' motion to reconsider on July 5, 2018. The court also awarded attorney's fees to plaintiff on July 5, 2018. Defendants filed its notice of appeal on August 3, 2018. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994) and Rule 303 (eff. July 1, 2017) governing appeals from final judgments entered below.

¶ 5 BACKGROUND

¶ 6 In 1969, Gerald Daimid purchased plaintiff, a funeral business, with business partner David Gaidas. Plaintiff conducted funerals out of the funeral home located at 4330 S. California Avenue in Chicago, Illinois, which it also owned. When Gaidas retired in 1990, Daimid purchased his interest in the business. As president of plaintiff, Daimid controlled all aspects of the business. Daimid also served as plaintiff's funeral director and in that capacity would, among other tasks, "issue the obituary notices, arrange for the embalming, casket, flowers, prayer cards and other items for the funeral." He also led the funeral at the premises.

¶ 7 In 2010, Daimid "decided to slow down" his practice as a funeral director. On April 27, 2010, plaintiff entered into a contract with defendants to sell the property at 4330 S. California

for $475,000. At the closing, defendant Alliance executed and delivered to plaintiff a promissory note in the principal amount of $380,000, and a mortgage on the property. The note provided that if Alliance fails to "pay the full amount of each monthly payment on the date it is due," it "will be in default." The note further provided that if the note holder has required Alliance "to pay immediately in full as described above, the Note Holder will have the right to be paid back *** for all of its costs and expenses in enforcing this Note," including "reasonable attorneys' fees." The note incorporated a personal guaranty executed by Alliance's shareholders, defendants Bobek and Krozel.

¶ 8 The parties also entered into a Non-Compete Agreement "[i]n connection with the sale and purchase of certain business assets *** and as partial consideration therefor." Pursuant to the Non-Compete Agreement, plaintiff agreed that for five years from July 15, 2010, and "within city limits of the City of Chicago, Illinois," it "will not engage, directly or indirectly, in the funeral business," except as provided in the accompanying Name License and Space Use Agreement (License and Space Agreement). That agreement contained the following provisions:

> "1. For a period of five years from the date hereof, [plaintiff] hereby grants to [defendants] the limited and non-exclusive use of the name "GAIDAS-DAIMID FUNERAL DIRECTORS," for the sole purpose of exhibiting said name *** on its street sign(s) on the building located at 4330 S. California Avenue, Chicago, Illinois. ***
>
> 2. For a period of five years from the date hereof, [defendants] agree[] to allow [plaintiff] the use of the funeral parlor facility at 4330 S. California Avenue, Chicago, Illinois, for the purpose of conducting services for [plaintiff's] pre-need clients and the families listed on the attached Exhibit A. [Plaintiff] shall give [defendants] reasonable notice *** and [plaintiff] shall pay $800 for each use."

Daimid signed the agreement on behalf of plaintiff.

¶ 9 Defendants made payments under the note until May of 2013, for a total of $110,838.75. On October 1, 2013, plaintiff filed a complaint to foreclose mortgage and recover under the note and guaranty. Defendants filed their initial affirmative defenses which were stricken by the trial court. They filed a second affirmative defense, claiming that plaintiff and Daimid breached the Non-Compete Agreement by performing 13 funerals in violation of the agreement. Defendants contended that because plaintiff "failed to perform its contractual duties," defendants' performance under the contract was excused.

¶ 10 Plaintiff filed a motion for summary judgment arguing that the Non-Compete Agreement lacked consideration, was unreasonable and unenforceable, and in any event plaintiff did not breach the agreement. In his affidavit, Daimid averred that the License and Space Agreement set forth an exception to the covenant not to compete. The exception allowed plaintiff "to conduct the funerals of the dozens of people with whom [Daimid] had already entered into pre-needs contracts with or otherwise committed to, in addition to the funerals of family and friends." Daimid averred that of the 13 funerals defendants challenged, seven were not directed by him and one of those deceased was listed twice. Of the remaining five, Daimid received permission to direct one and another was allowed pursuant to the License and Space Agreement. Daimid stated that the last three burials "occurred in the City of Chicago because they had already bought plots at St. Casimir prior to my engagement. The wakes occurred outside the city limits."

¶ 11 In their response to plaintiff's motion, defendants alleged that "Daimid breached the Non-Compete Agreement by conducting the following funerals which have a connection with the City of Chicago. Specifically, the funerals were either for individuals who died in Chicago, who resided in Chicago, who were buried in Chicago or who had some funeral service from a

Chicago business." Defendants attached a list of 19 funerals. In his affidavit, Bobek stated that defendants would not have purchased the business without the Non-Compete Agreement. Bobek paid $5,000 in earnest money and $110,000 in down payment for the business, and used $80,000 of his own funds to renovate, maintain and update the funeral home building. Bobek stated that in 2011, he and Krozel "learned that Daimid was breaching the Non-Compete Agreement because certain bills from vendors for funerals he performed were mistakenly sent to our funeral home." In 2012 Krozel confronted Daimid about the breach and hired an attorney to demand that Daimid cease competing in violation of the agreement.

