

No. 1-11-1282

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

MARIAM MUNSIF-TOSCANO, on behalf of)	Appeal from the
Herself and others similarly situated,)	Circuit Court of
)	Cook County
Plaintiff-Appellant,)	
)	No. 10 CH 23033
v.)	
)	Honorable
RESTAURANT.COM, INC.,)	Nancy Arnold,
)	Judge Presiding.
Defendant-Appellee.)	

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Lavin and Justice Fitzgerald-Smith concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in granting defendant's motion to dismiss pursuant to section 2-619(a)(9) because plaintiff's claim that she suffered "actual damages" under the Illinois Consumer Fraud and Deceptive Practices Act ("Act") was defeated by affirmative matter defendant raised in its motion to dismiss and attached affidavit. In dismissing plaintiff's amended complaint, the trial court did not rely on a superseded complaint. The trial court did not abuse its discretion by, in effect, denying plaintiff

the opportunity to take discovery relating to the “affirmative matter” raised in defendant's motion to dismiss when it granted that motion, which then precluded any future discovery. Finally, in defendant's cross-appeal, the trial court abused its discretion in denying defendant's Rule 137 motion for sanctions and its motion for attorneys' fees and costs pursuant to the Act because plaintiff and her counsel knew or upon reasonable inquiry should have known before filing the amended complaint that plaintiff suffered no actual damages.

¶ 2 Plaintiff Mariam Munsif-Toscano filed a lawsuit, on behalf of herself and others similarly situated, against defendant Restaurant.com. Plaintiff, however, was unable to get the class certified and brought this suit individually. Plaintiff alleged that defendant sold her and other customers gift certificates that had expiration dates in violation of the Illinois Consumer Fraud and Deceptive Practices Act (“Act”). Plaintiff appeals the trial court's granting of defendant's motion to dismiss pursuant to section 2-619(a)(9) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-619(a)(9) (West 2010)), based on its erroneous finding that she has not, and will not, suffer any “actual damage” within the meaning of the Act. Plaintiff also claims on appeal that the trial court erred in relying on her original complaint that was superseded by plaintiff's amended complaint when it ruled on defendant's motion to dismiss, and that the trial court abused its discretion by refusing to allow discovery relating to defendant's “affirmative matter” that it raised to defeat plaintiff's claims. Regarding its cross-appeal, defendant claims that the trial court abused its discretion in denying its Rule 137 motion for sanctions and motion for fees and costs pursuant to the Act. For the reasons that follow, we affirm in part, and reverse in part and remand for further proceedings.

¶ 3

Background

¶ 4 Beginning on January 1, 2008, the Act made it illegal for a company to issue a gift certificate containing an expiration period of less than five years. On May 28, 2010, plaintiff filed her original complaint in this putative consumer protection class action on her own behalf and on behalf of all others similarly situated in the United States (excluding those residing in the States of California and New Jersey). Plaintiff alleged that defendant violated state consumer protection laws because on March 21, 2009, defendant sold plaintiff two gift certificates that expressly stated on their face that they expire one year after the date of their issuance.

¶ 5 Defendant is an online seller and issuer of restaurant gift certificates. The purchased gift certificates are redeemable in exchange for restaurant services at various restaurants throughout the country. Customers access defendant's website to select the restaurant, the value of the gift certificate to be purchased, and to make an on-line payment for the gift certificate. Upon receiving payment, defendant provides customers with a link to a web page that displays the written gift certificate. To redeem the gift certificate, customers print a paper copy of the gift certificate and then present it at the participating restaurant. Customers may access their account with defendant at any time by logging into defendant's website with their user name and password. Customers access defendant's website to purchase certificates, reprint unused certificates, or check their account status.

¶ 6 In plaintiff's complaint, she alleges that on March 21, 2009, plaintiff purchased two gift certificates from defendant, one of which she redeemed on May 31, 2009, and the other is the subject of this dispute. Each of the gift certificates contained the following provision, displayed on their face: "Expires one (1) year from date of issue, except in California and where otherwise

1-11-1282

provided by law." Plaintiff claims that her unused gift certificate bearing the expiration date establishes that defendant violated the Act, and when the original complaint was filed, the unused gift certificate had expired since it was past the expiration date of March 21, 2010. Plaintiff alleged in her original complaint that she suffered damages equal to the value of her unused certificate.

¶ 7 In May 2010, plaintiff accessed her online Restaurant.com account and printed a copy of the two gift certificates she had previously purchased. Printed on the face of both certificates was the language, "This Restaurant.com Gift Certificate does not expire." Plaintiff attached these two copies of the gift certificates to her original complaint.

