

No. 1-10-1535

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

SPOMENKA LUEDI and HANS LUEDI,)	Appeal from the
)	Circuit Court of
Plaintiffs–Appellants/Cross-Appellees,)	Cook County.
)	
v.)	No. 09 L 014412
)	
ROBERT SCHILLERSTROM, and THE LAW OFFICES)	
OF ROBERT SCHILLERSTROM,)	Honorable
)	James Egan,
Defendants–Appellees/Cross-Appellants.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Quinn and Justice Connors concurred in the judgment.

ORDER

¶1 *Held:* Plaintiffs' complaint alleging that defendant attorneys had failed to notify them of a particular settlement offer was barred by *res judicata*, where defendants' alleged legal malpractice was already the subject of another prior lawsuit filed by plaintiffs and plaintiffs had tried to amend that prior complaint to allege that they did not know that one of the settlement offers allegedly conveyed to defendants was for six-figures and where the trial court had already denied plaintiffs' motion to amend that prior complaint to make this same exact factual allegation.

¶2 In the case at bar, the circuit court of Cook County granted defendants' motion to dismiss, but denied defendants' motion for sanctions for an allegedly frivolous lawsuit. On this appeal, plaintiffs ask us to reverse the dismissal of their complaint, while defendants ask us on a cross-

appeal to reverse the trial court's denial of defendants' motion for sanctions. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶3

BACKGROUND

¶4 In November 2001, plaintiffs Spomenka and Hans Luedi filed a legal malpractice complaint in the circuit court of Cook County against their attorneys, defendant Robert Schillerstrom and the Law Offices of Robert Schillerstrom. Their 2001 complaint alleged that defendants committed legal malpractice when they represented plaintiffs in litigation concerning the estate of Eunice Trout. The trial court in the Trout litigation issued an order in favor of the Trout family and ordered the Luedis to pay punitive damages. Plaintiffs appealed and, on June 22, 1999, the appellate court affirmed the trial court's order in the Trout litigation. *In re: Estate of Trout*, No. 2-96-1069 (June 22, 1999) (unpublished order pursuant to Supreme Court Rule 23).

¶5 In defendants' answer to plaintiffs' 2001 malpractice complaint, defendants allege that plaintiffs failed to mitigate their damages by failing to accept settlement offers recommended by defendants, and the trial court granted summary judgment for defendants. However, plaintiffs sought leave to file another amended complaint, alleging that defendants had not informed plaintiffs that the opposing parties in the Trout litigation were "interested in engaging in settlement negotiations." Specifically, plaintiffs allege that defendants had failed to inform them that the opposing parties had made "a six figure offer." On June 18, 2008, the trial court denied plaintiffs' motion for leave to amend for the reasons "as stated by the court on the record" and entered final

judgment in favor of defendants.¹ The Illinois Supreme Court then denied plaintiffs' petition for leave to appeal on January 26, 2011.

¶6 On November 24, 2009, plaintiffs filed this action, their second malpractice suit against defendants arising out of the Trout litigation. The sole allegation in this second complaint was defendants' alleged failure to inform plaintiffs of "a six figure range settlement offer." On April 28, 2010, the trial court granted defendants' motion to dismiss but denied defendants' motion for sanctions. This appeal and cross-appeal followed.

¶7 ANALYSIS

¶8 On appeal, plaintiffs claim that their second legal malpractice suit about an alleged "six figure" offer is not barred by *res judicata*, or the statute of limitations, or the statute of repose. Defendants claim in a cross-appeal that the trial court abused its discretion in denying their motion for sanctions.

¶9 For the reasons stated below, we affirm the trial court's order.

¶10 Defendants moved to dismiss pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2008)) on the grounds that plaintiffs' second complaint was barred by the doctrine of *res judicata*, the statute of limitations and the statute of repose.

