

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).

2012 IL App (4th) 110750-U

Filed 4/13/12

NO. 4-11-0750

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

PATEL & LEHMAN, P.C.,	)	Appeal from
Plaintiff-Counterdefendant,	)	Circuit Court of
v.	)	Vermilion County
RICHARD J. DOYLE,	)	No. 09CH315
Defendant-Counterplaintiff and	)	
Third-Party Plaintiff-Appellant,	)	
v.	)	
BAKU N. PATEL, Individually; and MARK A.	)	Honorable
LEHMAN, Individually,	)	Steven L. Garst,
Third-Party Defendants-Appellees.	)	Judge Presiding.

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JUSTICE KNECHT delivered the judgment of the court.  
Justices Appleton and Cook concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* A damages clause in a contract providing for liquidated damages in the event of a breach of contract that provides for such damages at the option of the injured party allows the alternative of pursuing actual damages. Thus, the liquidated damages provision is unenforceable because it preserves the alternative remedy of actual damages.
- ¶ 2 In July 2007, Richard Doyle, Mark Lehman, and Baku Patel, all attorneys, entered into a shareholders agreement as the shareholders of a professional services corporation. The agreement contained a section providing if any party to the agreement attempted "to avoid, subvert, obviate, or delay enforcement, payment, or effect of the provisions" of the agreement, personal liability would result to the injured party or parties. At the option of the injured parties, they would be entitled to \$250,000 in liquidated damages.

¶ 3 In 2009, Doyle resigned from the original professional services corporation. After the dissolution, Lehman and Patel, now operating as Patel and Lehman, P.C., sued Doyle for damages resulting from the dissolution. Doyle filed a third-party complaint against Lehman and Patel individually, which included two counts requesting \$250,000 in liquidated damages for breaches of the shareholders agreement.

¶ 4 After a motion to dismiss was filed by Lehman and Patel, the trial court dismissed the counts of the third-party complaint requesting the liquidated damages, finding that provision of the agreement was unenforceable. Doyle appeals. We affirm and remand.

¶ 5 I. BACKGROUND

¶ 6 On July 1, 2007, the parties, Doyle, Lehman, and Patel, entered into a shareholders agreement as the sole shareholders and owners of a professional services corporation entitled Doyle, Lehman, and Patel, P.C., where the parties, all attorneys, practiced law together. On September 20, 2009, Doyle gave written notice of his intent to withdraw from the corporation. Shortly thereafter, the corporation changed its name to Patel & Lehman, P.C. (the corporation).

¶ 7 On September 29, 2009, the parties signed a written amendment to the shareholders agreement addressing disposition of the physical assets of the firm as well as the division of criminal and social security files belonging to the firm. The amendment did not address the firm's "fee inventory," the contingent-fee cases staying with the new firm. The amendment states "any other aspects of the 2007 Shareholders' Agreement shall still be effective."

¶ 8 On December 10, 2009, the corporation filed a three-count complaint against Doyle for breach of the shareholders agreement and breach of fiduciary duty. On December 30, 2009, Doyle filed answers and/or motions to dismiss the various counts of the corporation's

complaint as well as a counterclaim against it and a third-party complaint against Lehman and Patel individually. Counts VI and VII of the third-party complaint sounded in contract and invoked section 7.1 of the shareholders agreement specifying liquidated damages of \$250,000 at the injured party's option for any attempt to breach any of the terms of the agreement. On October 1, 2010, amendments were made to Doyle's third-party complaint, which still included the allegations seeking liquidated damages in counts VI and VII.

¶ 9 On January 18, 2011, Lehman and Patel filed a motion to dismiss, among other things, counts VI and VII of the third-party complaint pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)). They contended the liquidated damages provision of the shareholder agreement was unenforceable.

¶ 10 On March 3, 2011, oral arguments were heard on the motion to dismiss counts VI and VII of Doyle's third-party complaint as well as on other motions to dismiss filed by all parties to the litigation. On March 16, 2011, the trial court issued a letter opinion granting the motion to dismiss counts VI and VII. The court stated the amount of liquidated damages referred to in section 7.1 of the shareholders agreement might be reasonable at the time the agreement was entered and actual damages were probably uncertain in amount and difficult to prove. However, the language of section 7.1 made liquidated damages optional and other counts of Doyle's third-party complaint alleged the same facts and sought damages. The court concluded a party was not entitled to both liquidated damages and actual damages. On March 18, 2011, the order dismissing counts VI and VII was entered.

¶ 11 On April 14, 2011, Doyle filed a motion to reconsider the trial court's order. On June 14, 2011, oral argument was heard on this motion. On June 23, 2011, the court issued a

letter opinion and entered an order denying the motion to reconsider.