¶ 8 Plaintiff filed her complaint on May 28, 2010. On July 1, 2010, defendant informed plaintiff's counsel by telephone, email, and by mail that, prior to the date on which plaintiff commenced her action, expiration dates had been removed from all Restaurant.com gift certificates, including plaintiff's certificates. Defendant, therefore, requested that plaintiff voluntarily dismiss the case because she could not in good faith allege that she had suffered any "actual damage" under the Act.

¶ 9 Plaintiff refused this request and informed defendant that she would be amending her original complaint, which she did, and filed it on July 19, 2010. Plaintiff attached to the amended complaint a copy of the unused gift certificate, which stated on its face: "Expires one (1) year from date of issue, except in California and where otherwise prohibited by law." The attached gift certificate was the original copy of the certificate that plaintiff purchased, downloaded, and printed on March 21, 2009.

¶ 10 Defendant filed a Rule 137 motion for sanctions on July 12, 2010. Defendant claimed

1-11-1282

that the exhibit attached to the complaint and its communication to plaintiff's counsel notifying her that expiration dates have been removed from gift certificates demonstrate that plaintiff's complaint was not well-grounded in fact.

¶ 11 Defendant filed a combined section 2-615 and 2-619 motion to dismiss on August 20, 2010. Defendant stated in its motion that plaintiff did not allege in her amended complaint that the gift certificate attached to her amended complaint was the operative version at the time she filed either the original or amended complaint. Defendant also stated that its counsel contacted plaintiff's counsel and informed counsel that it removed all expiration dates from all of its gift certificates, and it superseded all unused certificates with new certificates that had no expiration dates prior to plaintiff filing her original complaint. Attached as an exhibit to defendant's motion to dismiss was the affidavit of Linda Ramsey, who was the head of defendant's consumer marketing department since April 2008. The Ramsey affidavit says, in part:

"At all times since April 2008, any person wishing to purchase or use a certificate from Defendant, Restaurant.com's website has been required first to establish an online account with Restaurant.com. ... Prior to May 28, 2010 (the date on which the plaintiff commenced this action), Restaurant.com had removed all expiration dates from all Restaurant.com certificates that had not previously been redeemed, including the plaintiff's [unused] Certificate [], and had superseded all certificates bearing expiration dates with new certificates that [said], 'This restaurant.com Gift Certificate does not expire.' ... The superseding certificates with no expiration date have, at all times since prior to May 28, 2010, been only the version of Restaurant.com certificates available to be accessed by holders of Restaurant.com online accounts."

1-11-1282

¶ 12 On August 23, 2010, defendant filed a motion for attorneys' fees pursuant to section 10a(c) of the Act. Defendant alleged that plaintiff filed her amended complaint in bad faith because the gift certificates that she attached as an exhibit to her original complaint expressly stated that the gift certificates do not expire and defendant's counsel informed plaintiff, before she filed her complaint, that all unused gift certificates no longer had an expiration date.

¶ 13 On September 20, 2010, plaintiff filed her memorandum of law in opposition to defendant's motion to dismiss and attached the counter-affidavit of plaintiff as an exhibit. The counter-affidavit stated in pertinent part that:

"[p]ursuant to its terms, [her] certificate state[d] that it "[e]xpire[d] one (1) year from date of issue[.]" Based on this language, [she] believed that the certificate was unusable and had expired on March 21, 2010. As such, [she] did not attempt to use the certificate after March 21, 2010. [She] kept the unused, hard copy of the certificate in [her] possession. ... In connection with filing this litigation on May 28, 2010, [her] attorney asked that [she] provide a copy of the relevant certificate at issue. To do this, rather than provide the hard copy of the certificate that was originally issued on or about March 21, 2009, [she] believed that [she] could obtain an exact copy by accessing [her] online account with Restaurant.com. Thus, in May of 2010, [she] signed onto [her] Restaurant.com account and printed what [she] believed to be a copy of the certificate that was issued to [her] on or about March 21, 2009. As [she] learned subsequently, however, this version of the certificate was much different than the original. Unbeknownst to [her] Restaurant.com [had] attempted to materially change the language in [her] certificate. ... [She] would never have known of this language change had [she] not signed onto [her] account in

connection with this lawsuit. [She] would have just continued to believe that [her] certificate had expired and was unusable. [She is] without information as to the date on which Restaruant.com purported to change the language in [her] certificate."

¶ 14 The trial court granted defendant's motion to dismiss on December 2, 2010 pursuant to section 2-619(a)(9) holding that "plaintiff has not, and will not, suffer any 'actual damage' within the meaning of the Illinois Consumer Fraud and Deceptive Practices Act." On March 29, 2011, the trial court denied defendant's motion for Rule 137 sanctions and for attorneys' fees and costs pursuant to section 10a(c) of the Act. Plaintiff and defendant timely appealed the trial court's rulings.