¶11 "A motion to dismiss, pursuant to section 2-619 of the Code, admits the legal sufficiency

¹Although the trial court's order stated that it had provided its reasons "on the record," plaintiffs chose not to provide either a transcript or a bystander's report in the appellate record before us. Plaintiffs appealed and, on November 12, 2009, the appellate court affirmed the dismissal of plaintiffs' first malpractice action against defendants. *Schillerstrom v. Luedi*, No. 2-08-0474, app. denied 239 Ill. 2d 590 (2011).

of the plaintiffs' complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiffs' claim." *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006); *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006). For a section 2-619 dismissal, our standard of review is *de novo*. *Solaia Technology*, 221 Ill. 2d at 579; *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 488 (2008).

¶12 When reviewing "a motion to dismiss under section 2-619, a court must accept as true all well-pleaded facts in plaintiffs' complaint and all inferences that can reasonably be drawn in plaintiffs' favor." *Morr-Fitz*, 231 Ill. 2d at 488. "In ruling on a motion to dismiss under section 2-619, the trial court may consider pleadings, depositions, and affidavits." *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 262 (2004). Even if the trial court dismissed on an improper ground, a reviewing court may affirm the dismissal, if the record supports a proper ground for dismissal. *Raintree*, 209 Ill. 2d at 261 (when reviewing a section 2-619 dismissal, we can affirm "on any basis present in the record"); *In re Marriage of Gary*, 384 Ill. App. 3d 979, 987 (2008) ("we may affirm on any basis supported by the record, regardless of whether the trial court based its decision on the proper ground").

¶13 "For a motion to be properly brought under section 2-619, the motion (1) must be filed 'within the time for pleading,' and (2) must concern one of nine listed grounds." *River Plaza Homeowner's Ass'n v. Healey*, 389 Ill. App. 3d 268, 275 (2009), quoting 735 ILCS 5/2-619(a) (West 2006). In the case at bar, there is no claim that defendants' motion was untimely.

¶14 A section 2-619 motion is permitted only on the following grounds:

"(1) That the court does not have jurisdiction of the subject

matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction.

(2) That the plaintiff does not have legal capacity to sue or that the defendant does not have legal capacity to be sued.

(3) That there is another action pending between the same parties for the same cause.

(4) That the cause of action is barred by a prior judgment.

(5) That the action was not commenced within the time limited by law.

(6) That the claim set forth in the plaintiff's pleading has been released, satisfied of record, or discharged in bankruptcy.

(7) That the claim asserted is unenforceable under the provisions of the Statute of Frauds.

(8) That the claim asserted against defendant is unenforceable because of his or her minority or other disability.

(9) That the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a) (West 2008).

Defendants moved under subsections (a)(4) (prior judgment) and (a)(5) (untimely) above.

¶15 Thus, defendants' motion satisfied the second requirement of a section 2-619 motion, that the motion concern one or more of the listed grounds. Having determined that, procedurally, this

motion was properly brought under section 2-619, we must next determine whether, substantively, it was properly granted.

¶16 We affirm the trial court's dismissal on *res judicata* grounds. Since we affirm the dismissal on this ground, we do not reach other possible grounds, such as the statute of limitations or the statute of repose.

¶17 "The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action." *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008) (quoting *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996)). *Res judicata* bars relitigation of issues that were actually decided in the first lawsuit, as well as issues that could have been decided in that suit. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998). For the doctrine of *res judicata* to apply, three requirements must be met: (1) there was a final judgment on the merits by a court of competent jurisdiction; (2) there was an identity of causes of action; and (3) there was an identity of parties or their privies were identical in both actions. *Hudson*, 228 Ill. 2d at 467 (citing *Downing v. Chicago Transit Authority*, 162 Ill. 2d 70, 73-74 (1994)).

¶18 In order to determine whether there was an identity in the causes of action, we apply the "transactional test." *River Park*, 184 Ill. 2d at 311. "[P]ursuant to the transactional analysis separate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief." *River Park*, 184 Ill. 2d at 311.

¶19 Even if the three requirements of *res judicata* are met, courts should not apply this equitable

doctrine if its application would result in fundamental unfairness. *Yorulmazoglu v. Lake Forest Hospital*, 359 Ill. App. 3d 554, 563 (2005) ("even if the threshold requirements are met," the doctrine of *res judicata* "should only be applied as fairness and justice requires"); *Weisman v. Schiller, Ducanto & Fleck*, 314 Ill. App. 3d 577, 581 (2000) ("the doctrine of *res judicata* need not be applied where fundamental fairness so requires").