¶ 12 On April 2, 2018, the trial court denied plaintiff's motion for summary judgment on the issue of sufficient consideration. However, relying on *Sheehy v. Sheehy*, 299 Ill. App. 3d 996 (1998), the court found "that given the totality of the facts and circumstances of this case, the Non-Compete Agreement is unenforceable as a matter of law." The court reasoned that the scope of the agreement "is unreasonably broad," and the agreement "imposes undue hardship on [plaintiff], and due to the nature of the funeral services business, it is injurious to the public, which is entitled to a 'choice regarding burial plots and funeral services'" quoting *Sheehy*, 299 Ill. App. 3d at 1003. Since the Non-Compete Agreement was unenforceable as a matter of law, and plaintiff provided evidence of the amounts owed on the note and guaranty, the trial court granted plaintiff's motion for summary judgment in the amount of $321,719.83.

¶ 13 On May 1, 2018, defendants filed a motion to reconsider, and plaintiff filed a petition for attorney fees and costs. The trial court denied defendants' motion to reconsider and granted plaintiff's fee petition, awarding $38,054.87 in fees and costs. Defendants filed this appeal.

¶ 14 ANALYSIS

¶ 15 We first address plaintiff's contention that this court should strike portions of defendants' brief because their statement of facts contains improper argument and some facts are unsupported by references to the record, in violation of Illinois Supreme Court Rule 341(h)(6) (eff. May 25, 2018). Where an appellate brief violates the supreme court rules, this court has the discretion to strike the brief and dismiss the appeal, or disregard an appellant's arguments. *Budzileni v. Department of Human Rights*, 392 Ill. App. 3d 422, 440 (2009). However, striking a brief in whole or in part may not be warranted if the violations do not hinder or preclude our review. *Id.* While defendants' brief may have violated the rules, this court has the benefit of the record and of plaintiff's citations to the record on appeal. Therefore, we decline to strike defendants' brief and instead consider the merits of their appeal. See *Hurlbert v. Brewer*, 386 Ill. App. 3d 1096, 1101 (2008) (deciding to consider the merits of the appeal despite rules violations).

¶ 16 Defendants argue that the trial court erred in finding the parties' Non-Compete Agreement unenforceable and granting summary judgment in favor of plaintiff. Summary judgment is proper where the pleadings, depositions and admissions on file, viewed in the light most favorable to the nonmoving party, reveal that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). We review the trial court's grant of summary judgment *de novo*. *Id.*

¶ 17 As courts have long established, a contract "in total and general restraint of trade *** 'necessarily' injures the public at large and the individual promisor." *Reliable Fire Equipment Co. v. Arrendondo*, 2011 IL 111871, ¶ 12. However, courts have also recognized that a contract

in partial restraint of trade, such as a covenant not to compete, is valid if it reasonably protects a buyer's legitimate interests in the business purchased. *Id.* ¶ 18. A covenant not to compete "ancillary to the sale of a business *** ensures the buyer that the former owner will not walk away from the sale with the company's customers and goodwill, leaving the buyer with an acquisition that turns out to be only chimerical." *Sheehy*, 299 Ill. App. 3d at 1004. Whether such a restraint is enforceable "depends on the reasonableness of the restraint as to time and territory as judged by the circumstances of the particular case." *Id.* A restrictive covenant is reasonable if the restraint (1) is no greater than is required to protect the legitimate business interest of the buyer; (2) does not impose undue hardship on the seller; and (3) is not injurious to the public. *Reliable*, 2011 IL 111871, ¶ 17; *Sheehy*, 299 Ill. App. 3d at 1004.

¶ 18 *Sheehy* is instructive. *Sheehy*, like the case here, involved the sale of a funeral business and the real property on which the business operated. The purchase agreement contained a section that stated the seller, "for a period of four years from the date of this Agreement" shall not:

> "a) Directly or indirectly own, manage, operate, join, control, or participate in, or be connected as an officer, employee, partner, or otherwise with any funeral home business, or otherwise compete with the current business of the Company within a ten (10) mile radius of 7020 W. 127th Street, Palos Heights, Illinois (the 'Property').
>
> b) Canvass or solicit any business, individually or for any other funeral home, from any of the Company's prepaid clients or any member of the immediate family of any decedent for whom the Company has provided funeral services prior to the date hereof *** or from any potential clients within a 10 mile radius of the Property ***." *Id.* at 999.