¶ 15 *Analysis*

¶ 16 A. Plaintiff's Appeal Against Defendant

¶ 17 Plaintiff first contends that the trial court erred in finding that she failed to adequately plead "actual damages" under the Act in her amended complaint as a basis to dismiss her complaint pursuant to section 2-619(a)(9). A motion to dismiss pursuant to section 2-619 presents a question of law and therefore is reviewed *de novo*. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). If after construing the pleadings and supporting documents in the light most favorable to the nonmoving party, the trial court finds that no set of facts can be proved upon which relief could be granted, a motion to dismiss should be granted under section 2-619. *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 344 (2000).

¶ 18 A motion to dismiss filed pursuant to section 2-619(a)(9) admits the legal sufficiency of the plaintiff's claim, but asserts an affirmative defense or matter outside of the pleading that avoids or defeats the plaintiff's claim. *Kedzie & 103rd Currency Exchange, Inc v. Hodge*, 156

1-11-1282

Ill. 2d 112, 115 (1993). The affirmative defense or matter "negates an alleged cause of action completely or refutes crucial conclusions of law or material fact unsupported by allegations of specific fact contained in or inferred from the complaint." *Glass Specialty Co., Inc. v. Litwiller*, 147 Ill. App. 3d 653, 655 (1986). The phrase "affirmative matter" includes "any defense other than a negation of the essential allegations of the plaintiffs' cause of action." *Kedzie & 103rd Currency Exchange*, 156 Ill. 2d at 115. The affirmative matter asserted by the defendant must be supported by adequate affidavit if the affirmative matter asserted is not apparent on the face of the complaint. *Id.* at 116. The burden then shifts to the plaintiff who must establish that the defense is unfounded or requires the resolution of an essential element of material fact before it is proven. *Id.* In order to do this, the plaintiff must submit a counter-affidavit to refute evidentiary facts properly asserted by the defendant's affidavit supporting the motion or the facts are deemed admitted. *Id.* After considering the pleadings and affidavits, the trial court may grant the motion and dismiss the cause of action if it finds that the plaintiff has failed to carry the shifted burden. *Id.* An appeal from such a dismissal must consider whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law. *Id.*

¶ 19 The Act bars unlawful or unfair methods of competition, unfair or deceptive acts or practices or the use of deception, fraud, false pretense, false promise or misrepresentation. 815 ILCS 505/2 (West 2008). Section 10a(a) of the Act authorizes a private cause of action to any person who suffers *actual* damage as a result of a violation of the Act. 815 ILCS 505/10a(a) (West 2008). This remedy provided by the Act is for purely economic injuries amounting to actual damage, which must be calculable and measured by the plaintiff's loss. *Morris v. Harvey*

1-11-1282

Cycle & Camper, Inc., 392 Ill. App. 3d 399, 402 (2009). Thus, a plaintiff must prove that she suffered actual damage as a result of a violation of the Act. *Mulligan v. QVC, Inc.*, 382 Ill. App. 3d 620, 627 (2008).

¶ 20 Plaintiff claims that her allegations in the amended complaint sufficiently plead a cause of action under the Act, and, in particular, that she pled actual damages. Plaintiff contends that the expired gift certificate, which she could not use, was the actual damage that she sustained. More specifically, in count I of her amended complaint, plaintiff alleged the following:

"Plaintiff and those similarly situated suffered actual damage. Actual damages sustained by Plaintiff and those similarly situated include: the value of the gift certificate because the consumer fraud occurred at the point of sale and because, as in Plaintiff's case, the gift certificate expired after one year; the diminution in value of the gift certificate due to the provisions on the gift certificate which violate Illinois laws; and the amounts by which the gift certificates could decrease in value due to unlawful expiration provisions."

Plaintiff further claims that at the pleading stage, she is not required to prove the amount of actual damages, but is required only to plead that actual damages were suffered, which she claims was sufficiently pled in her amended complaint.

¶ 21 We disagree with plaintiff's contention that the trial court erred in granting defendant's section 2-619(a)(9) motion to dismiss. To support her claim, plaintiff relies on *Flournoy v. Ameritech*, 351 Ill. App. 3d 583 (2004), *Chandler v. American General Finance, Inc.*, 329 Ill. App. 3d 729 (2002), and *Miller v. William Chevrolet/GEO*, 326 Ill. App. 3d 642 (2001), but her reliance is misplaced. In *Flournoy*, this court held that the plaintiff had sufficiently stated a cause

1-11-1282

of action under the Act when his complaint alleged he sent money to his mother to cover the cost of the multiple fees and surcharges billed by Ameritech. *Flourney*, 351 Ill. App. 3d at 587. In *Chandler*, this Court rejected the defendant's argument that plaintiffs failed to state a claim under the Act because they did not allege any actual injury arising out of deceptive loan practices.

