2021 IL App (1st) 192349-U

No. 1-19- 2349

Order filed September 10, 2021

Sixth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PREMIER REMODELING & DESIGN, LLC, Plaintiff-Appellants, v. ANDREW CHANG, DALE CHANG, KIM SUNG, KURT ZELCKMAN, JEFFREY BELTRAN, and TED PARK, Defendants, (Andrew Chang, Dale Chang, Jeffrey Beltran, Defendants-Appellees).	)	Appeal from the Circuit Court of Cook County. 2016 L 9606 Honorable Patrick J. Sherlock, Judge, presiding.

JUSTICE SHARON ODEN JOHNSON delivered the judgment of the court.
Presiding Justice Mary Mikva and Justice Maureen Connors concurred in the judgment.

ORDER

¶ 1 Held: We affirm the judgment of the circuit court where: (1) Premier failed to demonstrate that there was sufficient consideration to enforce noncompete and nonsolicitation agreements in order to survive a partial summary judgment; (2) the record on appeal was insufficient to determine whether the circuit court abused its discretion in denying Premier's motion for leave to file a second amended complaint; and (3) Premier failed to demonstrate that the trial court committed error.

¶ 2 Following a bench trial, plaintiff, Premier Remodeling & Design, LLC (Premier), appeals from the judgment of the circuit court of Cook County which: granted partial summary judgment against defendants Caliber Restoration, LLC (Caliber), Andrew Chang (Andrew), Dale Chang (Dale), Kim Sung[1] (Sung), Kurt Zelckman (Kurt), Jeffrey Beltran (Jeffrey), and Ted Park (Ted) (collectively defendants) in an October 11, 2019, order; denied Premier leave to file a second amended complaint against defendants in an October 18, 2019, order; and found in favor of defendants at the conclusion of trial.

¶ 3 On appeal, Premier contends that the circuit court erred when it: (1) granted partial summary judgment in favor of defendants Dale and Andrew; (2) denied Premier leave to file a second amended complaint; and (3) denied Premier a fair trial. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 Premier is an Illinois company that is owned and operated by Molly Grossman and Ron Chang at 150 S. Washington, Suite J, in Carpentersville, Illinois 60118.[2] The individual defendants were hired by Premier as independent contractors and were required to sign nearly identical independent contractor agreements (with varying commission rates).[3] The defendants' independent contractor agreements contained provisions that prohibited them from sharing proprietary information.

[1] In 2019, Premier filed a motion to correct a typographical error in defendant's name from Kim Sung to Sung Kim. The court denied this motion.

[2] Although the principal place of business is in Kane County, Premier filed this case in Cook County indicating that some of the alleged conduct occurred in Cook County. Defendants did not object to venue.

[3] The record provides copies of the following agreements: Andrew (signed independent contractor agreement dated July 24, 2016), Dale (signed independent contractor agreement dated August 16, 2016), Ted (signed independent contractor agreement dated June 27, 2016), Jeffrey (signed independent contractor agreement dated August 22, 2016, with a noncompete effective date of July 12, 2016), and Kurt (noncompete effective date July 12, 2016).

¶ 6 All of the individual defendants, except Dale, also signed noncompete agreements. The noncompete agreements prohibited defendants from directly or indirectly engaging in any business that competed with Premier Remodeling & Design LLC within the State of Illinois both during employment and for a period of two years after the separation of employment for any reason. Notwithstanding having signed the agreements, each of the individual defendants subsequently left Premier and went to work at defendant Caliber.[4]

¶ 7 A. Procedural Background

¶ 8 On September 28, 2016, Premier filed its initial complaint against Andrew, Dale, Kim, Kurt, Jefferey, and Ted alleging breach of agreements (count I), conversion (count II), and unjust enrichment (count III).

¶ 9 On March 7, 2017, Premier sought leave to file an amended complaint. The amended complaint added Caliber as an additional defendant. On March 30, 2017, the circuit court granted the motion.

¶ 10 On April 13, 2017, Premier filed an amended complaint which alleged breach of contract (counts I through VII), breach of oral agreement (count VIII), conversion (count IX), unjust enrichment (count X), defamation *per se* (count XI), common law fraud (count XII), intentional trespass to property (count XIII), theft of proprietary information and trade secrets (count XIV), and tortious interference (count XV).

¶ 11 Defendant's counterclaims were fraudulent misrepresentation (count I), violation of the Illinois Uniform Deceptive Trade Practices Act (815 ILCS 510/2 (West 2016)) (count II), violation of the Illinois Consumer Fraud and Deceptive Business Act (815 ILCS 505/2 (West 2016)) (count

[4] The exact date for each defendant is unknown. However, Premier contends that they were all, except Kurt, fired sometime in August 2016.

III), violation of the Illinois Roofing Industry Licensing Act (225 ILCS 335/1 *et. seq*. (West 2016)) (count IV), defamation (count V), and commissions owed (count VI). On June 27, 2018, Premier answered, denying all allegations. On October 15, 2019, defendants voluntarily dismissed their counterclaims against Premier.

¶ 12 On May 6, 2019, the circuit court entered a default judgment against Sung, who had failed to file an appearance or answer. Premier proved up damages, attorney fees, and costs[5] totaling $543,476.11 against Sung.