¶ 19 Approximately six months later, the seller became managing director of another funeral home located in the Bridgeport area of Chicago, outside of the 10-mile restricted zone. Although this funeral home had branches within the 10-mile zone, the seller's employment was limited to the Bridgeport location. Since becoming employed at the new funeral home, however, the seller attended two continuing education classes and two business meetings at the Oak Lawn location, which is within the 10-mile zone. He also appeared as an employee for several funeral services at cemeteries located within the zone. *Id.* The buyer filed an emergency motion to enforce the covenant, alleging that defendant breached the agreement by participating in business activities within the 10-mile restricted zone. *Id.* at 999-1000. The buyer also requested that the first installment due under the purchase agreement be forfeited, along with all future installments, until the seller complied with the covenant not to compete. *Id*. The trial court denied the motion.

¶ 20 This court determined that reading the covenant to mean that the seller could not attend classes or meetings at a branch located within the restricted zone, even though he was employed at a branch outside of the zone, was an improperly broad interpretation where the seller was required to attend classes to maintain his license as a funeral director, and his attendance at the meetings had a *de minimis* competitive effect on the buyer's business. *Id.* at 1001-02. The court also found that the covenant did not preclude the seller from entering cemeteries located within the zone because it did not specifically prohibit such activity and courts must strictly construe restrictive covenants. *Id.* at 1003.

¶ 21 Furthermore, even if the covenant did contain such a prohibition, that restriction would be a violation of public policy where "due to the nature of funerals, the place of the burial is determined by the family members rather than the undertaker" and "a person is entitled to his or her choice regarding burial plots and funeral services." The funeral home's president also

testified that if the seller was prohibited from entering any cemeteries within the restricted zone, he would be unemployable by them and would essentially be denied the opportunity to work in his chosen profession. *Id.* at 1007. at 1003. We noted that noncompetition clauses should be no more restrictive than necessary "'so as to prevent injury to the public from a restraint on trade.'" *Id.* at 1007, quoting *Petrzilka v. Gorscak*, 199 Ill. App. 3d 120, 125 (1990). Therefore, this court concluded that the restrictive covenant was unreasonable and unenforceable. *Id.*

¶ 22 Like the seller in *Sheehy*, plaintiff here attended burials at cemeteries located in Chicago, where the burial plots had already been purchased by the families. In his affidavit, Daimid acknowledged he was present for these burials, but stated that the wakes were conducted outside of the city limits. As *Sheehy* found, a restrictive covenant preventing plaintiff from entering any cemeteries within the city interferes with the public's choice regarding burial plots and funeral services. *Sheehy*, 299 Ill. App. 3d at 1007.

¶ 23 We further determine, based on the particular facts of this case, that the restriction does not reasonably protect a legitimate business interest. *Reliable*, 2011 IL 111871, ¶ 37. The Non-Compete Agreement here is even more restrictive than the one in *Sheehy*. The agreement broadly prohibited plaintiff from engaging, "directly or indirectly, in the funeral business" within the city limits of Chicago. Accordingly, defendants alleged that Daimid breached the Non-Compete Agreement not only by attending burials in the city, but also by conducting "funerals for individuals who died in Chicago, who resided in Chicago, who were buried in Chicago or who had some funeral service from a Chicago business," due to "a connection with the City of Chicago." Such a restriction would unreasonably limit plaintiff's employability as a funeral director not only in Chicago, as the covenant intended, but also in surrounding areas where potential clients may have purchased burial plots in Chicago or had other minimal

connections with the city. If the agreement prohibits plaintiff from directing funerals of persons whose life or death had any connection with Chicago, regardless of where the clients had engaged plaintiff's services or where the services are held, it is unreasonable and unenforceable.

¶ 24 Defendants urge this court to follow *Hamer Holding Group, Inc. v. Elmore*, 202 Ill. App. 3d 994 (1990), wherein, defendants contend, "the circuit court found that the restriction in the covenant for a 75 mile radius for a period of three years was entirely reasonable in terms of geographical area and duration based on the business." We note, however, that the court in *Hamer* did not find such a covenant reasonable. Rather, the court only found that the plaintiff possessed "a protectable interest in the noncompetition agreement as a matter of law" and remanded the cause to the trial court for a determination of whether the restriction was reasonable in light of that interest. *Id.* at 1010. We find nothing in *Hamer* that changes our determination. [1]

¶ 25 Even if the Non-Compete Agreement was enforceable, defendants' claim that they are not obligated to pay under the note succeeds only if their affirmative defense of anticipatory repudiation applies. Defendants argue throughout their brief that plaintiff's "breach of the Non-Compete Agreement "serve[d] as a repudiation of the note and guaranty and excuse[d] the Defendant[s] under the guaranty." Anticipatory repudiation "requires a clear manifestation of an intent not to perform the contract on the date of performance. *** That intention must be a definite and unequivocal manifestation that [a party] will not render the promised performance when the time fixed for it in the contract arrives." *In re Marriage of Olsen*, 124 Ill. 2d 19, 24

[1] Defendants argue that the trial court should have used its equitable powers to reform the agreement and make it enforceable. This issue, however, was not raised before the trial court. A party that does not raise an issue in the trial court forfeits that issue and may not raise it for the first time on appeal. *1010 Lake Shore Ass'n v. Deutsche Bank National Trust Co.*, 2015 IL 118372, ¶ 14.

