

No. 1-14-3591

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

SUSAN MICHAEL, as Assignee of R&G Properties,)	
)	Appeal from the Circuit Court
Plaintiff-Appellee,)	of Cook County,
)	
v.)	No. 11 M1 702280
)	
ADRIANA MAZUTIS,)	Honorable
)	Raymond Mitchell,
Defendant-Appellant.)	Judge Presiding.
)	
)	

PRESIDING JUSTICE LIU delivered the judgment of the court.
Justice Cunningham and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's denial of defendant's motion for sanctions is affirmed where defendant failed to show the trial court's ruling was an abuse of discretion.

¶ 2 In January 2011, a complaint was filed against Adriana Mazutis and O'Splaine's, LLC, for unpaid rent. After over three years of litigation and the first day of trial had been completed, the complaint was voluntarily dismissed. Mazutis moved for sanctions against the plaintiffs pursuant to Illinois Supreme Court Rule 137 (eff. July 1, 2013), and her motion was denied by

the trial court. The sole issue on appeal is whether the trial court abused its discretion in denying Mazutis's request for sanctions. We affirm.

¶ 3

BACKGROUND

¶ 4 This action began in January 2011, when George Michael (George) and Michael Realty & Associates (Michael Realty) filed a complaint against Adriana Mazutis and O'Splaine's, LLC (O'Splaine's) (collectively, defendants), alleging that: (1) George and Michael Realty were "entitled to the possession" of the "restaurant/bar" located on the first floor of 2434 West Montrose Avenue in Chicago, Illinois; (2) defendants were "unlawfully [withholding] possession" of the premises; and (3) defendants owed rent to George and Michael Realty for the period of August 1, 2010 to January 31, 2011, in an amount totaling \$91,731.32 "after allowing the defendant all just credits, deductions, and set-offs."

¶ 5 The complaint was amended in June 2011, substituting R&G Properties (R&G) as the plaintiff instead of George and Michael Realty. According to the complaint, R&G owned the premises at 2434-36 West Montrose Avenue in Chicago, Illinois (the Premises), while O'Splaine's, of which Mazutis was "a member," had previously operated the restaurant located there. R&G further alleged that it had entered into a 5-year written lease with defendants for defendants' use of the Premises during a term from September 1, 2007 through August 30, 2012, and that the lease also required Mazutis to pay real estate taxes and insurance. All obligations under this lease were "personally guaranteed by" Mazutis. According to R&G, however, defendants had "failed to pay rent, real estate taxes or insurance" since the beginning of the lease through February 2011, and had abandoned the Premises, which remained vacant. R&G attached the purported lease agreement to the complaint.

¶ 6 R&G alleged two causes of action: an "action for past due rent" (count I), in which R&G alleged that defendants owed \$552,594.20 for the unpaid rent, real estate taxes, and insurance;

and an "action for conversion of personal property" (count II), in which R&G alleged that defendants had been permitted to use approximately \$10,000 worth of R&G's property—including four Dell computers, an HP printer, two Leneve laptops, and "[m]iscellaneous bottles of well and top shelf liquor"—but that defendants removed said property from the Premises when they abandoned it and "intentionally converted them to their own personal use and refused to return the items." R&G requested \$552,594.20 in damages for the unpaid rent, the reasonable value of the converted property, and reasonable fees and costs.

¶ 7 In September 2011, Mazutis filed a motion to dismiss count II of R&G's complaint pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2010)), because "the property the Plaintiff alleges was converted has never been in the possession of [] Ms. Mazutis and remains in the possession of George Michael, a principle in R&G Properties." Mazutis argued that R&G had failed to state a claim for conversion and, more specifically, alleged, *inter alia*: the lease attached to the complaint was forged; O'Splaine's had been "prevented from entering the business after December, 2010"; and that Mazutis had paid R&G "sums in excess of \$1,200,000.00" to cover the rent, taxes, and insurance obligations under the lease. Mazutis additionally claimed that defendant did not remove the allegedly converted personal property of R&G from the Premises. Mazutis supported her motion with a personal affidavit, averring to the truth of her above factual allegations.