¶ 13 On May 3, 2019, Premier filed a motion for sanctions pursuant to Illinois Supreme Court Rule 219 (c) (Ill. S. Ct. R. 219 (c) (eff. July 1, 2002)). The motion argued that despite the discovery process lasting over two years, defendants nonetheless failed to comply with the discovery requests and corresponding orders of court. As such, the motion sought to recoup reasonable attorney fees, bar defendants from presenting any new evidence at trial, and bar defendants from raising any counterclaims or affirmative defenses.

¶ 14 On May 10, 2019, the circuit court found that defendants violated several discovery orders and therefore issued sanctions against defendants in the amount of $2,433.75 as and for Premier's attorney fees. The court also prohibited defendants from giving any testimony or producing any documents at trial that had not been produced in discovery.

¶ 15 On August 21, 2019, defendants Dale and Andrew moved for partial summary judgment on counts IV and VI, claiming that they did not execute any noncompete agreements. Defendants Dale and Andrew argued that, even if they had entered into the noncompete agreement, the agreements were unenforceable because they were not supported by adequate consideration, not supported by sufficient prior employment, and not supported by additional compensation for

[5] Sung was subsequently dismissed from the case without prejudice on September 19, 2019.

entering into them. They further argued that pursuant to *Fifield v. Premier Dealer Services, Inc*., 2013 IL App (1st) 120327, ¶ 19, at least two years of employment were required to establish adequate consideration for a restrictive covenant like a noncompete agreement. Defendants Dale and Andrew maintained that they both only worked for about two months with Premier before they resigned.

¶ 16 On August 30, 2019, Premier obtained a default judgment against Caliber.[6]

¶ 17 On September 3 and 4, 2019, Premier filed four motions *in limine* which sought to: (1) bar defendants from introducing any evidence at trial; (2) impose an adverse inference at trial that the evidence not presented by defendants in response to discovery would not have favored defendants; (3) bar and limit witness testimony; and (4) bar defendants' counsel from making comments as to the truth or credibility of evidence based upon their personal opinions.

¶ 18 On September 18, 2019, Premier filed a response to defendants' motion for partial summary judgment arguing that *Fifield* was only applicable when employment was the only consideration in support of the restrictive covenant. Premier contends that, pursuant to *McInnis v. OAG Motorcycle Ventures, Inc*., when other consideration was provided, a more fact-specific analysis was required. 2015 IL App (1st) 142644. The circuit court in *McInnis* heard evidence to determine whether there were any facts that could constitute consideration beyond the fact of employment. Premier stated that this case had facts genuinely at issue and that Premier provided consideration beyond monetary payments. Premier pointed out that the agreements expressly provided that the consideration consisted of employment, access to Premier's information, and "other good and valuable consideration."

[6] Premier subsequently dismissed Caliber on September 19, 2019.

¶ 19 On September 26, 2019, defendants filed a reply to Premier's response to the motion for summary judgment noting that Premier failed to demonstrate what constituted additional consideration, aside from mere employment. Additionally, defendants referred to testimony from a deposition that occurred on July 2, 2019, in which Ron indicated that defendants were not provided any payment, proprietary training, or unique training while employed by Premier.

¶ 20 On October 11, 2019, the circuit court granted defendants Andrew and Dale's partial motion for summary judgment. The circuit court found that Premier provided no consideration to support the restrictive covenant and, absent that finding, the amount of time the defendants were employed was too short pursuant to *Fifield.* The circuit court noted that the alleged information and lists that were taken did not constitute additional consideration for purposes of restrictive covenants.

¶ 21 B. Trial

¶ 22 A four-day trial commenced on October 15, 2019. The circuit court's certified bystander's report was filed on appeal, detailing the evidence presented at the March 3, 2020, trial. According to the circuit court's recollection, Ted testified that he was a sales specialist, he signed an independent contractor agreement with Premier, and he was made aware of some disparaging comments that Ron made about him to other customers. Ted additionally testified that Ron lied to him about the success of the business, concealed fines that were imposed against Premier's Minnesota company, and falsely represented that Premier was a licensed roofer in Illinois. Ted recalled that Premier would leave projects "incomplete," would complete projects with the wrong colors, and permit projects to be worked on by subcontractors with no project managers on site. As such, he thought that Ron was unethical and provided poor construction services to its customers: all of which contributed to his decision to leave the company. Ted stated that after he

left, Andrew created Caliber, which specialized in roofing repair. He went to work for Caliber but by January 2017, less than 5 months later, Andrew and Dale had left Caliber, leaving only himself and Sung managing the company. As of the date of trial, Ted stated that he no longer had a business relationship with Sung.

¶ 23 Ted testified that Diane Chandler (Diane) was a Caliber customer, but he was unaware of other customers who received services from Caliber because he was focused on selling; not so much with financials or construction. Ted did not affirm whether Caliber "stole" any customers or payments from Premier; whether Caliber used any subcontractors that worked with Premier; how much or why Jeffrey was paid by Caliber; and, whether any customers went from Premier to Caliber and how much they paid. Ted provided materials to Premier's attorney that were stored in a Google drive, however, several people had access to that account. As such, Ted was unable to recall who created the various documents, when they were created, when they were uploaded, if they had been altered, if they were accurate, and if they were drafts or final documents. Ted did however admit that he compiled the list of customers in exhibit 32 but did not recall details about it.

