

No. 1-17-2842

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SOURCE ONE STAFFING, INC.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	No. 2014 CH 04915
)	(cons. with 15 L 06548)
)	
SCOTT LEWIS and JUST IN TIME STAFFING, INC.,)	Honorable Sanjay Tailor
)	Honorable Rita M. Novak
Defendants-Appellees.)	Judges Presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* Summary judgment in favor of defendants affirmed. Review of validity of restrictive covenants in employment agreement is forfeited given plaintiff's failure to provide record support for its assertions of fact necessary to sustain covenants. Breach of contract claim against former employee fails as written employment agreement contradicts plaintiff's claim and plaintiff asserted no claim based on later oral agreement.

¶ 2 Plaintiff-appellant Source One Staffing, Inc. appeals an order granting summary judgment to defendants-appellees Scott Lewis and Just In Time Staffing, Inc. on Source One's complaint alleging claims for (i) sums due from Lewis under a written an employment contract, (ii) Lewis's breach of restrictive covenants contained in that agreement, and (iii) Just In Time's

inducement of the latter breach. Finding no error, we affirm.

¶ 3 Source One is a staffing firm that supplies temporary employees for light industry requiring no-skill or semi-skilled labor. Source One has offices in West Chicago, Wood Dale, and South Elgin.

¶ 4 In 2005, Lewis began working for Source One as a sales representative in its South Elgin office. Before his employment at Source One, Lewis had worked for five years at another temporary staffing firm, Labor Network, where he developed a substantial book of business, which was one of the reasons Source One hired him. While at Labor Network, Lewis met Robert Gibson, who later founded Just In Time, a competitor of Source One that has offices in Bensenville and South Elgin. Just In Time's South Elgin office is in the same strip mall as Source One's office.

¶ 5 At the outset of his employment, Source One and Lewis entered into a written employment agreement. Under the agreement, Lewis's compensation was set at \$72,000 per year as a draw against commissions earned as a result of the placement of temporary employees with Source One's customers. In the event that Lewis did not procure sales sufficient to generate \$72,000 in commissions, the agreement provided that Lewis was obligated to repay Source One on demand the difference between his annual compensation and the commissions earned. As an example, the agreement recited that if in a particular year, Lewis's sales generated only \$52,000 in commissions, he would owe Source One \$20,000 payable immediately on demand. Between 2005 and 2013, when he left Source One, there was only one year (2006) when Lewis did not meet the \$72,000 minimum, and he more than made up the difference in 2007. In 2008, Source One and Lewis orally agreed to increase his annual draw against commissions to \$132,000, but never amended the employment agreement. Prior to Lewis's resignation, Source One never

claimed that Lewis failed to generate enough business to meet his commission threshold, nor did it demand reimbursement of any amount from him.

¶ 6 The agreement also contained non-disclosure and non-solicitation provisions. The non-disclosure provision was designed to protect Source One's "confidential information," broadly defined to include virtually every aspect of Source One's business, including all "customer information" and "[a]ll information which is marked confidential or explained to be confidential or which, by its nature is confidential." The terms of the non-solicitation provision purported to prevent Lewis from competing with Source One for one year following the termination of his employment by (i) soliciting "any customer" of the company that Lewis "had contact with, solicited, serviced and/or knew of" during his tenure, (ii) soliciting any Source One employees to leave the company, and (iii) accepting employment with any other temporary staffing agency within a 10-mile radius of Source One's Elgin office. In recognition of Lewis's prior work experience in the industry, Exhibit A to the employment agreement carved out from the non-compete provisions 67 customers with whom Lewis had developed relationships before his employment at Source One.

¶ 7 Lewis terminated his employment at Source One on May 16, 2013. Source One's President Scott Reedy reminded Lewis that he had "better stick to Exhibit A" of his employment agreement to which Lewis responded, "No problem, I agree." On May 20, 2013, Lewis began working at Just In Time's Bensenville office, which is more than 10 miles from Source One's South Elgin office. Other than the customers listed on Exhibit A to his Source One employment agreement, Lewis did not solicit business from customers located in the South Elgin area during the first year following his resignation.

