

2013 IL App (1st) 112962-U

No. 1-11-2962

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SIXTH DIVISION  
March 22, 2013

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IN THE APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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DANIELLA ZIPPERSHTEIN,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellee,	)	Cook County.
	)	
v.	)	Nos. 98 D 14083,
	)	03 CH 6953, 03 CH 10811,
	)	and 06 P 8633 consolidated
	)	
PNINA ISAAC ZIPPERSHTEIN, Executor of the Estate	)	
of Ruben Zippershtein,	)	The Honorable
	)	Mary L. Mikva,
Respondent-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.  
Justices Hall and Gordon concurred in the judgment.

**ORDER**

¶ 1     *HELD:* The circuit court did not err in refusing to impose sanctions against petitioner where her underlying claim was meritorious.

¶ 2     Respondent, Pnina Isaac Zippershtein, executor of the estate of Ruben Zippershtein, appeals the circuit court's order denying a motion for sanctions pursuant to Illinois Supreme

1-11-2962

Court Rule 137 (eff. Feb. 1, 1994) against petitioner, Daniella Zippershtein. Respondent contends the circuit court erred where petitioner caused eight years of unnecessary litigation based on false statements made in her verified pleadings. Based on the following, we affirm.

¶ 3

#### FACTS

¶ 4 The parties were married in 1969 and had four children during the course of their 31 year marriage. In 1996, the parties obtained a "get," which is a Jewish religious divorce. At that time, the parties drafted a marital settlement agreement (settlement agreement). In 1998, Daniella formally filed for divorce in the circuit court from Ruben. A judgment for the dissolution of the marriage was entered on August 31, 2000. The dissolution judgment incorporated the parties' settlement agreement, in which they agreed, in relevant part, to share equal ownership of 12 parcels of real estate in Illinois and 4 parcels of real estate in Israel. The settlement agreement additionally stated that "each party has made a true and direct representation of his or her financial status, including possible expectancies and inheritances" and that each party "has been fully informed of the wealth, property, estate and income of the other." A prove-up hearing was held on August 31, 2000, at which Daniella testified and Ruben was not present.

¶ 5 Both parties subsequently filed petitions for rule to show cause and for declarations of rights, arguing that the other party violated the dissolution judgment and settlement agreement. In particular, Ruben claimed that Daniella failed to pay him his share of distributions from the jointly-held properties. In her case, Daniella claimed that Ruben failed to place two additional jointly-owned properties in a trust for the benefit of the parties' children. On June 16, 2003, the circuit court denied both parties' petitions for rule to show cause.

1-11-2962

¶ 6 Then, on August 13, 2003, Daniella filed a verified petition to vacate the dissolution judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2002)). In her section 2-1401 petition to vacate, Daniella claimed that Ruben had failed to disclose various parcels of commercial real estate that he purchased after the creation of their separation agreement in 1996, but while they continued to be married. According to her section 2-1401 petition, Daniella became aware of the undisclosed properties on April 10, 2003, during Ruben's deposition.

¶ 7 Ruben filed an answer and affirmative defenses to the section 2-1401 petition. In his answer, Ruben alleged that as of the date of the dissolution judgment "he was the owner, directly or indirectly of various interests in real property not identified" in the settlement agreement; however, he argued that Daniella "knew or should have known that [Ruben] was in the real estate related business" and that he "had no duty to disclose the existence \*\*\* of the undisclosed properties." In relevant part, in his affirmative defenses, Ruben claimed that the circuit court lacked jurisdiction to enter judgment and that, pursuant to the couple's religious divorce in 1996, Daniella was not entitled to any properties obtained thereafter. Daniella filed a motion to strike Ruben's affirmative defenses related to jurisdiction and the religious divorce. The circuit court granted Daniella's motion to strike the affirmative defenses, but granted Ruben leave to file an amended affirmative defense related to the religious divorce. Ruben filed an amended affirmative defense, arguing that the parties had agreed to abide by the settlement agreement after obtaining the religious divorce on January 30, 1996, such that each party could invest in and/or acquire additional properties with his or her own funds and these investments or properties would

1-11-2962

not be shared between the parties as they had been prior to the date of the religious divorce.

Daniella again filed a motion to strike the affirmative defense, arguing that the preliminary settlement agreement did not negate Daniella's claims or exempt Ruben from disclosing the existence of newly acquired properties. The circuit court denied Daniella's motion to strike and granted her leave to respond.