¶ 24 Diane testified that she owned a home in Gurnee, Illinois, and entered into a contract[7] for roof repair with Premier on August 6, 2016. According to the contract, Ted was her salesperson. After signing the contract, Ted returned to her home and encouraged her to do online "research" on Premier. Diane did not recall ever meeting or speaking with Andrew, Dale, or Jeffrey. Diane said that Ted did all of the talking and that she does not recall any of the other workers saying anything negative about Premier. Diane testified that she did not realize Premier did not hold a roofing license and that her roofing repair work was performed by Caliber.

[7] Diane's executed contract was not entered into evidence.

¶ 25 Ron testified that he started Premier in 2016 in Illinois and owned it with Molly. At that time Premier did not have a roofing license, but instead had general contractors' licenses in Streamwood, Illinois and South Elgin, Illinois. Ron testified that Premier entered into contracts directly with homeowners for roofing repair and would get subcontractors to perform the work.

¶ 26 Ron recounted that Andrew "sought him out" because Andrew was not happy at Dynamic, his then place of employment, and wanted to work for Ron. Ron met Andrew for coffee, at which point, Andrew complained that he was not taught anything at Dynamic and that he was looking for someone to teach him to sell. Premier's exhibit 14, pages five through seven, were admitted into evidence.

¶ 27 Ron testified that Premier requires all independent contractor salesmen to sign both a company noncompete and independent contractor agreement: this was done to protect against the unauthorized use of Premier's proprietary information and solicitation of customers. Ron testified that he personally trained all of the defendants and gave Andrew, Dale, and Jeff "proprietary sales scripts" for how to sell roofing repair work. No evidence was offered concerning what the sales scripts entailed.

¶ 28 On cross examination, Ron testified that Andrew asked to be the administrator to the Google drive system, and Andrew proceeded to compile and help set up that account for Premier. The account consisted of names and numbers of subcontractors as well as clients. Ron testified that he introduced Jeffrey and Dale to Premier and they became independent contractors as well. Ron stated that on August 19, 2016, Dale walked into Ron's office and said he was going to steal Premier's clients. Ron referenced exhibit 50 that he authenticated as the clients Dale intended to steal. The police were called, and Dale left the office before they arrived. Nonetheless, Ron noticed that items were in fact stolen, namely noncompete agreements, shirts with Premier's name on

them, work orders, sales scripts, a "step by step" of how the company operated[8], and a ladder. Ron also discovered that Premier was locked out of the Google account, which lasted for a week, leaving them "crippled." Additionally, Ron later learned that the Premier website was duplicated for the Caliber website and that, according to police, Ted and Sung were approaching homeowners.

¶ 29 Ron admitted that his Minnesota roofing company had received various fines and reprimands for performing unlicensed roofing work. Specifically, his Minnesota roofing company was fined $10,000, which the company did not pay. Ron testified that he believed the confidentiality clauses and "agreement not to act as agents" clauses in the independent contractor contracts prohibited Dale, Andrew, and Jeffrey from working for another company. Ron believed that statements from unspecified defendants caused some homeowners to avoid or delay payment for services rendered by Premier, nevertheless, Premier ultimately received all payments.

¶ 30 Ron also admitted that he gave Andrew, Dale, and Jeffrey business cards for Premier that stated they were "licensed, bonded, and insured." All of the contracts at issue received "roofing work" from Premier. Ron denied that Premier mislead the public by stating his company was "licensed" even though it did not have a roofing license because it had a general contractor's license in Streamwood, Illinois and Elgin, Illinois. Ron knew that Molly failed the roofing license examination once but added that she passed the second time in 2017, after all the individual defendants left Premier. Ron acknowledged how customers might have thought they were directly doing the roofing work and not merely acting as a general contractor to subcontractors that they hired to perform the work.

[8] The circuit court noted that there were no details of whether this was an actual physical document or what it entailed.

¶ 31 Dale testified that he was an independent contractor for Premier for approximately one month in 2016. He did not execute a noncompete agreement and notified Molly that he would not do so.

¶ 32 Dale surmised that Sung likely prepared Caliber's financial documents, however, he was not sure because he was only at Caliber for a short time. Dale testified he did not know if Diane was a Caliber customer at any time. Dale did however identify the clients that were in Premier's amended complaint as solely Ted's clients at Premier; he never spoke to them and never stole them from Premier. Dale decided to leave Premier after finding out that its predecessor roofing company did not have a roofing license in Illinois and had been barred from operating in Minnesota for repeatedly operating without a roofing license. Dale testified that Ron informed him that Premier and the Minnesota company did over $1 million in a year: this turned out not to be true and Dale did not trust Ron as a result. Despite Ron's promise that he would have subcontractors supervised, Ron failed to do so and consequently the work was of "subpar" quality. Dale recalled that Premier regularly used a subcontractor named "Dino" who would damage roofs in order to ensure that the insurance companies would pay for coverage: this was something that made Dale want to further distance himself from Premier. Dale denied making disparaging comments about Premier to any homeowner, encouraging other sales personnel to leave Premier, and Caliber stealing any clients from Premier. Dale testified that Andrew provided customer leads to him based on software and research that Andrew obtained at another company. Dale asserted that Caliber was initially established with the intention of doing fire and water mitigation, however, after he joined, the principals at Caliber turned to roofing work.