¶ 8 On March 21, 2014, more than 10 months after Lewis resigned, Source One filed its complaint in the Chancery Division of the circuit court of Cook County naming only Lewis as a defendant. In Count I, Source One alleged that Lewis owed Source One money under the provisions of his written employment agreement pertaining to the annual draw against commissions. Source One attached the written agreement containing the \$72,000 minimum commission threshold and specifically requested that it be enforced. The complaint did not include any allegations regarding the increase in Lewis's draw against commissions or claim that any additional amounts were due as a result of that oral agreement. Count II alleged that Lewis had violated the agreement's post-employment restrictions by soliciting six identified customers of Source One, by soliciting a Source One employee, Angel Cardoso, to leave Source One's employ, and by accepting employment with Just In Time, which had an office in South Elgin. Although Source One filed a motion for a preliminary injunction with the complaint, it never noticed the motion for hearing.¹

¶ 9 Source One waited another 15 months to sue Just In Time in a separate complaint filed in the Law Division alleging in a single count that Just In Time tortiously interfered with the contract between Source One and Lewis. The cases were later consolidated.

¶ 10 The parties engaged in extensive discovery.

¶ 11 As to the customer solicitation claim, discovery revealed no support for the allegations in the complaint that Lewis improperly solicited six Source One customers—First Priority Restoration, Elgin Molded Plastics, Kristel Displays, Coating Methods, Old Hickory Smokehouse, and New Beginnings Contract Packaging—after leaving his employment.

¹ The complaint contained a third count labeled "Injunctive Relief," which we need not separately address since an injunction is a remedy, not a cause of action.

Discovery disclosed that (i) First Priority became a customer of Just In Time through solicitation by Cardoso, not Lewis; (ii) Elgin Molded and Kristel both approached Just In Time because they were unable to obtain temporary employees from Source One; (iii) Coating Methods is an exempt customer listed on Exhibit A to Lewis's employment agreement; (iv) Old Hickory was never a customer of Just In Time and Lewis never solicited its business; and (v) New Beginnings was a Just In Time customer before Lewis left Source One and Lewis had no part in its decision to do business with Just In Time. Four of the customers identified by Source One—First Priority, Elgin Molded, Kristal, and New Beginnings—continued to do business with Source One after Lewis resigned.

¶ 12 Source One's allegation that Lewis solicited Cardoso to leave its employ was likewise not corroborated by discovery. Cardoso terminated his employment with Source One more than two weeks before Lewis left and he and Lewis never discussed leaving together. Cardoso also knew Gibson before joining Just In Time because he, like Lewis, had worked with Gibson at Labor Network.

¶ 13 After the close of discovery, Lewis filed a motion for summary judgment. Source One supported its initial response with a lengthy affidavit from Reedy attaching numerous documents for which Reedy laid no foundation. Lewis filed a motion to strike the affidavit on that ground, which, after briefing, the trial court granted without prejudice to Source One's ability to file an amended affidavit. Source One later filed an amended affidavit, which Lewis again moved to strike, arguing that it suffered from the same deficiencies as Reedy's original affidavit. After further briefing and argument, the trial court granted the motion to strike as to paragraphs 11, 14, 16, 26, and 28.

¶ 14 The case was reassigned to a new judge due to the original judge's retirement, and after

hearing, the trial court concluded that: (i) the written employment agreement that the complaint sought to enforce set the threshold draw against commissions at \$72,000 and that although the parties orally agreed to raise the annual draw to \$132,000, the agreement, and particularly Lewis's reimbursement obligation, had never been amended to reflect that fact; (ii) Source One had not identified evidence establishing a protectable interest in its customers such as evidence showing that Source One had a "near permanent" relationship with those customers, its information was not "confidential" as it could easily be replicated, and there was no record evidence that Lewis violated the terms of his employment agreement as to the six customers identified in the complaint. Finding no genuine issues of material fact, the court granted Lewis's motion. Source One never sought to amend its complaint to assert a claim based on the 2013 oral agreement to increase Lewis's draw against commissions.