¶20 The party seeking to apply *res judicata* has the burden of proof. This party must demonstrate to the trial court "with clarity, and certainty the parties, the precise issues, and the judgment of the former action." *Best Coin-Op, Inc. v. Paul F. Hg Supply Co.*, 189 Ill. App. 3d 638, 650 (1989).

¶21 However, on appeal, it still remains the appellant's burden to provide a sufficient record from which we may determine the issues. "This court has long recognized that to support a claim of error, the appellant has the burden to present a sufficiently complete record." *In re Marriage of Gulla*, 234 Ill. 2d 414, 422 (2009) (citing *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005); *Webster v. Hartman*, 195 Ill. 2d 426, 432, (2001); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). To determine whether the trial court made the error which the appellant is claiming, a court of review must have before it the record of the proceedings where the error was allegedly made. *Gulla*, 234 Ill. 2d at 422 (citing *Foutch*, 99 Ill. 2d at 391).

¶22 On this appeal, plaintiffs claim that their second complaint was not barred by *res judicata* because, first, the Illinois Supreme Court had not yet ruled on their petition for leave to appeal in their first suit and, as a result, the judgment in the first suit was not final. Even if we were to accept this argument, it is now moot, since the Illinois Supreme Court subsequently denied their petition.

¶23 Second, plaintiffs rely on the fact that *res judicata* is an equitable doctrine, and they argue

that it is unfair that plaintiffs did not have an opportunity in the first suit to fully present their claim of an unrevealed "six figure" offer. In essence, plaintiffs are seeking to use the vehicle of a second suit to appeal the trial court's denial of leave to amend in the first suit.

¶24 Even if we were to entertain this argument, plaintiffs have failed to support their argument on appeal that they did not have an opportunity to present their claim. In the first suit, they were permitted to file a motion for leave to amend, even after summary judgment was granted; and their claim was heard in open court and ruled upon in a written order. In order for plaintiffs to substantiate their appellate argument that their claim was not fully heard in the prior suit, they would have had to – at the very least – provide a transcript or bystander's report of the hearing in which they allege that their claim was not fully heard. As a result, we must presume that the trial court fully considered the claim that was, in fact, presented to it, and that the trial court fully considered the arguments that plaintiffs made in writing and in open court. *People v. Stoffel*, 239 Ill. 2d 314, 327 (2010) ("The trial court is presumed to know and follow the law.")

¶25 The trial court could have entered an order stating that its denial of plaintiffs' motion for leave to amend was entered without prejudice to plaintiffs' right to bring the claim in a subsequent suit. However, the written order did not make any such reservation or exception.

¶26 Not only did plaintiffs make a motion and argue it before the trial court, but they also appealed its denial in the prior case. The appellate court has previously ruled on this exact argument before. We quote here our prior and detailed consideration of plaintiffs' claim:

"On appeal, the Luedis argue that the trial court erred in denying them leave to amend *** to include an allegation that

Schillerstrom failed to disclose the desire of the Trout plaintiffs to engage in settlement discussions. The Luedis make no reference to the proceedings in the trial court and allege no error on the part of their trial counsel. As the Luedis offer no argument on appeal as to how the trial court erred, they forfeit this argument on appeal. See *Pederson v. MiJack Products, Inc.*, 389 Ill. App. 3d 33, 44 (2009) (failure to provide argument in support of contention on appeal violates Supreme Court Rule 341(h) (210 Ill. 2d R. 341(h)) and results in waiver." *Schillerstrom v. Luedi*, No. 2-08-0474, order at 21-22 (November 12, 2009) (unpublished order pursuant to Supreme Court Rule 23).

A second suit is not a means to evade a prior holding of waiver and forfeiture. In addition to finding a procedural forfeiture, we also found plaintiffs' claim to be substantively without merit:

"Moreover, included in the record on appeal is a letter dated September 7, 1997, from the Luedis to Schillerstrom. In it they stated, "We like to confirm again, that there will be no settlement talks with the opposing attorney." (Emphasis in original [letter].) Consequently, the Luedis cannot now reasonably claim any injury from Schillerstrom's alleged negligence in failing to notify them of a settlement possibility. Accordingly, we hold the Luedis' argument to be without merit." *Schillerstrom*, No. 2-08-0474, order at 22

(November 12, 2009) (unpublished order pursuant to Supreme Court Rule 23).

