

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

ROBERT PARADISE

Respondent

v.

MIDWEST ASPHALT COATINGS, INC.

Appellant

DOCKET NUMBER **WD70944**

DATE: March 16, 2010

Appeal From:

Circuit Court of Jackson County, MO
The Honorable Jack Richard Grate, Jr., Judge

Appellate Judges:

Division Four: Thomas H. Newton, C.J., Lisa White Hardwick, and Cynthia L. Martin, JJ.

Attorneys:

Bruce McCurry, Springfield, MO

Counsel for Appellant,

Attorneys:

George E. Kapke, Lee's Summit, MO

Counsel for Respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

ROBERT PARADISE, Respondent, v.
MIDWEST ASPHALT COATINGS, INC., Appellant

WD70944

Jackson County

Before Division Four Judges: Thomas H. Newton, C.J., Lisa White Hardwick, and Cynthia L. Martin, JJ.

Robert Paradise sought a declaratory judgment to void a non-compete agreement that he had signed with Midwest Asphalt Coatings, Inc., claiming the agreement was unreasonable and against public policy. Midwest counterclaimed, asking the trial court to declare the agreement valid or modify the agreement to be valid, grant an injunction against Mr. Paradise prohibiting him from breaching the agreement, and award Midwest contractual attorney fees. After a bench trial, the trial court modified the agreement, declared it enforceable as modified, and refused to grant an injunction against Mr. Paradise or to award attorney fees to Midwest. Midwest appeals the trial court's denial of an injunction and attorney fees.

AFFIRMED.

Division Four holds: In its first point, Midwest argues that the trial court erred in denying the injunction because its findings required it to issue an injunction against Paradise. Once a trial court finds that a business has a legitimate business interest at stake and the non-compete agreement is valid, in most cases, an injunction should be granted. Here, the trial court found Midwest had a legitimate business interest in retaining its customers; Paradise did not solicit those customers, although he could have done so; and the non-compete agreement was valid as modified. Because the law does not require an actual solicitation to prove a legitimate business interest is at stake, these findings entitled Midwest to an injunction. However, the period of time for the injunction has past; so the issue is moot.

In its remaining three points, Midwest argues the trial court erred in denying attorney fees because striking the attorney fees provision for unconscionability was beyond the scope of the pleadings and not supported by the record. Under the law, Midwest is only entitled to attorney fees if it were the prevailing party. Midwest was not the prevailing party because the trial court determined that the non-compete was unreasonable. It only found the agreement reasonable and enforceable after its discretionary modification. Although we concluded in the first point that Midwest was entitled to an injunction, our conclusion that Midwest was entitled to that remedy was based on the modified agreement. Consequently, Midwest was not the prevailing party. Thus, the trial court did not err in denying Midwest attorney fees. Because this issue is dispositive, we do not address the propriety of the trial court's decision that the attorney fees provision was unconscionable. Accordingly, Midwest's second, third, and fourth points are denied.

Therefore, we affirm.

Opinion by: Thomas H. Newton, Judge

March 16, 2010

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