

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 DISTRICT

EURO PARCEL SERVICE, LLC.,)	
)	
Plaintiff-Appellee,)	Appeal from the Circuit Court
)	of Cook County.
v.)	
)	
MICHAL SITKO,)	No. 2013 M1 118784
)	
Defendant-Appellant)	
)	The Honorable
(Impex World,)	Dennis McGuire,
)	Judge, presiding.
Defendant).)	

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Pucinski and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in denying defendant's two motions for Rule 137 sanctions where complaint and amended complaint, though dismissed without prejudice for failing to state a claim, were factually accurate, and not brought for improper purpose. Defendant's oral request for costs under 735 ILCS 5/2-1009(a), made 49 days after plaintiff voluntarily dismissed lawsuit, was untimely.

¶ 2 Defendant Michal Sitko twice sought Rule 137 sanctions for what he contends was a meritless claim. Ill S. Ct. R. 137(a) (eff. July 1, 2013). The trial court denied both motions. The

trial court also denied Sitko's request for costs in connection with plaintiff's voluntary dismissal of its amended complaint (see 735 ILCS 5/2-1009(a)), a request made 49 days after the court had entered the order non-suiting the case.

¶ 3 We conclude that the trial court correctly ruled on both the sanctions and the matter of costs. The record before us does not indicate the trial court decisions constitute an abuse of discretion. As for the request for costs, we agree with the trial court that the request was untimely.

¶ 4 Background

¶ 5 Plaintiff, Euro Parcel Service, LLC, provides shipping services to Poland, and defendant Michal Sitko, who frequently visits Poland, on several occasions, used Euro's services to ship his motorcycle there. Euro asked Sitko to recommend a firm to receive and distribute good in Poland, and Sitko identified defendant Impex World, a Polish company. Euro directly negotiated and entered into an agreement with Impex. Sitko had nothing to do with the negotiations and was not a signatory to the agreement. Before leaving for Poland, Sitko went to Euro to pay for shipping the motorcycle and Euro inquired whether, while in Poland, he would deliver \$2,000 to Impex. Sitko agreed, and Euro wrote him a check in that amount.

¶ 6 In March 2013, Euro sued Impex and Sitko, as Impex's agent, for breach of the agreement and requested damages of \$3,718 (the \$2,000 deposit and \$1,718 incurred in procuring substitute performance in Poland). Euro never served Impex, and Impex never filed an appearance.

¶ 7 Sitko moved to dismiss and for sanctions under Rule 137 (Ill S. Ct. R. 137(a) (eff. July 1, 2013)), arguing that instead of attaching to the complaint the agreement with Impex, Euro

attached a shipper's letter of instructions. The trial court dismissed the complaint with leave to amend and denied the motion for sanctions.

¶ 8 Euro then amended its complaint and this time attached copies of the agreement with Impex, a copy of the \$2,000 check to Sitko, and Euro's contract with another carrier to secure substitute performance. Euro also alleged it did not know whether Sitko, in his capacity as Impex's agent, paid over to Impex the \$2,000 he agreed to deliver.

¶ 9 Sitko responded by again moving to dismiss, partly on the basis that he was not a party to the agreement, and again the complaint was dismissed without prejudice. A few weeks later, the trial court granted Sitko leave to file a motion for sanctions and set a briefing schedule on the motion. At that same hearing, Euro orally moved to voluntarily dismiss its complaint under section 2-1009 of the Code of Civil Procedure. 735 ILCS 5/2-1009(a) (West 2012). The trial court allowed Euro's motion. Sitko did not ask for an award of costs under 2-1009(a).

¶ 10 Sitko's second motion for Rule 137 sanctions accused Euro and its counsel of maliciously abusing the judicial process in the hope Sitko would simply pay Euro rather than incur significant legal fees defending the lawsuit. The trial judge did not buy into Sitko's argument, stating "a successful motion to dismiss without a finding of bad faith or lack of diligence by the plaintiff is not a basis for a [Rule] 137 sanction." Having lost his demand for sanctions a second time, Sitko orally requested Euro to pay costs under Section 2-1009(a). The trial court refused to do so on the basis that the request was untimely and should have been sought weeks earlier, at the time Euro took the nonsuit. Sitko appeals.

¶ 11 Analysis

¶ 12 Sitko argues that the trial court erred in denying his motions for sanctions and refusing to grant him costs available under Section 2-1009(a). We disagree and affirm.

¶ 13 Motions for Sanctions

¶ 14 Sitko argues that his motions for sanctions should have been granted because (i) Euro alleged a breach of contract claim in its complaint, but attached a shipper's letter of instruction instead of a copy of the agreement; and (ii) Sitko's liability was premised on agency, but, under existing Illinois agency law, an agent is not personally liable for the principal's breach of contract.

¶ 15 Illinois Supreme Court Rule 137 leaves the decision on sanctions to the sound discretion of the trial court, and we will affirm that decision unless it amounts to an abuse of discretion. *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 487 (1998); *In re Marriage of Schneider*, 298 Ill. App. 3d 103, 108 (1998) (decision on propriety of sanctions entitled to great weight by reviewing court). An abuse of discretion occurs when no reasonable person would take the position adopted by the trial court. *Sterdjovich v. RMK Mgmt. Corp.*, 343 Ill. App. 3d 1, 19 (2003).

¶ 16 Rule 137 has a profoundly critical function—to deter abuse of the litigation process. See *Dismuke v. Rand Cook Auto Sales, Inc.*, 378 Ill. App. 3d 214, 217 (2007). The movant under Rule 137 bears the burden of proof. *Technology Innovation Center, Inc. v. Advanced Multiuser Technologies Corp.*, 315 Ill. App. 3d 238, 243 (2000).

