VENTURE EXPRESS, INC.,	)	
	)	
Plaintiff/Appellant,	)	
	)	Appeal No.
	)	01-A-01-9608-CH-00352
VS.	)	
	)	Davidson Chancery
	)	No. 93-1921-III
RAEFORD TRUCKING COMPANY,	)	
MOTOR TRUCK EQUIPMENT, INC.,	)	
R. L. KEITH, Individually, and	)	
HERBERT KEITH, Individually, and	)	
JOSEPH KEITH, Individually,	)	
	)	
Defendants/Appellees.	)	

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CHANCERY COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

THE HONORABLE ROBERT S. BRANDT, CHANCELLOR

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AFFIRMED AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:
TODD, P.J., M.S.
KOCH, J.

O P I N I O N

The primary question in this appeal is whether a contract reciting a separate consideration for a non-compete provision amounts to a promise to pay that amount if the seller breaches the non-compete provision. The Chancery Court of Davidson County held that the contract did not provide for liquidated damages. We affirm.

I.

In October of 1990 J. L. Keith and his two sons, Herbert and Joseph Keith, sold their interests in two North Carolina companies to Venture Express, Inc. As part of the transaction, the Keiths executed a separate non-compete agreement promising not to compete with Venture for a period of two years. Paragraph three of the agreement not to compete stated:

> 3. Consideration for this Agreement shall be ten (10%) percent of the value assigned to be the average wholesale appraised value of the owned rolling stock (including Ryder units leased at date of letter of intent, October 24, 1990). Fifty (50%) percent of said compensation shall be paid at closing in joint check payable to Keiths. The balance shall be placed in an escrow account under J. L. Keith's social security number to be withdrawn only upon obtaining signature of Keiths or Keiths' representative (to be designated under oath in writing) and Venture's representative certifying compliance with all terms and directions of this non-competition agreement.

The parties agree that the stated consideration, calculated according to the agreement, amounted to $49,996.00 (10% of the rolling stock). When the parties closed the transaction, however, the payments called for in the various agreements consumed the entire purchase price. Therefore, Venture did not establish the escrow account that the non-compete agreement required.

By June of 1992 Venture's business in North Carolina had declined significantly and the Keiths began to compete with Venture in that state. The chancellor granted Venture summary judgment on the question of the defendants' breach. On the question of damages, however, Venture did not offer any proof of damages resulting from the breach. Rather, they argued that they should be awarded $49,996 as liquidated damages.

The chancellor dismissed the claim because Venture failed to prove any damages from the breach and because the parties had altered the contract by not establishing the escrow account. Venture filed its notice of appeal on June 13, 1996 but failed to file a copy of the notice with the clerk of this court. See Rule 5(a), Tenn. R. App. Proc. On August 2, 1996, Venture moved this court for an extension of time in which to file a copy of the notice in this court. The appellees opposed the motion and we took the motion under advisement.

II.

The Notice of Appeal

In *Cobb v. Beier*, No. 03A01-9602-CV-00051 (filed July 6, 1996), the Eastern Section of this court held that mere inadvertence was not a sufficient excuse for failing to comply with Rule 5(a), Tenn. R. App. Proc. -- even where no prejudice resulted from the failure. Our decisions on the question have tended to be more lenient. See *Holder v. Holder*, No. 84-117-II (filed Sept. 5, 1984).

The Supreme Court has granted permission to appeal in *Cobb v. Beier* and we await a final decision in that case. In view of that fact, and the conclusion we have drawn on the principal issue, we choose to pretermit the issue raised concerning the failure to comply with Rule 5(a) and we will address the merits of the appeal.

III.

Liquidated Damages

Liquidated damage provisions in contracts are enforceable if they bear a reasonable relationship to the damages that might be expected in the event of a breach. *McGann v. United Safari, Inc.*, 694 S.W.2d 332 (Tenn. App. 1985). See also *Harmon v. Eggers*, 699 S.W.2d 159 (Tenn. App. 1985). The trouble with Venture's position in this case, however, is that there is no liquidated damage provision in the agreement. The only reference to a sum certain in the agreement is the consideration for the non-compete provision. There is no promise to pay that amount in the event of a breach; nor is there anything else that could be construed as a liquidated damage provision.

The provision in this agreement is no different from the consideration stated for the purchase of any other asset, whether tangible or intangible. If the seller does not deliver what the contract called for, the damages are not measured by the price but by the difference between the price and the value of the thing delivered -- plus consequential or special damages if they can be proved with reasonable certainty. Where a contract of sale includes a non-compete agreement the measure of damages for a breach of the agreement is the actual damages the buyer may be able to prove. *Jackson v. Byrnes*, 103 Tenn. 698, 54 S.W. 984 (1900); *Johnson v. Jones*, 1 Tenn. App. 24 (1925). The difficulty in proving actual damages for breach of a non-compete agreement is a good reason to include a liquidated damage provision in the contract, or a requirement that the promisor post a bond to secure performance. See *Muse v. Swayne*, 70 Tenn. 251 (1879). In this case the parties did neither, so we conclude that the burden was on Venture to prove its actual losses as a result of the defendants breach of the non-compete agreement.

IV.

Actual Damages

Venture argues in the alternative that they proved actual damages resulting from the breach. They argue that but for the non-compete agreement they would not have bought the operating licenses ($25,000), they would not have leased the seller's terminal ($40,250), nor would they have paid the brokerage commission on the sale ($10,000). But that is the same argument using different numbers. We see no connection between a breach of the non-compete agreement a year and a half after the sale and payments made under the terms of the sale agreement. We, therefore, affirm the chancellor's finding that Venture failed to prove that it suffered damages from the breach of the non-compete agreement.

In view of the result we have reached on this issue we will not address the issue of whether the parties altered their agreement by failing to establish the escrow account.

V.

Attorney Fees

The non-compete agreement contained this provision:

> If it is necessary for any party to enforce the terms or conditions hereof, suit may be brought in Davidson County, Tennessee, for injunctive relief as well as money damages, and the successful party shall be entitled to all expenses, court costs and a reasonable sum for attorneys fees.

This provision provides one of the exceptions (contract) to the American Rule against awarding attorney fees to successful litigants as part of the costs of suit. See *Goings v. Aetna Casualty and Surety Company*, 491 S.W.2d 847 (Tenn. App. 1972).

The key in this case is whether Venture qualifies as the "successful party." The contract allows either party to bring suit for "injunctive relief as well as money damages." Since Venture obtained neither an injunction nor a judgment for damages, we conclude that they are not the successful party. It is true that they obtained a declaration that the defendants breached the non-compete agreement, and to that extent they were successful, but they did not get the relief they set out to obtain -- a judgment for liquidated damages. Therefore, we affirm the chancellor's decision not to award attorney fees in this cause.

The judgment of the trial court is affirmed and the cause is remanded to the Chancery Court of Davidson County for any further proceedings necessary. Tax the costs on appeal to the appellant.

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BEN H. CANTRELL, JUDGE

CONCUR:

_____
HENRY F. TODD, PRESIDING JUDGE
MIDDLE SECTION

_____
WILLIAM C. KOCH, JR., JUDGE