¶ 33 Molly testified that her responsibilities were "back office" work and she sometimes communicated with insurance companies. Molly had Andrew set up Premier's Google account

and he was a "super administrator" while she was only a "group administrator," which she believed gave him privileges that she did not possess. After Dale, Andrew, and Jeffrey left she was unable to get into the account for over a week. Although Andrew ultimately helped her get back in, Molly testified that she believed he locked her out of it. She also stated that Dale stole checks that homeowners made out to Premier, but he later returned them. Molly testified that defendants stole over $100,000 worth of work from Premier and that Andrew, Dale, and Jeffrey stole Premier business cards[9] with their respective names on them. Molly admitted Premier never had a roofing license and used subcontractors to do roofing work, but she received her roofing license in 2017. Molly testified that when defendants left, so did "over half" of Premier's sales team.

¶ 34 Andrew testified that he worked at Premier for less than two months. He had roofing experience from his former employment with Dynamic, which specialized in storm damage. His job at Premier was the same as at Dynamic where he sold door to door roofing repair services. He was trained at Dynamic how to sell and was given a long "sell script" which he altered to making it a shorter pitch to homeowners. Andrew used the same script at Premier and denied that Ron trained him or gave him any sales script. Andrew testified that Premier implied to customers that it held a roofing license by distributing materials that stated, "Licensed, Bonded and Insured."

¶ 35 Andrew testified that while at Dynamic he was given access to an application (app) called "Hail Recon," which was "like an app that connected to your phone or tablet." The app showed where there were recent hailstorms which helped Andrew locate new customers. Dynamic paid for Andrew's access to Hail Recon even after he left them and worked at Premier. Andrew testified that as of the date of trial he worked for a new company named Liberty.

[9] Molly could not place a value on the stolen business cards.

¶ 36 Andrew testified that he did sign the independent contractor agreement with Premier and believed he could quit Premier at any time. When Andrew and Ron initially meet, Ron told Andrew that he had a $1 million Minnesota company but no sales yet in the Illinois market. Andrew was hired by Ron because of his familiarity with the Illinois market and his sales reputation at Dynamic which resulted in $900,000 in roofing repair services. He denied that Ron gave him any leads on potential business, and stated that, in fact, it was the other way around; Andrew showed Ron where to find storm damaged homes and generate leads. Ron testified that he was the first salesperson hired at Premier and he helped recruit others.

¶ 37 Andrew left after finding "Premier to be shady." He was informed by Ron that Dino was used to ensure that insurance repairs were covered by causing extra damage to homes. Andrew testified that Premier used cheap materials on homes that Premier supplied to the subcontractors. Andrew denied taking anything from the Google drive, locking anyone out, or improperly accessing it. His access to the Google drive did not encompass any special privileges that Molly did not also possess. After he left Premier, Andrew testified that Molly texted him demanding that he show her how to remove his access and asked for his password. Andrew was reluctant to give his password to her because it was the same for other personal accounts. Andrew denied talking to any homeowners listed in Premier's amended complaint, taking clients to Caliber from Premier, or otherwise stealing customers or independent contractors. Andrew further denied spreading information about Premier but admitted that if he were asked questions about Premier, he would tell the truth, especially regarding its lack of a roofing license. Andrew testified that Ted and Sung actively approached Premier customers and shared information about Premier. Andrew asserted that he was given items such as business cards and shirts and they were not stolen.

¶ 38 Andrew testified that when he came to Premier, the filing system was paper and manila folders. He was asked by Ron or Molly to create Premier's website; however, he hired a subcontractor to create the website. He did the same for Caliber's website.

¶ 39 Premier rested its case, then filed a motion for leave to file a second amended complaint. The circuit court's October 18, 2019, order denied the motion for leave to file a second amended complaint based on the *Loyola* factors. It also granted Premier's motion *in limine* seeking an adverse inference against defendants Andrew and Dale for failure to produce documents, but not against Jeffrey because there was an inadequate showing that he never had the materials. The court dismissed all claims against Ted for want of prosecution and found in favor of defendants on all claims without explaining the basis for its reasoning. Premier's timely notice of appeal was filed on November 15, 2019.

¶ 40 C. Posttrial

¶ 41 On March 6, 2020, Premier filed a motion under Supreme Court Rule 321 (Ill. S. Ct. R. 321 (eff. Feb. 1, 1994)), for the inclusion of trial exhibits in the record on appeal. The motion requests that all of exhibits 14 and 17, which were partially admitted into evidence, should be included in the record on appeal. Additionally, Premier argued that other exhibits offered into evidence should also be apart the record under Rule 321, even if objected to and not received in evidence. Premier claims that the circuit court should have certified that exhibits 1 through 28, and exhibit 32, were offered or filed and thus, should have been included in the record on appeal. In the alternative, Premier requested that the circuit court amend the bystander's report to reflect the determinations of the court as to documentary exhibits that were offered, objected to, and received in evidence at the trial.

¶ 42 On March 13, 2020, defendants filed a response to Premier's motion, and argued that the circuit court should deny the report because it was inaccurate. Defendants argued that nothing in the bystander's report indicated that they were even offered or admitted. Defendants accused Premier of attempting to supplement and contradict the bystander's report with the record on appeal.

¶ 43 On November 6, 2020, the circuit court entered an order denying defendants Rule 321 motion. The circuit court clarified that all of the exhibits that Premier was seeking to have admitted into evidence on appeal were never offered into evidence at trial. The court also acknowledged that exhibits 50A-G, F, G, and H were entered into evidence. As such the circuit court had no jurisdiction to hear those matters because the statute provided that the "reviewing court" may include evidence in the record upon motion pursuant to Rule 321.