¶ 8 Meanwhile, over Ruben's objection, the circuit court granted Daniella 45 days to conduct discovery related to her original petition. Daniella attempted to obtain information regarding Ruben's undisclosed properties by issuing 29 subpoenas, all of which were rejected by Ruben. In April 2005, Daniella served Ruben with amended discovery requests seeking information on 182 properties and subsequently filed a motion to compel discovery in May 2005 upon Ruben's failure to reply to the discovery requests. On June 15, 2005, the circuit court granted Daniella's motion to compel discovery of the 182 properties, requiring Ruben to respond whether he had direct or indirect ownership of the subject properties and, if so, the value of equity in the property as of August 2000. The court denied Ruben's request to vacate the motion to compel. Instead, on September 12, 2005, the circuit court entered an order requiring Ruben to pay \$2,000 for every day thereafter wherein he did not comply with the motion to compel. Ruben responded by filing answers to interrogatories in which he revealed he owned 52 properties as of August 31, 2000, that were not included in the parties' settlement agreement. The properties were valued at over \$12 million as of November 2000.

¶ 9 On October 20, 2005, Daniella was deposed. During her deposition, Daniella provided that she knew Ruben had been involved in real estate activities during the period between their

1-11-2962

separation in 1996 and their divorce in August 2000. Daniella further stated she had been offered an opportunity to participate in real estate transactions with Ruben and his partners after the entry of the settlement agreement, and that her son, Eddie, had been involved in real estate activities with Ruben. Moreover, Daniella agreed that Ruben had assisted her boyfriend to obtain financing for the purchase of an investment property.

¶ 10 On October 21, 2005, Daniella filed a motion for leave to file answers to Ruben's affirmative defenses, arguing that she failed to comply with the February 14, 2005, deadline as an oversight. The circuit court denied the motion, finding that Daniella admitted at her deposition that she knew of some of Ruben's real estate investments during the time period between the parties' settlement agreement in January 1996 and the dissolution judgment in August 2000.

¶ 11 Daniella was subsequently granted a motion for substitution of judge wherein she claimed that Ruben's counsel had an *ex parte* conversation with the judge's law clerk.

¶ 12 On January 31, 2006, Daniella filed a motion for leave to file an amended section 2-1401 petition to vacate the dissolution judgment. Over Ruben's objection, the circuit court granted Daniella's motion. In the amended section 2-1401 petition, Daniella alleged that, as of the date of the dissolution judgment, Ruben held interest in 46 properties that were undisclosed in the parties' settlement agreement, but were acquired before the parties' dissolution. Daniella alleged that the 46 properties were marital and, due to the \$12 million value of the properties, the parties' settlement agreement was unconscionable. According to her amended section 2-1401 petition, Ruben fraudulently concealed his assets and she only learned of them as a result of Ruben's April 10, 2003, deposition testimony. On August 17, 2006, Ruben filed an answer to the amended

1-11-2962

section 2-1401 petition, denying the material allegations of the petition and raising affirmative defenses. Ruben died on November 3, 2006. A probate estate was opened thereafter with Ruben's widow, Pnina Zippershtein, acting as the executor of the estate.

¶ 13 On June 3, 2010, the estate filed a motion for summary judgment of the original section 2-1401 petition and a motion for sanctions pursuant to Rule 137. In the motion for sanctions, the estate claimed that sanctions should be issued against Daniella because of the false allegations included in her original section 2-1401 petition, namely, that Ruben's real estate acquisitions were not disclosed to her, that she had no knowledge of the transactions prior to the dissolution judgment, and that she had no knowledge of the transactions until Ruben's April 2003 deposition because they were fraudulently concealed by Ruben. On January 3, 2011, the estate filed an amended motion for summary judgment of the amended section 2-1401 petition.

¶ 14 On June 28, 2011, in a written order, the circuit court granted the estate's amended motion. In its order, the circuit court provided:

"There is no question that [Daniella] can show the existence of a meritorious claim, specifically that the property Ruben acquired during their marriage, including the forty-six properties he allegedly acquired after they separated and obtained a Jewish divorce, should have been included in the divorce decree and taken into consideration in the divorce proceedings.

However, the Court also finds that the uncontested facts clearly establish that [Daniella] failed to exercise due diligence in presenting this claim. \*\*\*.

