

No. 1-10-3466

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(3)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

POM 1250 N. MILWAUKEE, LLC, an Illinois limited liability company,)	Appeal from the
)	Circuit Court of
)	Cook County.
Plaintiff-Respondent-Appellant/Cross-Appellee,)	
)	
v.)	
)	
F.C.S.C., INC., and REPUBLIC BANK OF CHICAGO,)	
)	07 CH 09789
Defendant-Movant-Appellee/Cross-Appellant,)	
)	
v.)	
)	
Michael S. Pomerantz,)	Honorable
)	Stuart Palmer,
Cross-Appellee.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Murphy and Salone concurred in the judgment.

ORDER

¶ 1 **HELD:** To receive an award of attorney fees under a contract, the party seeking fees must plead a claim for relief, and in the absence of any pleading, the appellate court will reverse

a fee award. Where testimony supports the trial court's finding that an attorney had a reasonable belief in the truth of the pleadings he signed, the appellate court will not reverse the trial court's denial of a motion for sanctions under Supreme Court Rule 137.

¶ 2 POM 1250 N. Milwaukee, LLC (POM), sued F.C.S.C., Inc. (FCSC), alleging that FCSC breached a contract for sale of a building in Chicago. The trial court dismissed with prejudice three counts of POM's complaint and POM voluntarily dismissed the sole remaining count. FCSC filed two postjudgment motions: one for sanctions under Supreme Court Rule 137 (Ill. S. Ct. R. 137 (eff. Feb. 1, 1994)) for filing false pleadings, and a second motion for attorney fees based on a provision in the sales contract for an award of fees to the prevailing party in any litigation involving the contract. The trial court denied the motion for sanctions, but it awarded FCSC attorney fees pursuant to the contract. POM appeals from the award of fees, and FCSC cross-appeals from the amount of the fee award and the denial of sanctions.

¶ 3 We hold that in the absence of any pleading from FCSC, the trial court should not have awarded it any relief based on the contract. The manifest weight of the evidence does not contradict the trial court's finding that POM had adequate grounds for signing the pleadings at issue here, and therefore the trial court did not abuse its discretion when it denied the motion for sanctions.

¶ 4 **BACKGROUND**

¶ 5 On June 20, 2006, FCSC signed a contract in which it promised to sell a building at 1250 N. Milwaukee Avenue to POM for \$1,900,000. In the contract, FCSC agreed to send POM plans, engineering reports and environmental surveys concerning the building by July 7, 2006. In November 2006, POM sued FCSC for failing to send the promised documents and for failing to complete the sale of the property. POM alleged that it "st[ood] ready, willing and able to

consummate the closing on the Property." It divided its complaint into four counts, which it labeled (1) specific performance, (2) breach of contract, (3) scheme to defraud, and (4) consumer fraud. POM requested attorney fees pursuant to a clause in the sales contract that provided for the payment of fees to the prevailing party in any action for breach of the contract.

¶ 6 FCSC moved to dismiss the complaint. The trial court dismissed the first three counts with prejudice, and it struck the consumer fraud count with leave to replead. The court added language that allowed an immediate appeal from the dismissal of the first three counts. See Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). Although POM filed a notice of appeal, it never briefed the appeal. This court dismissed the appeal.

¶ 7 On July 24, 2007, with count IV still pending, FCSC filed a motion in which it requested attorney fees based on the contract provision for payment of fees to the prevailing party. FCSC never filed a counterclaim or any other pleading in the case.

¶ 8 On July 24, 2008, the trial court offered to help the parties settle the case. POM's attorney, Michael Pomerantz, who is also a member of POM, immediately offered to close the sale on the terms set in the contract, if he could obtain financing. The parties agreed to release all claims related to the complaint, except that POM reserved the right to sue for fraud if it discovered after the sale that FCSC misrepresented the condition of the property. FCSC agreed to obtain a new survey of the property.