¶ 44 II. ANALYSIS

¶ 45 On appeal, Premier alleges that the circuit court erred when it: (1) granted partial summary judgment in favor of Dale and Andrew; (2) denied Premier leave to file a second amended complaint; and (3) denied Premier a fair trial.

¶ 46 A. Summary Judgment

¶ 47 Premier contends that the circuit court erred in granting partial summary judgment in favor of defendants Dale and Andrew. Premier contends that each of the defendants signed a contract that included a covenant not to compete and a covenant not to solicit Premier's customers, which defendants violated when they abruptly left in 2016 to work for Caliber. Premier contends that the circuit court erroneously found that there was no other consideration provided for these covenants and proceeded to find this case analogous to *Fifield v. Premier Dealer Services, Inc*., 2013 IL App (1st) 120327, which Premier contends does not require a threshold requirement of two years of

continued employment to support a covenant not to compete. Premier contends that the proper analysis would be to look at the "totality of the facts and circumstances," citing *Reliable Fire Equipment Co v. Arredondo.*, 2011 IL 111871, ¶ 46, as support. Premier contends that it provided additional consideration to defendants in the form of employment, access to information, and "other good and valuable consideration." Premier asserts that "other good and valuable consideration" entailed specialized training, access to Premier's contracts, client lists, email administration, spreadsheets, proprietary information, and other electronic information, and confidential information and methods Premier used in developing leads and customer lists. Premier concedes that it did not pay defendants for consideration. Premier contends that the motion for summary judgment failed to show the absence of consideration for the covenants. Premier asserts that the circuit court should have inferred that the parties had agreed to some other consideration because the contract specifically stated, "other good and valuable consideration," and the circuit court should have determined that Premier established that the evidence demonstrated a *prima facie* case, citing *Estate of Karolkiewicz v. Kary*, 100 Ill. App. 2d 350, 358 (1968), as support.

¶ 48 In response, defendants argue that the noncompete covenants at issue were unsupported by adequate consideration, which made them unenforceable. Defendants contend that employment for two years or more is required for adequate consideration pursuant to *McInnis v. OAG Motorcycle Ventures, Inc.*, 2015 IL App (1st) 142644, ¶ 27. Defendants assert that they received no fringe benefits because they were at-will employees, no money was paid to sign the noncompete agreements, no proprietary information was given that was unique to Premier's business during their respective employment which both lasted a little over a month. Defendants maintain that since no additional compensation, including fringe benefits were not given and the employees at issue left less than two years after executing the restrictive covenants, the consideration was

inadequate, and the restrictive covenant was unenforceable. Defendants argue that Premier's reliance on cases such as *Estate of Karolkiewicz* is not applicable because it did not involve a restrictive covenant in an employment case. Finally, defendants contend that the circuit court's granting of the summary judgment against Premier should be affirmed because Premier failed to present any evidence of consideration beyond their at-will employment of less than two months' duration.

¶ 49 "A motion for summary judgment is properly granted when the pleadings, depositions, and admissions on file, together with the affidavits, if any, 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." *AYH Holdings, Inc. v. Avreco Inc*., 357 Ill. App. 3d 17, 30-31. Summary judgment is an efficient and useful aid in the expeditious disposition of a lawsuit; however, it is a drastic measure that should only be employed if the right of the moving party is clear and free from doubt. *Id*. at 31. Thus, the standard of review for the trial court's granting of a motion for summary judgment *de novo. Id.*

¶ 50 Our court has a long history of resisting requests to analyze sufficiency of consideration in private contracts. However, postemployment restrictions on trade are highly disfavored by Illinois courts. *Fifield,* 2013 IL App (1st) 120327, ¶ 13. "Illinois courts analyze the adequacy of consideration in the context of postemployment restrictive covenants because it has been recognized that a promise of continued employment may be an illusory benefit where the employment is at-will." *Id.* at ¶ 12. Whether the covenant is valid and enforceable is a question of law, which we review *de novo*. *McInnis*, 2015 IL App (1st) 142644, ¶ 24, citing *Mohanty v. St. John Heart Clinic, S.C., 225 Ill.2d 52, 63 (2006).*

¶ 51 The terms of a restrictive covenant must be reasonable in order for it to be valid and enforceable. *Id.* at ¶ 26. It is established precedent in Illinois that a restrictive covenant is

reasonable only if the covenant (1) is no greater than is required for the protection of a legitimate business interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public. *Id.* Prior to making this determination, a court must make two findings: (1) whether the restrictive covenant is ancillary to a valid contract; and (2) whether the restrictive covenant is supported by adequate consideration. *Id*.

¶ 52 Here, neither party raised an issue of whether the contract was valid or whether the noncompete and nonsolicitation covenants were ancillary thereto. Consequently, we will not opine as to the ancillary nature or lack thereof of the covenants.

¶ 53 The next prerequisite is whether the restrictive covenant was supported by adequate consideration. "Absent adequate consideration a covenant is not enforceable." *Id.* We have held that continued employment beyond the threat of discharge is sufficient consideration to support a restrictive covenant in an employment agreement. *Id.* at 27. Generally, two years or more of continued employment is adequate for consideration. *Id.*

¶ 54 In this case, both parties agree that each individual defendants' status was as an independent contractor. We note that Illinois law has not held restrictive covenants against independent contractors to a less strict standard than those in employment contracts. *Eichmann v. National Hosp. and Health Care Services, Inc.*, 308 Ill. App. 3d 337, 343 (1999). Thus, independent contractors would also have to have worked two years or more pursuant to their agreement for work or services in order constitute sufficient consideration for a restrictive covenant.