1-11-2962

[Daniella] claims that her failure to discover the extent of Ruben's assets cannot be categorized as a lack of due diligence on her part; however, she points to no evidence that she engaged in any due diligence at all. She stated in her Amended Petition that she waited to file suit, and in turn to take any discovery on this issue in the divorce case or do anything to discover Ruben's assets, because she 'was negotiating a settlement and, in absence of a settlement, seeking a favorable ruling from the Court on her petition to interpret and enforce the Judgment.' As noted above, [Daniella] admitted in her deposition that she knew that Ruben was buying real estate yet she never did anything to figure out the extent of his investments. [Daniella] attached to her 1401 Petition financial statements submitted on Ruben's behalf to various banks prior to or around the time of the divorce. As she points out, these reflect a net value of interests in excess of \$12,000,000 that is not reflected as marital property in the [settlement agreement]. However, these smoking gun documents suggest that even minimal discovery during the divorce proceedings would have allowed [Daniella] to ascertain Ruben's true financial worth before she agreed to the terms of the [settlement agreement.]"

The circuit court concluded that there was no disputed issue of material fact as to Ruben's alleged fraudulent conduct that would require the court to relax the due diligence requirement.

1-11-2962

¶ 15 The court denied Daniella's subsequent motion to reconsider its June 28, 2011, order, finding Daniella failed to offer sufficient evidence of Ruben's fraudulent state of mind.<sup>1</sup>

¶ 16 On August 25, 2011, the circuit court denied the estate's motion for Rule 137 sanctions.

In so finding, the court provided:

"[The Estate] argues that [Daniella] did not bring her Amended §2-1401 Petition to Vacate Judgment of Dissolution of Marriage in good faith. The Estate contends that Daniella made knowingly false allegations in her Amended Petition including that she was unaware of Ruben's acquisition of certain real estate investments until October 23, 2003, and that Ruben fraudulently concealed his investment activities from her. As a result of these alleged false allegations, the Estate argues that sanctions are warranted because [Daniella] caused the Estate to incur substantial attorney's [*sic*] fees and participate in unnecessary litigation.

In the Court's view, [Daniella] brought her Amended Petition in good faith. While [Daniella] knew that Ruben was engaged in the business of real estate prior to the entry of their Marital Settlement Agreement, this knowledge is fully consistent with the allegations in her 1401 Petition that she did not know the

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<sup>1</sup>In its written order granting summary judgment, the circuit court found that Daniella's failure to timely respond to Ruben's amended affirmative defenses resulted in her admitting the substance of the defenses. However, in denying Daniella's motion to reconsider its order granting summary judgment of the section 2-1401 petition to vacate, the court conceded that its ruling regarding the admission of the affirmative defenses was incorrect.

extent of his investment activities and that Ruben took certain steps to prevent her from realizing the extent of his wealth. For example, [Daniella] alleged that Ruben led a modest lifestyle, maintained a small office and even lived out of his car for a period of time to prevent [Daniella] from knowing the success he achieved since their separation. These allegations were the basis for [Daniella's] argument that the Petition should be granted and that the two year statute of limitations was waived by Ruben's fraudulent conduct. While the Court granted [Ruben's] Motion for Summary Judgment on the 1401 Petition, in the Court's view the Petition was brought in good faith, the Motion for Sanctions should be denied and no response from the Petitioner on the Motion for Sanctions is required."

This timely appeal followed.

¶ 17

#### DECISION

¶ 18 The estate contends the circuit court erred in denying its motion for Rule 137 sanctions where Daniella filed false allegations in her section 2-1401 petition.

¶ 19 Rule 137 provides:

"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

1-11-2962

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 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).

¶ 20 Rule 137 is penal in nature and, therefore, must be strictly construed. *Dismuke v. Rand Cook Auto Sales, Inc.*, 378 Ill. App. 3d 214, 217 (2007). "The party seeking to have sanctions imposed by the court must demonstrate that the opposing litigant made untrue and false allegations without reasonable cause." *Id.* A circuit court's decision whether to grant Rule 137 sanctions must be informed, based on valid reasons, and follow logically from the circumstances of the case. *Id.* (citing *Burrows v. Pick*, 306 Ill. App. 3d 1048, 1051 (1999)). It is within the circuit court's discretion whether to grant a Rule 137 request for sanctions, and we will not disturb the court's decision absent an abuse of that discretion. *Id.*