¶ 15 Following the court's ruling in favor of Lewis, Just In Time filed its own motion for summary judgment. Just In Time argued that the court's determination regarding the enforceability of the restrictive covenants in Lewis's employment agreement warranted summary judgment in its favor. The trial court agreed and granted Just In Time's motion for summary judgment as well.

¶ 16 Source One timely appealed.

¶ 17 At the outset, we note, as Lewis and Just In Time point out, that Source One's brief contains numerous violations of Illinois Supreme Court Rule 341 (eff. Nov. 1, 2017). In particular, throughout its briefs and without citation to the record, Source One refers to the "competitive nature" of the field of providers of temporary employees to light industry, the "confidential" nature of its business information, and its "near permanent relationships" with customers. See Ill. Sup. Court Rule 341(h)(6), (7) (appellant's brief shall contain statement of

facts “with appropriate reference to the pages of the record on appeal”; argument section required to include citation of authority and “pages of the record relied on”). Rule 341's mandate detailing the format and content of appellate briefs is compulsory. *Rosestone Investments, LLC v. Garne*, 2013 IL App (1st) 123422, ¶ 18. The conclusions regarding the nature of Source One’s business, the confidentiality of its information, and its relationships with customers, which are essential to the viability of Source One’s claim regarding Lewis’s alleged violation of the restrictive covenants, are all highly dependent on the facts of each case. *Reliable Fire Equipment Co. v. Arredondo*, 2011 IL 111871, ¶ 43 (whether employer possesses legitimate business interest justifying restrictive covenant depends on “the totality of facts and circumstances of the individual case.”). Source One’s failure to cite to the record to support these critical factual assertions not only violates the rule, but also warrants our refusal to consider its arguments. *Vancura v. Katris*, 238 Ill. 2d 352, 370 (2010); *Rosestone Investments*, 2013 IL App (1st) 123422, ¶ 18; *Engle v. Foley & Lardner, LLP*, 393 Ill. App. 3d 838, 854 (2009) (“Failure to provide proper citations to the record is a violation of [Rule 341], the consequence of which is waiver of the facts or argument lacking such citation.”).

¶ 18 In its reply brief, Source One’s only response to the identified deficiencies in its opening brief is the assertion that its “response to Lewis’ motion for summary judgment motion and affidavit in support of that response are all made part of the Record on appeal.” Source One’s response to the summary judgment motion is comprised of a 15-page brief and dozens of pages of exhibits. As has often been noted, this court “ ‘is not simply a depository into which a party may dump the burden of argument and research.’ ” *Lake County Grading Company, LLC v. Village of Antioch*, 2014 IL 115805, ¶ 36, quoting *People ex rel. Illinois Department of Labor v. E.R.H. Enterprises, Inc.*, 2013 IL 115106, ¶ 56. We decline to search through the record to find

support for Source One's representations.

¶ 19 Further, although the enforceability of the restrictive covenants in Lewis's employment agreement is one of Source One's main arguments on appeal, it never once bothers to cite or quote those provisions in its briefs. To make matters worse, Source One relies on a non-binding Seventh Circuit case, *Outsource International, Inc. v. Barton*, 192 F.3d 662 (7th Cir. 1999), to argue, apparently as a matter of law, that the provision of temporary employees for light industry involves near permanent relationships with customers sufficient to support post-employment solicitation restrictions. But there is no "one size fits all" in this area of the law and Source One offers no meaningful analysis of its own relationships with those customers or the nature of the information regarding customers that it claims is confidential.