¶ 55 In the case at bar, Premier concedes that Dale and Andrew were only with Premier for approximately two months after they signed their respective agreements. As stated above, consideration upon less than two years is not sufficient consideration. *McInnis,* 2015 IL App (1st)

142644, ¶ 26. Thus, based thereon, we must find that Premier did not demonstrate sufficient consideration to support the noncompete agreement.

¶ 56 Using the fact-specific approach, Premier still fails to demonstrate sufficient consideration. The court in *Mcinnis* clarified that *Fifield* was important in demonstrating that the employment itself cannot be used to constitute consideration. *Mcinnis*, 2015 IL App (1st) 142644, ¶ 32. In the case at bar, Premier asserts that the consideration consisted of the tools that were necessary or essential to performance of the services that they contracted for. i.e., the employment itself. Specifically, Premier alleged that the consideration included: training, access to Premier's contracts, client lists, email administration, spreadsheets, proprietary and other electronic information, and confidential information and methods Premier used in developing leads and customer lists. Dale and Andrew's positions consisted of using these tools to sell Premier's services. Without access to the above referenced items, that Premier details as consideration, they would not have been able to do the job they were hired to do. If we allow the job itself to be considered the benefit that constitutes consideration, we will completely alter this courts precedent of disfavoring restrictive covenants. *Id.* Thus, we find that the noncompete agreements were not supported by adequate consideration and therefore were unenforceable against Dale and Andrew.

¶ 57 Based on our review of the record, we find that there is no genuine issue as to any material fact that would entitle Premier to move forward with these issues at trial. Undisputedly, the defendants worked considerably less than the two year threshold and there was no consideration in excess of the employment or services that were contracted for. Hence, there is no question that the defendants were entitled to a judgment as a matter of law regarding the unenforceability of the noncompete and nonsolicitation agreements. Therefore, the circuit court did not err in granting the partial summary judgment in favor of Dale and Andrew.

¶ 58 B. Second Amended Complaint

¶ 59 Premier also contends that the circuit court erred in denying its motion for leave to file a second amended complaint. Premier asserts that the second amended complaint was identical to the amended complaint which had been filed on April 13, 2017, except that it added claims for civil conspiracy and expanded the claim of conversion; the factual allegations remained the same. Premier maintains it properly plead a claim for conspiracy that is supported by the facts.

¶ 60 Premier contends that the trial court improperly applied the factors in *Loyola Academy v. S & S Roof Maintenance, Inc.,* 146 Ill. 2d 263 (1992), when it denied Premier's motion for leave to file a second amended complaint. Premier admits that the first *Loyola* factor of whether the proposed amendment would have cured a defective pleading, was not applicable to the case at bar. Premier, nevertheless, insists that nothing in *Loyola* requires satisfaction of all four of the factors to justify leave to amend: all that is required is an amendment that "further the ends of justice; the *Loyola* factors are guidelines," citing *Hiatt v. Ill. Tool Works*, 2018 IL App (2d) 170554, ¶ 38, as support. Premier contends that the second *Loyola* factor, which requires that the other parties would sustain no prejudice or surprise, was met because the substance of the second amended complaint was identical to the amended complaint: the only difference was the theory of recovery. The third *Loyola* factor, regarding the timeliness of the proposed amendment, was reportedly satisfied when it was filed before the conclusion of evidence, after the plaintiff rested. The fourth and last *Loyola* factor of whether previous opportunities to amend could be identified was met because defendant's non-compliance with discovery requests made it difficult to provide amendments to the complaint. As such, Premier maintains that it satisfied the *Loyola* factors, and the circuit court abused its discretion when it denied its motion for leave to amend its complaint.

¶ 61 In response, defendants argue that because Premier did not make an adequate record of how the circuit court exercised its discretion in denying its motion for leave to amend, it has not preserved the issue for review. Defendants contend that the bystander's report stated that the circuit court noted the *Loyola* factors in the basis of its decision to deny Premier's motion for leave to file its second amended complaint but does not contain any of the parties' arguments; making the record inadequate to determine an abuse of discretion. Defendants contend that in the absence of a record, this court must presume that the circuit court had a sufficient factual basis for its ruling citing *Corral v. Mervis Industries, Inc*., 217 Ill. 2d 144, 156 (2005), as support.

¶ 62 Defendants further assert that Premier failed to satisfy the four *Loyola* factors. Defendants contend that the first factor was not satisfied because the amendment was not intended to cure a defect. As Premier concedes, the amendment sought to add a new claim of civil conspiracy that required a specific mental state of defendants to be pled. Defendants point out that amendments have been denied at trial where it was based on a new cause of action and theory of recovery that requires a new mental state like this one citing *W. E. Erickson Construction, Inc. v. Chicago Title Ins. Co*., 266 Ill. App. 3d 905, 912 (1994), as support. Defendants assert that failing to satisfy the first prong should terminate this courts analysis.