¶ 21 The estate contends the circuit court erroneously based its ruling on Daniella's amended section 2-1401 petition when the motion for Rule 137 sanctions was directed at false allegations Daniella made in her original section 2-1401 petition. Daniella argues that the act of amending

1-11-2962

her section 2-1401 petition effectively eliminated the original pleading. To the extent that "[a] sworn statement of fact in a verified pleading remains binding on the party even after an amendment, and the party cannot subsequently contradict the factual allegation" (*L.D.S., LLC v. Southern Cross Food, Ltd.*, 2011 IL App (1st) 102379, ¶35), we consider the allegations in both section 2-1401 petitions.

¶ 22 Our review of both pleadings demonstrates that the circuit court's refusal to impose Rule 137 sanctions was informed, based on valid reasons, and followed logically from the circumstances of the case. In both pleadings, Daniella stated that, as of the date of the dissolution judgment, she did not know that Ruben was the owner of any properties not disclosed in the parties' settlement agreement. The estate argues that Daniella's statement was a falsehood because she admitted during her deposition that she knew Ruben was involved in the real estate business, that she was offered opportunities to participate in real estate transactions with Ruben, that Ruben and their son participated in real estate transactions together, and that Ruben provided Daniella's boyfriend assistance in securing funding for a real estate investment. We, however, find that Daniella's knowledge that Ruben participated in the real estate business does not demonstrate she was aware of the extent of Ruben's ownership of 46 additional properties outside of the parties' settlement agreement to which she may or may not have had a claim as marital property. Rather, the 46 undisclosed properties only became known after Daniella conducted discovery in connection with the filing of her original section 2-1401 petition. Notably, Daniella's discovery requests were ignored by Ruben until he was threatened by the circuit court with a \$2000 per day sanction for lack of compliance. Accordingly, we conclude that Daniella

1-11-2962

did not present sanctionable false allegations regarding the extent of her knowledge of Ruben's real estate ownership during the time in question.

¶ 23 Moreover, we do not find that Daniella falsely alleged Ruben fraudulently concealed his real estate ownership. We recognize that the circuit court granted the estate's motion for summary judgment of the section 2-1401 petition because Daniella could not establish sufficient evidence demonstrating Ruben's fraudulent intent in concealing the properties such as to excuse her failure to exercise due diligence in filing her petition. However, Daniella did present circumstantial evidence demonstrating that Ruben took action to prevent Daniella from learning of his investments between the settlement agreement and the dissolution judgment, such as conversations Ruben had with his business partner and instructions Ruben gave his attorney to not include additional properties at the parties' August 31, 2000, prove up for the dissolution. A grant of summary judgment against Daniella in this case is not inconsistent with the circuit court's denial of sanctions. See *Benson v. Stafford*, 407 Ill. App. 3d 902, 929 (2010). "Rule 137 is intended to prevent the filing of frivolous lawsuits based on falsehoods, but does not purport to penalize litigants, or their attorneys, for zealous but unsuccessful litigation. *Sterdjevich v. RMK Management Corp.*, 343 Ill. App. 3d 1, 19 (2003). Daniella's fraudulent concealment allegation, while insufficient for a section 2-1401 petition, was not sanctionable as a frivolous lawsuit based on falsehoods.

¶ 24 We find *Whitmer v. Munson*, 335 Ill. App. 3d 501 (2002), a case relied upon by the estate, is distinguishable from the case before us. In *Whitmer*, this court determined that Rule 137 sanctions were appropriate where the plaintiff filed a complaint against his neighbors which

1-11-2962

contained "a fraudulent, false or misleading version of the truth" that the plaintiff knew, or should have known upon reasonable inquiry, to be false. *Whitmer*, 335 Ill. App. 3d at 516-17. Here, in contrast, the circuit court determined that Daniella's underlying claim was meritorious, in that Ruben's undisclosed properties should have been included in the dissolution proceedings; however, Daniella failed to assert a timely claim. Therefore, unlike the plaintiff in *Whitmer*, the underlying allegations were not falsely pled by Daniella.

¶ 25 We conclude that the circuit court did not abuse its discretion in denying the estate's motion for Rule 137 sanctions.

¶ 26 CONCLUSION

¶ 27 We affirm the judgment of the circuit court.

¶ 28 Affirmed.