Chandler, 329 Ill. App. 3d at 741. This Court held that the actual dollars lost by the plaintiffs is a matter of proof, not pleading, and the plaintiff pleading that they incurred inordinate loan costs was a sufficient "actual loss." *Id.* Finally, in *Miller*, this Court reversed the trial court's grant of summary judgment in favor of the defendants, holding in part, that plaintiff's allegation of diminished resale value of his used car was sufficient to allege actual damages under the Act. *Miller*, 326 Ill. App. 3d at 653-54.

¶ 22 In each of these cases, this court held that the plaintiffs had sufficiently alleged an ability to prove actual damages under the Act. However, those cases are distinguishable because they do not address dismissal under section 2-619(a)(9) where a defendant asserts an affirmative matter that defeats the plaintiff's allegation. Here, plaintiff's actual damages that she plead in her amended complaint was the value of the gift certificate that she alleged expired and that could no longer be used. Defendant's section 2-619(a)(9) motion to dismiss, however, raised an affirmative matter that refuted plaintiff's pleading of "actual damages."

¶ 23 In its section 2-619(a)(9) motion to dismiss, defendant attached Ramsey's affidavit, who was the head of the consumer marketing department of Restaurant.com since April 2008.

Ramsey's affidavit stated, in part, that:

"Prior to May 28, 2010 (the date on which the plaintiff commenced this action),

Restaurant.com had removed all expiration dates from all Restaurant.com certificates that

1-11-1282

had not previously been redeemed, including the [P]laintiff's Certificate No. 98319592, and had superseded all certificates bearing expiration dates with new certificates that say, 'This restaurant.com Gift Certificate does not expire.' ... The superseding certificates with no expiration date have, at all times since prior to May 28, 2010, been the (sic) version of Restaurant.com certificates available to be accessed by holders of Restaurant.com online accounts."

Thus, Ramsey's affidavit, which was attached to defendant's motion to dismiss, establishes that before plaintiff filed her lawsuit, plaintiff's unredeemed gift certificate "does not expire."

Therefore, plaintiff's allegation in her amended complaint that she suffered "actual damage" is defeated by the affirmative matter asserted by defendant, because if the gift certificate was not expired, plaintiff has no actual measurable loss. Without suffering actual damages, plaintiff has no actionable claim under the Act. Defendant's affirmative matter, supported by Ramsey's affidavit, then shifted the burden to plaintiff, who must establish that defendant's defense was unfounded or requires the resolution of an essential element of material fact before it is proven. Unless plaintiff refutes defendant's evidentiary facts with a counter-affidavit, the facts set forth in Ramsey's affidavit are deemed admitted. *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116.

¶ 24 Rather than rebutting the information provided in Ramsey's affidavit, plaintiff's counter-affidavit actually supports the affirmative matter raised by defendant. According to plaintiff's affidavit, she logged onto Restaurant.com and printed a copy of her unused gift certificate prior to filing this lawsuit. In doing so, plaintiff noted that the gift certificate's language had been "materially changed." Plaintiff indicated that she has no information regarding when

1-11-1282

Restaurant.com changed the language on her gift certificate. These facts obtained from plaintiff's counter-affidavit do not contradict Ramsey's affidavit, but instead, are supportive of it. It is clear from plaintiff's counter-affidavit that she logged onto her Restaurant.com account prior to filing this lawsuit and discovered that her gift certificates were "materially changed," or no longer had an expiration date, which was consistent with the information stated in Ramsey's affidavit.

Because plaintiff's counter-affidavit does not refute the information set forth in Ramsey's affidavit attached to defendant's motion to dismiss, the information in Ramsey's affidavit must be deemed admitted. *Id.* As such, plaintiff's allegation that she suffered "actual damages" was defeated by affirmative matter because the gift certificates were not, in fact, expired when she filed her lawsuit. Plaintiff has not, and cannot, refute defendant's contention that she has not, nor will she, suffer any "actual damage," which is an essential element to bring a cause of action under the Act. Accordingly, the trial court did not err in granting defendant's motion to dismiss pursuant to section 2-619(a)(9) because plaintiff has not, and will not, suffer any "actual damage" under the Act.