¶27 As the quotes from our prior order show, the appellate court has previously ruled that plaintiffs' claim of malpractice due to the alleged failure to inform them of a "six figure" offer was both procedurally waived and substantively without merit. As a result, the issue is now *res judicata*.

¶28 On cross-appeal, defendants appeal the trial court's denial of their motion for sanctions pursuant to Supreme Court Rule 137 (Ill. S. Ct. R. 137 (eff. Feb. 1, 1994)). Defendants moved for sanctions on the ground that plaintiffs' complaint was not well grounded in fact and not argued in good faith.

¶29 In the cross appeal, defendants become the appellants and thus they now become the ones who bear the burden of providing a sufficient record from which we can determine the issues presented on the cross appeal. *In re Marriage of Gulla*, 234 Ill. 2d at 422 (“[t]his court has long recognized that to support a claim of error, the appellant has the burden to present a sufficiently complete record”) (citing *Corral*, 217 Ill. 2d at 156); *Webster*, 195 Ill. 2d at 432; *Foutch*, 99 Ill. 2d at 391-92)).

¶30 Supreme Court Rule 137 provides, in relevant part, that:

"Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record ***. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it

is well grounded in fact and is warranted by existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

*** If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney fee." Ill. S. Ct. R. 137 (eff. Feb. 1, 1994).

¶31 "The purpose of Rule 137 is to prevent abuse of the judicial process by penalizing claimants who bring vexatious and harassing actions." *Krautsack v. Anderson*, 223 Ill. 2d 541, 561 (2006) (quoting *Sundance Homes, Inc. v. County of Du Page*, 195 Ill. 2d 257, 285-86 (2001); *Kingbrook, Inc. v. Pupurs*, 202 Ill. 2d 24, 34 (2002) (purpose is put a procedure "in place to resolve contentions of bad-faith litigation"). Rule 137 is designed "not to stifle good faith arguments for the extension, modification, or reversal of existing law," without which "the law could not change or evolve." *Sundance*, 195 Ill. 2d at 286. "Because Rule 137 addresses the pleadings, motions and other papers a litigant files, the rule does not provide a sanction against all asserted instances of bad faith conduct by a litigant or the litigant's attorney during the course of a litigation." *Krautsack*, 223 Ill. 2d at 562.

¶32 The trial court's decision to impose or deny sanctions is entitled to great weight on appeal and will not be disturbed on review absent an abuse of discretion. *Benson v. Stafford*, 407 Ill. App.

3d 902, 928-29 (2010). When an appellate court reviews a trial court's decision to impose or deny sanctions, it considers whether the trial court's decision was informed, based on valid reasoning, and followed logically from the facts. *Benson*, 407 Ill. App. 3d at 929.

¶33 When a trial court imposes sanctions under this rule, Rule 137 requires it to "set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order." Ill. S. Ct. R. 137 (eff. Feb. 1, 1994). However, when denying a motion for sanctions, the trial court is not obligated by the rule to set forth its reasons in writing. As a result, the trial court in the instant case chose to hear argument in court and in writing and it stated in writing only that it denied the motion. However, neither party chose to provide us, in the record on appeal, with a transcript or bystander's report of either: (1) the hearing on the motion for sanctions; or (2) the hearing in the first malpractice suit in which the trial court denied plaintiffs' motion for leave to amend.

¶34 Plaintiffs claim in this second suit that their six-figure allegation was not fully heard in the first suit. In order for us to find that the trial court abused its discretion by not imposing sanctions for bringing this claim, we would need a transcript or bystander's report of the hearing in which plaintiffs claim that this allegation was not fully heard. Without a sufficient record, we cannot find an abuse of discretion. As a result, we must affirm.

¶35 For the foregoing reasons, we affirm the order of the circuit court of Cook County.

¶36 Affirmed.