¶ 20 And even on a cursory review, it is apparent that the restrictive covenants in Lewis's employment agreement, which (i) label "confidential" virtually all of Source One's business information, including such publicly available information as the names and addresses of customers, and (ii) purport to prohibit Lewis from soliciting customers he "knew about" during his employment at Source One, are facially overbroad. See *Office Mates 5, North Shore, Inc. v. Hazen*, 234 Ill. App. 3d 557, 575-76 (1992) (information not confidential because it was "readily available to competitors through normal competitive means," such as asking); *AssuredPartners, Inc. v. Schmitt*, 2015 IL App (1st) 141863, ¶ 36 (refusing to enforce restrictive covenant that prohibited former employee from servicing customers employee never had contact with at former employer). Source One's request that we "blue pencil" any overbroad provisions, which it never raised in the trial court and is made for the first time in its reply brief, is likewise forfeited. Ill. Sup. Ct. Rule 341(h)(7) (eff. Nov. 1, 2017) (points not argued in opening brief "are waived and shall not be raised in the reply brief").

¶ 21 For these reasons, we find that Source One has forfeited review of the judgment entered in Lewis's favor as it relates to enforcement of the restrictive covenants. It necessarily follows that affirmance of the judgment in favor of Just In Time for allegedly inducing Lewis's breach of the restrictive covenants must also fail for if Source One is unable to demonstrate the existence of a valid restrictive covenant, it cannot pursue a third party for inducing its breach.

¶ 22 Source One's claim against Lewis for amounts allegedly owed to Source One for failure to meet his commission threshold fares no better. Summary judgment is appropriate "if 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 judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2016). "In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. A triable issue precluding summary judgment exists where the material facts are disputed or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Although the non-moving party "need not prove his case at the summary judgment stage, he must come forth with some evidence that arguably would entitle him to recover at trial." *Keating v. 68th and Paxton, L.L.C.*, 401 Ill. App. 3d 456, 472 (2010). We review an order granting summary judgment *de novo*. *Williams*, 228 Ill. 2d at 417.

¶ 23 Source One could not prevail in the trial court and it cannot prevail here based on a claim it never included in its complaint. *Pagano v. Occidental Chemical Corp.*, 257 Ill. App. 3d 905, 911 (1994) (party cannot survive summary judgment based on an unpled theory of relief). When a party seeks to recover based on a claim that a written contract between the parties was later

modified, recovery on the modified contract is a distinct claim. *Schwinder v. Austin Bank of Chicago*, 348 Ill. App. 3d 461, 469 (2004). The success of any lawsuit depends on enforcement of the agreement as modified, not the original agreement. *Id.*

¶ 24 The only agreement Source One sought to enforce contained a minimum annual commission threshold of \$72,000. Even after Lewis established that with the exception of 2006, he had met that threshold during his employment with Source One and pointed out that any claim by Source One for additional sums must necessarily be premised on the 2013 oral agreement to increase his draw, Source One never requested leave to amend its complaint to assert such a claim.² Because the only agreement before the trial court contained the \$72,000 figure and it was undisputed that Lewis met that threshold during his tenure at Source One, the trial court properly determined that Source One, as a matter of law, was not entitled to any additional sums from Lewis. The trial court was not obligated to and we will not consider a claim based on the 2013 oral agreement and its effect on the written employment agreement that Source One never pled.

¶ 25 Finally, given our determination that Source One has forfeited review of any issues relating to enforcement of the restrictive covenants and because Source One never asserted any claim based on the 2013 oral agreement, we need not consider its additional arguments regarding the sufficiency of Reedy's affidavit or the trial court's ruling striking certain paragraphs of that affidavit. As with its other arguments, Source One does not articulate in its brief how the stricken paragraphs of Reedy's affidavit created any genuine issue of material act sufficient to defeat

² We also note that the written agreement that Source One asked the trial court to enforce contained a provision that the reimbursement obligation would not survive termination of the agreement. As noted, before Lewis left Source One's employ, thus terminating the agreement, Source One never demanded any sums it claimed Lewis owed under this provision.

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summary judgment. And even if the trial court improperly refused to consider certain paragraphs of that affidavit—and we do not believe it did—the error would be harmless.

¶ 26 Affirmed.