¶ 25 Plaintiff next claims that the trial court abused its discretion by relying on the original complaint, which was superseded by plaintiff's amended complaint, in granting defendant's motion to dismiss. Plaintiff claims that the only evidence in the record indicating that she knew that she suffered no damage was purportedly contained in her original complaint, which was superseded by the amended complaint. However, at issue is not whether plaintiff *knew* that she suffered "actual damages," but, rather, that plaintiff cannot plead that she has or will suffer any "actual damages." Plaintiff's allegation that the trial court reached its ruling based on the superseded original complaint and not the pleadings filed in conjunction with the amended

1-11-1282

complaint is not persuasive, and the record fails to support her contention. The trial court considered plaintiff's amended complaint, defendant's section 2-619(a)(9) and 2-615 motion to dismiss along with the attached Ramsey affidavit, and plaintiff's counter-affidavit. Defendant's section 2-619(a)(9) motion to dismiss was in response to plaintiff's amended complaint, and not her original complaint. Thus, the Ramsey's affidavit and plaintiff's counter-affidavit were filed based on the allegations contained in plaintiff's amended complaint, and not on her original complaint. Defendant's motion to dismiss along with the supporting affidavit and plaintiff's counter-affidavit provided the basis to determine that plaintiff has not, and she will not, suffer any "actual damage" within the meaning of the Act, and not her original complaint.

¶ 26 Finally, plaintiff contends that the trial court abused its discretion by refusing to allow plaintiff to obtain discovery information related to the "affirmative matters" that defendant set forth in Ramsey's affidavit, which the trial court relied upon in granting defendant's motion to dismiss. Discovery should be denied when there is insufficient evidence that the requested discovery is relevant to the issues in the case. *TTX Co. v. Whitley*, 295 Ill. App. 3d 548, 557 (1998). Therefore, the trial court properly denies discovery when it is irrelevant to responding to a pending motion. *Pederson v. Mi-Jack Products, Inc.*, 389 Ill. App. 3d 33, 42-43 (2009). Discovery rulings are within a trial court's discretion and will not be reversed absent a clear abuse of discretion. *Bright Horizons Children's Centers, LLC v. Riverway Midwest II, LLC*, 403 Ill. App. 3d 234, 245 (2010). An abuse of discretion exists where no reasonable person would agree with the trial court's ruling. *Matthews v. Avalon Petroleum Co.*, 375 Ill. App. 3d 1, 9 (2007).

¶ 27 Plaintiff contends that she was entitled to discovery concerning the information set forth in Ramsey's affidavit. Specifically, plaintiff requested information regarding the exact date when

1-11-1282

defendant changed the language on her gift certificate, how plaintiff accepted the change to the previously purchased gift certificate, and how defendant notified plaintiff and other Restaurant.com customers of this change. The information plaintiff requested, however, is irrelevant to determine whether plaintiff suffered "actual damage" sufficient to state a claim under the Act. Ramsey's affidavit stated that prior to plaintiff filing this lawsuit, all expiration dates were removed from all Restaurant.com gift certificates. Because plaintiff's counter-affidavit does not refute the assertions in Ramsey's affidavit, those assertions must be deemed admitted. *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116. The information that plaintiff requested does not refute the fact that plaintiff's gift certificate had not expired when she filed her amended complaint, and she, thus, cannot plead that she suffered any "actual damage" within the meaning of the Act. In the instant case, the trial court had before it sufficient information to rule upon defendant's motion to dismiss, and the information plaintiff requests would not assist her in resisting against defendant's motion to dismiss. *Yuretich v. Sole*, 259 Ill. App. 3d 311, 317 (1994). Moreover, we consider it noteworthy that unlike the plaintiff in *Cole Taylor Bank v. Corrigan*, 230 Ill. App. 3d 122, 125-26 (1992), in which plaintiff relies upon, plaintiff here did not file a motion to continue to allow her to obtain any previously served discovery requests. In fact, plaintiff did not file any discovery requests, and she, instead, raised in her memorandum of law in opposition to defendant's motion to dismiss that issues of fact existed that should be the subject of discovery. Here, the trial court did not abuse its discretion in precluding plaintiff from conducting future discovery to obtain information that has no relevance to the affirmative matter raised in defendant's motion to dismiss.

¶ 28 In sum, the trial court did not err in granting defendant's motion to dismiss pursuant to

1-11-1282

section 2-619(a)(9) based on the affirmative matter raised in that motion and supporting affidavit, as well as plaintiff's counter-affidavit, because plaintiff has not established that she has or will suffer "actual damages."