¶ 9 In its written order, the court made the settlement contingent on "completion of the Settlement Agreement" by "[t]he closing of the sale of the real property." The court added, [POM's] obligation to close pursuant hereto is subject to and contingent upon New Century Bank's agreement

to make a loan to purchaser pursuant to the terms [(or substantially similar terms)] of that certain loan commitment" the bank previously made to POM. However, before POM could obtain the loan commitment, the market for the property collapsed. A new appraisal of the property, completed less than a month after the settlement, showed that the value of the property had fallen from \$1,900,000 to \$1,450,000. No bank would finance the transaction at the excessive price called for in the settlement agreement. FCSC moved to terminate the settlement, and POM agreed. On April 17, 2009, the trial court terminated the settlement agreement. POM promptly moved for voluntary dismissal of the lawsuit, and the trial court granted the unopposed motion on May 1, 2009.

¶ 10 On May 11, 2009, FCSC filed the two motions that form the basis for this appeal. In one motion, FCSC sought sanctions against POM and its attorney, Michael Pomerantz, for violating Supreme Court Rule 137. FCSC alleged that at the time Pomerantz signed the complaint, in which POM alleged it was able to buy the property, POM was not able to buy the property because it never obtained financing for the purchase. In the second motion, FCSC asked the court to set a hearing on its motion filed in 2007 for reimbursement of fees, as part of the relief expressly available under the terms of the contract.

¶ 11 POM objected to the second motion on grounds that the court lacked jurisdiction to grant any relief on the contract because FCSC had never filed a pleading for contractual relief, and the court had entered a final judgment disposing of all claims filed in the case. The court overruled the objection. POM responded to the Rule 137 motion on its merits, submitting affidavits to support its contention that it had reason to believe all the allegations of the complaint.

¶ 12 At the hearing on the motions, Pomerantz testified that he and a partner set up POM

specifically to purchase the building at 1250 N. Milwaukee Avenue from FCSC. Because the purchase never took place, POM never started operating. Two banks began preparations to loan money to POM for the purchase, but both required POM to provide evidence of probable profitability that POM never provided. For example, both banks required POM to have a tenant for the building's first floor restaurant space before the banks would finance the purchase of the building. Although POM found a prospective tenant, that tenant never signed the proffered lease.

¶ 13 Pomerantz testified that when POM filed the lawsuit, Pomerantz had almost \$1,000,000 in cash and marketable securities, and he owned a home valued at about \$2,000,000, with an outstanding mortgage of about \$750,000. He said that from his own assets he could have completed the purchase of the building for POM. However, he admitted that he did not intend to buy the property without bank financing.

¶ 14 FCSC presented documents showing the time its attorneys spent on the case and the charges for that time. POM did not challenge the evidence.

¶ 15 The court found the total fees of more than \$71,000 reasonable, but the court reduced the fees by 25% because FCSC had not prevailed on the consumer fraud count. Therefore, the court awarded FCSC, pursuant to the contract, costs and fees totaling \$54,145.28. The court denied the motion for Rule 137 sanctions because it found that FCSC did not show POM made any false allegations in its complaint. In particular, the court found that POM showed it could have completed the purchase without financing specifically for the transaction.

¶ 16 POM appealed from the award of costs and fees. FCSC cross-appealed, claiming that the court should have awarded it the full \$71,000 in attorney fees it incurred, and that the court should

have sanctioned Pomerantz for violating Rule 137.

¶ 17 ANALYSIS

¶ 18 POM's Appeal

¶ 19 POM argues that the trial court should not have awarded FCSC any relief on the contract because FCSC never pled a claim for such relief. The Code of Civil Procedure provides: "Each separate cause of action upon which a separate recovery might be had shall be stated in a separate count or counterclaim." 735 ILCS 5/2-603(b) (West 2008). The Code does not allow a motion as a pleading in which a party may state a claim for recovery. 735 ILCS 5/2-603(b) (West 2008).

¶ 20 Illinois courts have repeated the fundamental principle:

"The issues are determined from the pleadings and the evidence. To have evidence without pleading an issue is just as fatal as pleading an issue and not supporting it with evidence. Both are essential and each must conform to the other." *Consoer, Townsend & Associates v. Addis*, 37 Ill. App. 2d 105, 110 (1962).

See also *Burke v. Burke*, 12 Ill. 2d 483, 487 (1957); *Tembrina v. Simos*, 208 Ill. App. 3d 652, 656 (1991).