¶ 63 In the alternative, however, defendants argue that even if this court were to consider the remaining factors, they still would not support Premier's argument. Defendants allege that the amendment would have caused surprise and prejudice to them, and they would have had no notice or opportunity to defend against the new claims, thus failing the second factor. For the third *Loyola* factor, defendants contend that the amendment was untimely as it was filed 30 months after Premier's initial complaint, and there was no reason for the time lapse given. For the fourth and

last *Loyola* factor, defendants contend that Premier had previous opportunities to make the amendment and yet failed to do so until the last day of trial.

¶ 64 The right to amend a pleading is not absolute but rather a matter within the circuit court's discretion. *Hiatt*, 2018 IL App (2d) 170554, ¶ 36. Therefore, the standard of review is an abuse of discretion. *Id.* "A court abuses its discretion only if it acts arbitrarily, without the employment of conscientious judgment, exceeds the bounds of reason and ignores recognized principles of law; or if no reasonable person would take the position adopted by the court." *Id*.

¶ 65 "The relevant factors considered in determining whether to grant leave to amend a pleading are: '(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified.'" *Id*. at ¶ 7. (quoting *Loyola*, 146 Ill. 2d at 273).

¶ 66 Our supreme court has held that "an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Here, Premier contends that the circuit court erred when it denied its motion for leave to file its second amended complaint. However, Premier fails to provide a sufficient record on appeal for us to review that decision. There was no transcript of the proceedings nor any written findings in support of the circuit court's denial of Premier's motion for leave to file its second amended complaint. Additionally, the bystander's report does not include the reasons why the circuit court denied the motion, and we remain unclear as to what arguments if any were made by the parties at

the hearing on the motion. The bystander's report simply mentions that the *Loyola* factors were "commented on" by the circuit court before it denied the motion. Although we know that the circuit court referenced and analyzed *Loyola*, we do not know the factual reasoning behind its decision or whether the decision was based on one or all of the *Loyola* factors. Without an adequate record preserving the claimed error, this court must presume that the circuit court had a sufficient factual basis for its holding and that its order conforms with the law. *Id.* at 157.

¶ 67 C. Denial of Fair Trial

¶ 68 Finally, Premier contends that in addition to the grant of partial summary judgment and denial of leave to file second amended complaint, the circuit court made several errors during the trial. First, defendants committed a litany of discovery abuses and even when the circuit court attempted to cure it through court orders, they refused to provide the required disclosures. At trial the circuit court granted Premier's motions *in limine* resulting in sanctions against defendants which included an adverse inference that defendants failed to rebut. According to Premier defendants offered no evidence or witnesses in their case in chief and corroborated Premier's proofs that defendants had executed the noncompete agreements, violated said agreements, and damaged Premier accordingly. Premier proposes that on this record, there was no reasonable basis for the trial court to rule in defendant's favor.

¶ 69 Premier also asserts that the trial court erroneously refused to admit its exhibit 18, which was an unsigned amendment of the operating agreement of Caliber. Premier purported to use this document to show that the defendants agreed to divide the profits of their roofing repair business, specifically including profits from several Premier clients.

¶ 70 Next, Premier accuses the trial court of confounding the preparation of the record by certifying a report of proceedings which in large part does not discuss the parties' introduction of

documentary evidence at trial. There were 50 exhibits introduced and offered into evidence, but with few exceptions, were largely not mentioned in the bystander's report. By way of example, Premier points out that the bystander's report states that Premier's customer, Diane Chandler, authenticated her executed contract but it was not admitted into evidence, however, this was exhibit 50C which was in fact admitted into evidence. To justify its refusal, the circuit court determined that it had no jurisdiction to enter an order including Premier's exhibits in the record. Premier argues, however, that Illinois Supreme Court Rule 321 (Ill. S. Ct. R. 321 (eff. Feb. 1, 1994)), authorizes the court upon notice to have a hearing and requires the inclusion in the record of any documentary exhibits offered and filed by a party. Premier contends that the totality of these errors should result in a new trial.

¶ 71 Given the facts as enumerated above, Premier found it inexplicable for the court to find in defendants favor at the end of trial. Premier argues that the circuit court's erroneous ruling, coupled with the earlier grant of partial summary judgment and denial of leave to file second amended complaint, denied it a fair trial. Consequently, Premier maintains that the summary judgment should be reversed, and all of the issues should be retried together.

¶ 72 In response, defendants assert that they opposed Premier's motion *in limine* that sought an adverse inference by arguing that the motion did not identify the documents allegedly within their control, they produced all the documents in their control, and that other documents requested related to financial documents that were within Caliber's control. Although the court granted Premier's motion *in limine*[10] regarding adverse inference with respect to those documents not produced, defendants contend that after the four-day trial, the court looked at the facts established by the evidence and decided that the inferred fact was nonexistent. Defendants assert that at trial,

[10] The motion was granted as to Dale and Andrew only as Beltran was never a member of Caliber.

no homeowners supported Premier's claim. Although the adverse inference was against Dale and Andrew, Premier did not produce evidence to demonstrate that they approached homeowners or either stole customers or payments. Defendants contend that the one customer that was called as a witness was Diane, who identified Ted as her salesperson. The police also told Ron that Ted was the person approaching homeowners. Defendants contend that Premier does not discuss the testimony and solely relies on the adverse inference in assessing whether the judgment is contrary to the manifest weight of the evidence, and thus his argument should be waived or forfeited.