¶ 29 B. Defendant's Cross-Appeal Against Plaintiff

¶ 30 Defendant filed a cross-appeal contending that the trial court abused its discretion in denying its Rule 137 motion for sanctions and motion for attorneys' fees and costs pursuant to the Act. We turn first to address defendant's Rule 137 claims.

¶ 31 Defendant claims that plaintiff knew that her gift certificates were not expired when she filed her original complaint because the copies of the gift certificates attached to her complaint stated that they did not expire. Defendant maintains that plaintiff received correspondence from its attorneys on July 1, 2010, which was prior to the date that plaintiff filed her amended complaint, stating that plaintiff's gift certificates had no expiration date. Despite knowing that the gift certificates did not expire, defendant claims that plaintiff, nonetheless, made false allegations in her amended complaint that she suffered actual damages. Thus, defendant contends that the trial court abused its discretion in denying its motion for sanctions under Rule 137.

¶ 32 Supreme Court Rule 137 states in pertinent part:

"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 or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to

1-11-1282

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." ILCS S. Ct. Rule 137 (eff. Feb. 1, 1994).

Rule 137 was created to prevent parties from abusing the judicial process by imposing sanctions on litigants who file vexatious and harassing actions based upon unsupported allegations of fact or law. *Dismuke v. Rand Cook Auto Sales, Inc.*, 378 Ill. App. 3d 214, 217 (2007). Pursuant to Rule 137, "litigants and attorneys have an affirmative duty to conduct an inquiry of the facts and law prior to filing an action, pleading, or other paper." *Couri v. Korn*, 202 Ill. App. 3d 848, 855 (1990). To prevail on a motion for Rule 137 sanctions, the party requesting attorneys' fees must demonstrate that the opposing party pled untrue facts without reasonable cause. *Id.* Rule 137 is "penal in nature and must be invoked only in those cases falling strictly within its terms." *Id.* A trial court's ruling on a motion for Rule 137 sanctions is reviewed for an abuse of discretion. *Id.* An abuse of discretion occurs where no reasonable person would agree with the trial court's ruling. *Matthews*, 375 Ill. App. 3d at 9.

¶ 33 In the instant case, the trial court abused its discretion in denying defendant's motion for sanctions pursuant to Rule 137. The record reveals that plaintiff and her attorney knew or upon reasonable inquiry should have known that the unused gift certificate identified in the amended complaint as the basis for actual damages was, in fact, not expired and could be redeemed and

1-11-1282

used by plaintiff. The correspondence in the record between the parties' attorneys, which consists of a letter dated July 1, 2010, an email dated July 2, 2010 and a letter dated July 7, 2010, clearly establishes that Restaurant.com communicated to plaintiff's attorney that the gift certificate that is the subject of this litigation was not expired and unusable as claimed by plaintiff. Defendant's counsel sent a letter to plaintiff's counsel dated July 1, 2010, which stated in part:

"The complaint in the above-referenced action bears your signature and is premised upon the allegation that two Restaurant.com gift certificates your client purchased on March 21, 2009 have, unlawfully, expired prior to five years from date of purchase. That is false. All unused Restaurant.com gift certificates have no expiration date, and may be printed by the customer by going to Restaurant.com's website. Indeed, the certificate attached as an exhibit to your complaint plainly states, that, 'This Restaurant.com Gift Certificate does not expire.' "

¶ 34 In this letter, defendant's counsel also requested plaintiff to voluntarily dismiss the complaint. As follow-up to a telephone conversation between the parties' attorneys occurring on July 2, 2010, defendant's attorney sent an email on that same day summarizing the conversation. The email stated in relevant part that:

"You told me when you called this morning that, when your client originally printed her Restaurant.com gift certificate when she purchased it in March of last year, it had an expiration date on it and that she (and you) hadn't noticed when she re-printed it from the Restaurant.com website for purposes of attaching it as an exhibit to your complaint that it now states on its face that it does not expire.

1-11-1282

I told you that, given that you now know that both your client and the class she seeks to represent have suffered no damage whatsoever and can still use their gift certificates, continuing the lawsuit would be in bad faith. The law is clear that, unless a consumer has suffered 'actual damages', there is no cause of action for violation of the Consumer Fraud Act.

Now that your client and you know that her Restaurant.com gift certificate has not expired and may still be used, and that that fact was true prior to the date on which you filed the complaint, there is no justification for the continued pursuit of this lawsuit. Should you persist, Restaurant.com reserves its rights to seek to recover its attorneys' fees from your client pursuant to Section 10(c) of the Consumer Fraud Act and from you pursuant to Illinois Supreme Court Rule 137. I hope you'll reconsider your position."

¶ 35 Plaintiff's counsel responded by sending defendant's counsel a letter dated July 7, 2010.