¶ 12 In its opinion letter, the trial court stated it had inartfully stated the grounds for dismissal of counts VI and VII. Pursuant to case law, the language of section 7.1 "at the injury parties [*sic*] option" can only be read to preserve the alternative remedy of actual damages. Therefore, the right to liquidated damages was unenforceable. Further, the court stated a liquidated damages amount must be for a specific amount for a specific breach and section 7.1 created a liability for liquidated damages for even any "attempt" to breach any provision of the shareholders agreement. Thus, not specific enough for enforcement. Based on these points, the trial court denied Doyle's motion to reconsider.

¶ 13 On July 29, 2011, the trial court amended its order denying Doyle's motion to reconsider and making an express finding under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) authorizing this interlocutory appeal.

¶ 14 II. ANALYSIS

¶ 15 The liquidated damages clause at issue in this case, section 7.1 of the shareholder agreement states:

"7.1 *Binding Effect.* This Agreement is binding upon the parties and their respective heirs and personal representatives. Any attempt by any party to avoid, subvert, obviate, or delay enforcement, payment, or effect of the provisions herein, whether by dissolution of this Professional Corporation or otherwise, shall result in personal liability of said shareholder(s) to the injured party or parties. At the injury parties [*sic*] option, they shall be entitled

to liquidated damages in the sum of \$250,000."

¶ 16 Doyle argues the trial court erred in concluding section 7.1 both (1) preserved the alternative remedy of actual damages and (2) the liquidated damages amount was not for a specific amount for a specific breach and, therefore, for either reason, was unenforceable under Illinois law.

¶ 17 The validity of a liquidated damages provision is a question of law which is reviewed *de novo*. *Dallas v. Chicago Teachers Union*, 408 Ill. App. 3d 420, 424, 945 N.E.2d 1201, 1205 (2011). In general, Illinois courts do not favor liquidated damages provisions. See *Catholic Charities of the Archdiocese of Chicago v. Thorpe*, 318 Ill. App. 3d 304, 312 n. 2, 741 N.E.2d 651, 656 n. 2 (2000); *Grossinger Motorcorp, Inc. v. American National Bank & Trust Co.*, 240 Ill. App. 3d 737, 749, 607 N.E.2d 1337, 1345 (1992). A liquidated damages provision is enforceable only if (1) the parties intended to agree in advance to a settlement of damages that might arise from a breach; (2) the amount of liquidated damages was reasonable at the time of contracting and bore some relation to the damages that might be sustained; and (3) the actual damages anticipated from the breach would be uncertain in amount and difficult to prove. *Dallas*, 408 Ill. App. 3d at 424, 945 N.E.2d at 1204. Additionally, liquidated damages must be for a specific amount for a specific breach and the provision may not be a penalty to punish nonperformance or a threat used to secure performance. *Grossinger*, 240 Ill. App. 3d at 750, 607 N.E.2d at 1346.

¶ 18 An optional liquidated damages provision is unenforceable. *Grossinger*, 240 Ill. App. 3d at 752, 607 N.E.2d at 1347. As noted above, the first consideration in determining whether a liquidated damages provision is enforceable is whether the parties intended to agree in

advance to the settlement of damages that might arise from a breach. When liquidated damages are provided as an option, it shows the parties never intended to establish a specific sum to constitute damages in the event of a breach. *Id.*, 240 Ill. App. 3d at 750, 607 N.E.2d at 1346. Although the liquidated damages provision in *Grossinger* specifically stated an option to pursue actual damages instead of the liquidated damages upon default, and the provision in this case does not explicitly provide that option, Illinois courts have found the use of the word "option" implies the preservation of a party's alternative right to actual damages. See *Catholic Charities*, 318 Ill. App. 3d at 311, 741 N.E.2d at 656-57.

¶ 19 In this case, we note, first, despite the fact all three parties involved in signing, and we presume drafting, the shareholder agreement are lawyers, the provision for liquidated damages was not well drafted and, possibly, ambiguous. However, the liquidated damages provision in section 7.1 of the shareholder agreement clearly stated liquidated damages of \$250,000 were available as an option to a party injured due to a breach, or even an attempted breach, of the contract. Under *Catholic Charities*, this language constitutes an implied option of pursuing actual damages and this shows the parties did not intend to agree in advance to the settlement of damages upon a breach. Doyle argues the use of the word "option" in this case is mere surplusage and should not be considered dispositive of this issue. This argument was rejected in *Catholic Charities* and we reject it here. See *Catholic Charities*, 318 Ill. App. 3d at 311-12, 741 N.E.2d at 656-57.

¶ 20 As we have found the liquidated damages remedy to be optional, we need not engage in further analysis to declare it unenforceable. See *Catholic Charities*, 318 Ill. App. 3d at 313, 741 N.E.2d at 657. We affirm the trial court's order granting the motion of Lehman and

Patel to dismiss counts VI and VII of the third-party complaint. Mediation might well assist the parties in resolving the remaining issues.

¶ 21

### III. CONCLUSION

¶ 22

For the foregoing reasons, we affirm the trial court's judgment.

¶ 23

Affirmed and remanded for further proceedings.