¶ 17 The standard for evaluating offensive conduct under this rule is one of reasonableness under the circumstances at the time the challenged pleading or motion was filed. *In re Marriage of Schneider*, 298 Ill. App. 3d 103, 109 (1998). The rule should not be employed as a tool to penalize unsuccessful litigants. *Mandziara v. Canulli*, 299 Ill. App. 3d 593, 601 (1998). Nor used to punish those who misapply the law. *Shea, Rogal & Associates, Ltd. v. Leslie Volkswagen, Inc.*, 250 Ill. App. 3d 149, 154 (1993).

¶ 18 We first address Euro's failure to attach a contract to its original complaint. Generally, a claim based on a written instrument should attach a copy of a document or recite the relevant terms. 735 ILCS 5/2-606 (West 2012). Attached to the original complaint was a shipper's letter of instructions rather than the agreement. Whether or not a clerical error, nothing in the record indicates that Euro attached the incorrect document to harass or vex Sitko. This point is reinforced by correct agreement being attached to the amended complaint.

¶ 19 Sitko misplaces his reliance on *Baker v. Daniel S. Berger, Ltd.*, 323 Ill. App. 3d 956 (2001). In *Baker*, the declaratory judgment complaint was based on unexecuted contracts. *Id.* at 957. The trial court denied a motion for Rule 137 sanctions. *Id.* at 958. On appeal, this court determined that the complaint was not warranted by existing law and reversed the denial of sanctions because the contract was not signed, and there was no legal basis on which to bind the defendant. *Id.* at 965. Nothing in *Baker* stands for the proposition that failure to attach a signed contract warrants sanctions. Moreover, despite Sitko's arguments to the contrary, Euro's complaint specifies the agreement and not the shipper's letter as the basis for its claim and that attached exhibit involves something all-together irrelevant to the claim does not negate Euro's allegations.

¶ 20 Sitko maintains that Euro failed to conduct a reasonable inquiry into the law and facts as Sitko, an alleged agent of a disclosed principal, could not be personally liable for the breach of contract, citing well-established agency law that an agent is not personally liable for a disclosed principal's breach unless the agent expressly agreed to be so. *Knightsbridge Realty Partners, Ltd.-75 v. Pace*, 101 Ill. App. 3d 49, 53 (1981); *Landau v. Landau*, 409 Ill. 556, 564 (1951) (agent with actual or apparent authority not liable to third parties for the principal's acts).

¶ 21 But Euro had a legitimate reason to bring suit and nothing in the record suggests any factual allegations were other than to the best of Euro's "knowledge, information, and belief formed after reasonable inquiry." Ill. S. Ct. Rule 137(a) (eff. July 1, 2013). Euro alleged that Sitko acted as an agent when he accepted the \$2,000 check. If Sitko did not deliver the money to Impex, he could be liable for conversion. *Fortech, L.L.C. v. R.W. Dunteman Co.*, 366 Ill. App. 3d 804, 813 (2006). In addition, without regard to his status as an agent, Sitko might have been liable under a theory of promissory estoppel. *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 233 Ill. 2d 46, 58 (2009) (For promissory estoppel, "the plaintiff must prove that (1) defendant made an unambiguous promise to plaintiff, (2) plaintiff relied on such promise, (3) plaintiff's reliance was expected and foreseeable by defendants, and (4) plaintiff relied on the promise to its detriment."). While Euro did not plead conversion or promissory estoppel, that is irrelevant. The factual allegations demonstrate that Euro did not file this action for spurious reasons, even though its complaint (and the amended complaint) failed to plead an actionable claim. Accordingly, the circuit court did not abuse its discretion in denying Sitko's motions for sanctions.

¶ 22 Sitko's Motion for Costs

¶ 23 Sitko appeals the circuit court's denial of his oral motion for court costs under 735 ILCS 5/2-1009(a) (West 2012), which he made immediately after the trial court rebuffed his second motion for sanctions. We review the trial court's ruling under the abuse of discretion standard. See *Metropolitan Water Reclamation Dist. of Greater Chicago v. Terra Foundation for American Art*, 2014 IL App (1st) 130307, ¶ 52. We affirm.

¶ 24 The trial court ruled that the request for costs was untimely, having been made 49 days after the entry of the order of voluntary dismissal, at which Sitko was present. A defendant's

right to costs under section 2-1009 is subject to forfeiture for lack of timeliness, just as any right. See *In re Marriage of Brown*, 86 Ill. App. 3d 964, 970-1 (1980); *People v. Tapia*, 2014 IL App (2d) 111314, ¶ 36 (defining "forfeiture" as failure to make timely assertion of rights). Sitko presumably knew of his right to costs under section 2-1009; see *In re Estate of Pellico*, 394 Ill. App. 3d 1052, 1067 (2009) ("litigants are presumed to have full knowledge of applicable court rules and procedures").

¶ 25 While Sitko had a right to request costs, that right must be asserted and it is not the role of the judge to exercise a parties' right in the presence of that parties' counsel. Moreover, the procedure to ask for costs after the entry of the order of voluntary dismissal was not to move for costs as if the earlier order of voluntary dismissal did not exist, but to seek reconsideration of the earlier order so as to provide for costs as a condition for dismissal. The trial court did not abuse its discretion when it denied the motion for costs.

¶ 26 CONCLUSION

¶ 27 Affirmed.