In this letter, plaintiff's counsel stated in relevant part that:

"As you know, we inadvertently included the certificates annexed as exhibits to Plaintiff's complaint as those originally issued by Defendant and containing the language referenced in Paragraph 4. To correct this error, we will seek leave to file an Amended Complaint with the certificates as they existed at the time of issuance.

As I have advised during our July 1, 2010 conversation, Plaintiff has sufficiently pled all of the requisite elements necessary to pursue her claim under the Consumer Fraud Act. With respect to actual damages, Plaintiff has pled that she is in possession of certificates that have facially expired. Plaintiff has no indication whatsoever concerning

when the language in her certificates was purportedly changed.

While you have stated, after Plaintiff filed suit, that Restaurant.com has removed the expiration date language, this does not attack Plaintiff's standing. To the contrary, at best for Restaurant.com, fact issues surround the issue of Plaintiff's actual damages.

These fact issues touch on the following: (1) whether Restaurant.com gave notice to Plaintiff of the language change in her expired certificates and the content of such notice; (2) the circumstances surrounding Restaurant.com's decision to change the language in its expired certificates; [and] (3) the timing of Restaurant.com's language change in Plaintiff's expired certificates. Plaintiff is entitled to discovery on these topics, which will likely present genuine issue of material fact surrounding her actual damages that can be resolved only by the appropriate fact-finder."

¶ 36 The above sequence of correspondence affirmatively establishes that plaintiff's counsel knew or should have known, before filing the amended complaint, that plaintiff's allegations that she suffered actual damages in the amount of the face value of the gift certificate, because it had expired, was not true. In plaintiff's counsel's July 7, 2010 letter, she acknowledges that she and her client inadvertently annexed to the complaint the current gift certificates that bear no expiration date, and to rectify that error, an amended complaint would be filed attaching as an exhibit the gift certificates that plaintiff printed at the time of purchase. Although plaintiff and her counsel may have inadvertently not read the gift certificates before attaching them as an exhibit to the originally filed complaint, their attempt to conceal from the trial court their knowledge that the gift certificate purported to have expired had not, in fact, expired, was not inadvertent, but deliberate. Despite knowing that plaintiff currently possessed a gift certificate

1-11-1282

with no expiration date, plaintiff and her counsel, nevertheless, disregarded that gift certificate and, instead, attached a prior gift certificate that contained an expiration date, which is no longer available on her Restaurant.com account, as support for her claim of suffering actual damages. In the amended complaint, plaintiff alleges that she suffered actual damages because "the consumer fraud occurred at the point of sale and because, as in Plaintiff's case, the gift certificate expired after one year." However, the record establishes that on July 1, 2010, which was before plaintiff filed the amended complaint, plaintiff owned a gift certificate that she could still redeem and had not expired. Moreover, clearly, as of July 1, 2010, plaintiff and her counsel knew or should have known that plaintiff suffered no actual damages because plaintiff's previously purchased and unused gift certificate was not expired and would no longer expire. In sum, when plaintiff's counsel signed and filed the amended complaint, counsel knew or should have known that the pleading was not well-grounded in fact and not warranted by the law as is evident from her communication with defendant's counsel. Here, the facts of the instant case fall squarely within the parameters of Rule 137 sanctions. Accordingly, the trial court abused its discretion in denying defendant's motion for Rule 137 sanctions.

¶ 37 We next turn to address defendant's contention that the trial court abused its discretion in denying its motion for attorneys' fees and costs pursuant to section 10a(c) of the Act. Defendant maintains that plaintiff acted in bad faith when she filed her amended complaint. Defendant raises the same contentions, here, that it raised regarding its motion for Rule 137 sanctions, which include that plaintiff knew her gift certificates had no expiration date. Because plaintiff knew the gift certificates did not expire, defendant maintains that she and her attorney acted in bad faith by filing the amended complaint.

¶ 38 Section 10a(c) of the Act expressly authorizes, among other relief, an award of attorneys' fees and costs. *Krautsack v. Anderson*, 223 Ill. 2d 541, 553 (2006). Section 10a(c) states:

"Except as provided in subsections (f), (g), and (h) of this Section, in any action brought by a person under this Section, the Court may grant injunctive relief where appropriate and may award, in addition to the relief provided in this Section, reasonable attorney's fees and costs to the prevailing party." 815 ILCS 505/10a(c) (West 2008).

¶ 39 It is within the trial court's discretion whether to award reasonable attorneys' fees and costs under section 10a(c) of the Act. *Kraustack*, 223 Ill. 2d at 554. The trial court's ruling regarding the grant or denial of fees under section 10a(c) is reviewed for an abuse of discretion. *Id.* A trial court abuses its discretion where no reasonable person would agree with its ruling. *Matthews*, 375 Ill. App. 3d at 9.