¶ 73 Defendants assert that Premier failed to meet its burden in any of its claims and the circuit court did not deny Premier a fair trial where there was no genuine issue as to the noncompete agreement and when the judgment was supported by the evidence at trial. Additionally, defendants contend that the circuit court did not err in denying Premier's Rule 321 (Ill. S. Ct. R. 321 (eff. Feb. 1, 1994)), motion because Premier did not file the motion until after it filed its opening brief. Further, it was Premier's responsibility to order a court reporter for the trial, submit a bystander's report identifying the exhibits it wanted on the record, or request that the bystander's report indicate that Premier's exhibits were offered and admitted into evidence before it was approved and filed.

¶ 74 Reviewing courts are not concerned that parties receive a trial free from errors. *Netto v. Goldberg*, 266 Ill. App. 3d 174, 184 (1994). The concern is whether a plaintiff received a fair trial, one free of substantial prejudice. *Id.* "A new trial is necessary when the cumulative effect of trial errors so deprives a party of a fair trial that the verdict might have been affected." *Id.* We will take a look at each issue that Premier raises and determine first if the issue constituted error and second whether the error, if any, had a cumulative effect.

¶ 75 We have already decided that the circuit court did not err in granting partial summary judgment or denying Premier leave to file a second amended complaint. Therefore, we will begin with the adverse inference argument. Even though an adverse inference was granted against defendants, they were free to offer evidence rebutting the inference. *Meeks v. Great America, LLC*, 2017 IL App (2d) 160655, ¶ 15. This is exactly what Dale and Andrew's testimony did in Premier's case-in-chief. Andrew specifically testified that he had not stolen property from Premier, did not steal clients, and did not spread information about Premier unless asked, at which time he told the truth. Dale specifically testified that he did not steal any clients from Premier and denied saying anything negative about Premier to any homeowner or encouraging anyone working for Premier to leave. Apparently, the trial court found that this testimony was sufficient to rebut the adverse inference.

¶ 76 The November 6, 2020, order from the circuit court not only rebuffs Premier's contentions, that exclusion of the exhibits was erroneous, but also concludes, pursuant to Rule 321, that the trial court had no jurisdiction to enter any exhibit into evidence on appeal. We must first establish jurisdiction prior to addressing whether the exhibits should have been admitted and or included with the record on appeal.

¶ 77 When determining whether the trial court lacked jurisdiction, we must look to the statute itself. "The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Midstate Sliding and Window Co., Inc. v. Rogers*, 204 Ill. 2d 314, 320 (2003). The statute is the most reliable indicator of the legislature's objectives in enacting the law. *Id*. We afford the language of the statute its plain and ordinary meaning and construe the statute as a whole. *Id.* Words and phrases must not be viewed in isolation but must be considered in light of other relevant provisions of the statute. *Id*. We also presume that in enacting the statute the legislature did not

intend absurdity, inconvenience, or injustice. *Id*. This is a question of law that we will review *de novo*. *Id.*

¶ 78 Rule 321 (Ill. S. Ct. R. 321 (eff. Feb. 1, 1994)), states:

> "The record on appeal shall consist of the judgment appealed from, the notice of appeal, and the entire original common law record, unless the parties stipulate for, **or the trial court, after notice and hearing, or the reviewing court, orders less.** The common law record includes every document filed and judgment and order entered in the cause and any documentary exhibits offered and filed by any party. **Upon motion the reviewing court may order that other exhibits be included in the record.** The record on appeal shall also include any report of proceedings prepared in accordance with Rule 323. There is no distinction between the common law record and the report of proceedings for the purpose of determining what is properly before the reviewing court."

¶ 79 The plain language of Rule 321 grants the circuit court the power to order less of the record on appeal, after notice and hearing. *Buerkett v. Illinois Power Co.,* 384 Ill. App. 3d 418, 421 (2008). Conversely, it allows for a party to motion this reviewing court, in order to include other exhibits in the record. *Pikovsky v. 8440-8460 North Skokie Blvd. Condominium Ass'n, Inc.*, 2011 IL App (1st) 103742, ¶ 16. We read the word "other" as used in the statute to be synonymous with "additional" documents that were not previously offered or filed during the trial court proceedings.

¶ 80 Premier sought to have the circuit court certify, pursuant to Rule 321, that certain documentary exhibits were offered into evidence at trial and thereby should be included in the record on appeal. After having conducted a hearing pursuant to Rule 321, the circuit court determined that the exhibits at issue were not "offered in evidence." Absent a transcript of the proceedings or a bystander's report that states otherwise, this court must give deference to the

findings of the circuit court. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). The circuit court's order on plaintiff's motion under supreme court rule 321 is consistent with the bystander's report that was entered. Thus, we find that any documents that were not included in the bystander's report must be considered "other." Rule 321 clearly reserves admission of "other" documents for the reviewing court. *Pikovsky.*, 2011 IL App (1st) 103742, ¶ 16. Consequently, the circuit court was not vested with the power to grant the requested relief. *Id*. Accordingly, the circuit court did not err in determining that it lacked jurisdiction to grant Premier's Rule 321 motion.

¶ 81 Finding no error, we cannot find that the circuit court created a series of errors that resulted in the denial of a fair trial to Premier. *Bachman v. General Motors Corp*., 332 Ill. App. 3d 760, 806.

¶ 82 III. CONCLUSION

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

¶ 84 Affirmed.