¶ 21 A request for attorney fees pursuant to the terms of a contract constitutes a claim for relief under the contract. *F.H. Prince & Co., Inc. v. Towers Financial Corp.*, 266 Ill. App. 3d 977, 983 (1994); *Home State Bank/National Association v. Potokar*, 249 Ill. App. 3d 127, 136-37 (1993). Thus, the trial court should not have awarded FCSC attorney fees unless FCSC stated its claim for such relief in a pleading. But FCSC filed no pleadings in this case. Instead, it filed a motion to

dismiss the complaint, a motion for fees, and a motion for Rule 137 sanctions. These motions do not constitute pleadings within the meaning of the Code of Civil Procedure. See 735 ILCS 5/2-603(b) (West 2008); *Opalka v. Yellen*, 14 Ill. App. 3d 779, 781 (1973) (a motion to dismiss a complaint is not a pleading).

¶ 22 FCSC cited a number of cases in which courts awarded a party attorney fees pursuant to the terms of a contract, but in every Illinois case FCSC cited, the winning party pled a claim for the fees awarded. See *Potokar*, 249 Ill. App. 3d at 129; *Longo v. Globe Auto Recycling, Inc.*, 318 Ill. App. 3d 1028, 1030 (2001); *Myers v. Popp Enterprises, Inc.*, 216 Ill. App. 3d 830, 832 (1991); *Touchdown Sportswear, Inc. v. Hickory Point Mall Co.*, 165 Ill. App. 3d 72, 74 (1987). We note that federal courts, by rule, permit parties to file postjudgment motions for awards of attorney fees pursuant to a contract. Fed. R. Civ. P. 54(d)(2); see *Obin v. District No. 9, International Ass'n of Machinists & Aerospace Workers*, 651 F.2d 574, 583-84 (8th Cir. 1981). Illinois has no similar rule.

¶ 23 Accordingly, because FCSC filed no pleading in which it stated a claim for relief pursuant to the contract, the trial court erred when it awarded FCSC attorney fees based on the contract. We reverse the judgment entered in favor of FCSC on its motion for contractual fees.

¶ 24 FCSC's Cross-Appeal

¶ 25 Because the trial court erred when it awarded FCSC attorney fees under the contract in the absence of any pleading for those fees, we find no case or statutory support for FCSC's claim in the cross-appeal that the trial court awarded it too little in costs and fees.

¶ 26 FCSC also appeals from the denial of sanctions under Rule 137. Rule 137 requires every attorney or party who signs any pleading, motion or other paper to certify 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." (Ill. S. Ct. R. 137 (eff. Feb. 1, 1994)). The rule expressly permits any party to file a postjudgment motion for sanctions because an opposing party or attorney has violated the rule. We will not reverse the trial court's decision on a motion for sanctions under Rule 137 unless the trial court abused its discretion. *Sterdjevich v. RMK Management Corp.*, 343 Ill. App. 3d 1, 19 (2003). A trial court abuses its discretion when its findings of fact are against the manifest weight of the evidence demands a contrary finding. *Baker v. Daniel S. Berger, Ltd.*, 323 Ill. App. 3d 956, 963 (2001); *Technology Innovation Center, Inc. v. Advanced Multiuser Technologies Corp.*, 315 Ill. App. 3d 238, 244 (2000).

¶ 27 Although FCSC charged Pomerantz with several violations of Rule 137, on appeal it challenges the trial court's finding only on the issue of whether Pomerantz violated the rule when he signed a pleading in which POM alleged that it could purchase the property for \$1,900,000. Pomerantz testified that he had about \$1,000,000 in cash and marketable securities when he filed the complaint, and those assets, together with his equity in his home, gave him enough resources that he could have completed the purchase. FCSC presented evidence to show that POM never obtained an unequivocal loan commitment from any bank, but it presented no evidence to disprove Pomerantz's assertions about his own assets. The trial court found Pomerantz's testimony on the issue credible. We cannot say that the trial court's finding that POM, as a vehicle for Pomerantz's and Udell's real estate investment, had the ability to complete the purchase when it filed the complaint was against the manifest weight of the evidence. Thus, we find that the trial court did not abuse its discretion when it denied FCSC's motion for Rule 137 sanctions against POM and

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Pomerantz.

¶ 28

CONCLUSION

¶ 29 Because FCSC never pled a claim for relief under the contract, the trial court erred when it awarded FCSC attorney fees pursuant to the contract. The trial court did not abuse its discretion when it denied FCSC's motion for Rule 137 sanctions.

¶ 30 Affirmed in part; reversed in part.