(1988). The doctrine concerns manifestations of an intent not to perform at a future date when performance is required under the contract. *Podolsky and Associates L.P. v. Discipio*, 297 Ill. App. 3d 1014, 1023-24 (1998). Here, however, plaintiff had been performing under the Non-Compete Agreement and defendants alleged past or present breaches, rather than manifestations of plaintiff's intent not to perform at a future date. As such, defendants' defense "is not truly for anticipatory breach." *Id.*

¶ 26 Furthermore, although defendants conclude that plaintiff materially breached the Non-Compete Agreement, the trial court below made no such determination. In fact, Daimid never expressed an intent to repudiate the Non-Compete Agreement with defendants. Instead, Daimid contended he did not breach the agreement. In his affidavit, Daimid stated that the agreement contained an exception allowing him "to conduct the funerals of the dozens of people with whom [Daimid] had already entered into pre-needs contracts with or otherwise committed to, in addition to the funerals of family and friends." He stated that he followed the agreement, and of the three where Daimid admitted he attended burials in Chicago, those plots had been purchased by the family prior to Daimid's engagement. He emphasized that the wakes for these clients were held outside of the city. Defendants, however, disagreed with Daimid's interpretation of the agreement and therefore alleged that plaintiff acted in violation of the agreement. "'Where the two contracting parties differ as to the interpretation of the contract or as to its legal effects, an offer to perform in accordance with his own interpretation made by one of the parties is not in itself an anticipatory breach.'" *Olsen*, 124 Ill. 2d at 24, quoting 4 A. Corbin, Contracts § 973, at 911-12 (1951).

¶ 27 As our supreme court cautioned, "[a]nticipatory breach is not a remedy to be taken lightly." *Id.* at 25. When a party repudiates a contract, "the nonrepudiating party is excused from

performing *** or may continue to perform and seek damages for the breach." *Tower Investors, LLC v. 111 East Chestnut Consultants, Inc.*, 371 Ill. App. 3d 1019, 1032 (2007). Daimid's statements and actions did not indicate a clear intent to repudiate the Non-Compete Agreement with defendants. Therefore, we find defendants' affirmative defense of anticipatory repudiation inapplicable here and affirm the trial court's grant of summary judgment in favor of plaintiff.

¶ 28 Defendants' final contention is that the trial court erred in granting plaintiff's petition for attorney fees where plaintiff did not request such fees in its summary judgment motion, and the trial court's order granting summary judgment stated that "[t]his is a final order disposing of this case in its entirety." Defendants argue that "[w]ith nothing reserved by the Trial Court, all matters were resolved and the order was final." Therefore, defendants contend, plaintiff's request for attorney fees was untimely.

¶ 29 In *Herlehy v. Marie V. Bistersky Trust Dated May 5, 1989*, 407 Ill. App. 3d 878, 898 (2010), the trial court granted the bank's motion to dismiss with prejudice on June 17, 2008, and on December 2, 2008, granted the bank's request to insert Rule 304(a) language that "[t]here is no just reasons for delaying either enforcement or appeal or both," in the June order. More than seven months later, on July 22, 2009, the bank filed a motion for attorney fees. The trial court found the bank's motion untimely, ruling that it should have been filed within 30 days of the December 2, 2008, order, when the court inserted Rule 304(a) language into the June 17, 2008, order making it a final order. *Id.*

¶ 30 This court affirmed the trial court's determination, noting that the June 17, 2008, order became final on December 2, 2008, when the court made an express finding that there was no just reason to delay enforcement or appeal. *Id.* at 898-99. Generally, the trial court retains jurisdiction for 30 days after entry of a final order or judgment. *Id.* Furthermore, the court has

jurisdiction to consider a motion for attorney fees filed within 30 days of the entry of a final judgment "regardless of whether the request is considered to be a part of the original action or collateral to the original claim." *Id.* Since the bank's motion for attorney fees was filed more than 30 days after the December 2, 2008, order, it was untimely and the trial court lacked jurisdiction to consider the motion. *Id.* at 899-900.

¶ 31 Here, the trial court granted summary judgment on April 2, 2018, and plaintiff filed its petition for attorney fees on May 1, 2018, within 30 days of the final judgment. Therefore, the court had jurisdiction to consider the petition and properly granted fees pursuant to that petition.

¶ 32 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 33 Affirmed.