¶ 40 In *Krautsack v. Anderson*, the Illinois Supreme Court set forth the following factors that should be considered when ruling upon a section 10a(c) fee petition:

" '(1) the degree of the opposing party's culpability or bad faith; (2) the ability of the opposing party to satisfy an award of fees; (3) whether an award of fees against the opposing party would deter others from acting under similar circumstances; (4) whether the party requesting fees sought to benefit all consumers or businesses or to resolve a significant legal question regarding the Act; and (5) the relative merits of the parties' positions.' " 223 Ill. 2d at 554, quoting *Graunke v. Elmhurst Chrysler Plymouth Volvo, Inc.*, 247 Ill. App. 3d 1015,1022-23 (1993).

Before considering the above factors, the *Krautsack* court held that the defendant's ability to

recover fees is limited to instances where the plaintiff acted in bad faith. *Id.* at 559. Thus, the threshold inquiry is whether the plaintiff acted in bad faith. *Id.*

¶ 41 Here, plaintiff acted in bad faith in filing her amended complaint. Our reasons for concluding that the trial court abused its discretion in denying the motion for Rule 137 sanctions stated above are also applicable here. Plaintiff's claim of actual damages was essentially based on owning a worthless expired gift certificate. Before the amended complaint was filed, however, plaintiff and her counsel knew or should have known that the basis underlying her claim of actual damages was no longer valid or true because she did not, in fact, own an expired, unusable gift certificate. Even if we are to assume that plaintiff's counsel did not communicate in detail the correspondence she engaged in with opposing counsel, plaintiff, nonetheless, should have made a reasonable inquiry regarding the gift certificate's expiration date by accessing her Restaurant.com account and reading the language on her unused gift certificate to determine what, if any, was the expiration date of the unused gift certificate before proceeding with her legal action against defendant. Had plaintiff made that reasonable inquiry regarding the unused gift certificate's expiration date, she would have learned from the affirmative language on the face of the gift certificate that it had not expired and she could still use that unredeemed gift certificate. Thus, the threshold inquiry of whether plaintiff demonstrated bad faith in filing the amended complaint is answered in the affirmative.

¶ 42 The other *Krautsack* factors also support the awarding of attorneys' fees and costs in the case *sub judice*. Plaintiff's degree of bad faith is high because despite knowing that she owned a gift certificate that could be used in the future, she asserted in her amended complaint that she essentially owned a worthless gift certificate. Since all of Restaurant.com's gift certificates no

1-11-1282

longer expire, imposing fees in accordance with the Act would deter others from bringing similar, unfounded litigation that is lacking in well-pled facts and not warranted by the law. Also, awarding attorneys' fees and costs pursuant to the Act, here, reinforces the significant, and well established, legal principle that actual damages must be suffered to bring a claim under the Act. Although plaintiff's counsel claims that factual issues exist regarding the issuance of the gift certificates bearing no expiration date, the factual issues she identified in her July 7, 2010 letter have no relevance in determining whether plaintiff suffered actual damages when the amended complaint was filed on July 10, 2010. It is clear that, prior to filing the amended complaint, plaintiff knew or should have known that she owned a gift certificate that was not expired and could be redeemed at the restaurant. Plaintiff's ability to satisfy an award of attorneys' fees and costs is unknown from the record. However, the trial court should consider this factor when determining the amount of attorneys' fees and costs to award to defendant. The facts in the instant case warrant the imposition of attorneys' fees and costs in accordance with section 10a(c) of the Act.

¶ 43 In sum, the trial court abused its discretion in denying defendant's motion for Rule 137 sanctions and attorneys' fees and cost pursuant to the Act because plaintiff and her attorney filed an amended complaint for an improper purpose since plaintiff suffered no "actual damages." Based on our review of the record, it is evident that plaintiff and her counsel, before filing the amended complaint on July 10, 2010, knew or should have known that plaintiff suffered no actual damages because plaintiff owned a gift certificate bearing no expiration date, which was still valid and redeemable. This cause is remanded on the attorneys' fees and costs issue, and the trial court is instructed to conduct a hearing to determine the appropriate amount of Rule 137

1-11-1282

sanctions and section 10a(c) attorneys' fees and costs to be imposed on plaintiff and her attorney resulting from and relating to plaintiff's filing of her amended complaint.

¶ 44 *Conclusion*

¶ 45 For the reasons stated, we affirm in part, and reverse in part and remand for further proceedings.

¶ 46 Affirmed in part and reversed in part; cause remanded.