¶ 8 In response, R&G argued that Mazutis's motion was conclusory in nature and unsupported by anything beyond her affidavit. Affidavits from George and Terri Wurster, an employee of Michael Realty, were attached to R&G's response to the motion. Both affiants averred that they were present when the lease was signed by the parties, including Mazutis, and that the "true and correct" copy of the lease was attached to the complaint.

¶ 9 The court denied defendants' motion to dismiss in January 2012.

¶ 10 Mazutis filed her answer to R&G's complaint approximately one week later, denying that she entered into a lease agreement for the Premises and that a true and correct copy of the lease was attached to the complaint, that she "personally guaranteed the obligations under the lease," and that she failed to pay rent. Mazutis further alleged that "[u]pon information and belief, the rent was paid in full through December 31, 2010 and, [stated] affirmatively, the Defendant is entitled to a set off for the total amount of rent paid" through that time. Mazutis also alleged four affirmative defenses: (1) payment, arguing that the lease was paid in full; (2) mitigation, arguing that, by failing to relet the Premises, R&G did not mitigate damages after defendants were locked out of the Premises, and therefore was not entitled to recovery; (3) fraud by inducement, arguing that R&G and its principals, George and Robert Michael (Robert), "willfully and knowingly defrauded [defendants] in the inducement of the lease agreement"; and (4) *laches*, arguing R&G failed to act "in a reasonably timely manner."

¶ 11 In January 2013, Mazutis moved "for rule to show cause or, in the alternative, to dismiss pursuant to S.Ct.R. 219(c)." In her motion, Mazutis stated that the principals of R&G, George and Robert, were required to appear for their depositions as noticed up on four separate dates but that, on "each occasion, the depositions were cancelled by the Plaintiff and the Michael Brothers have refused to submit to deposition." She also claimed that R&G had "consistently refused to comply with" her written discovery requests. She asked the court to dismiss the matter with prejudice as a sanction pursuant to Illinois Supreme Court Rule 219(c) (eff. July 1, 2002).

¶ 12 Mazutis's motion for rule to show cause was dismissed by the trial court. The court stated in its written order that the motion was "procedurally infirm" because a "rule to show cause cannot be entered against a party based solely on the opposing party's unsubstantiated allegations of noncompliance." The court further observed that Mazutis had failed to "characterize Plaintiff's

conduct as willfully or intentionally violative of this Court's orders." In rejecting Mazutis's request for dismissal of the lawsuit as sanctions, the court noted:

"Dismissal of an action is the most drastic sanction and should be imposed only as a last resort in cases where the actions of a party demonstrate a deliberate, contumacious and unwarranted disregard of the trial court's authority. [Citation.] Here, Plaintiffs have canceled four scheduled depositions, failed to respond to some written discovery and failed to retain counsel by the deadline set by the Court. Remedies short of dismissal are available to Mazutis that would strike a more proper balance between Plaintiff's supposed violation and any harm or prejudice that has resulted to Mazutis."

¶ 13 In August 2013, Mazutis filed her first amended answer and affirmative defenses, both of which were substantially similar to her previous answer and affirmative defense. Mazutis additionally filed a counterclaim against George, Robert, Susan Michael (Susan),¹ and Dorothy Michael. Dorothy is the daughter of George and Susan. In this counterclaim, Mazutis alleged, *inter alia*, that: George, Robert, Susan, and Dorothy "conspired, combined and acted in concert to deprive [Mazutis] of funds which rightfully and legally belong to her; "obtained by false and fraudulent pretenses the sum of" \$1.4 million from Mazutis; made false representations to cause O'Splaine's to enter into the lease for the Premises; and took possession of the Mazutis assets" by fraud and misrepresentation by "acting in concert with and on behalf of Michael Realty and R&G Realty."

¹ In May, 2013, the trial court granted R&G's motion to substitute Susan Michael as the plaintiff. At the time, R&G was involved in a Chapter 11 bankruptcy proceeding in the United States Bankruptcy Court for the Northern District of Illinois, which had approved the sale of R&G's "right, title, and interest" in its claims against defendants to Susan Michael for \$4,000, and said interest was assigned to her.

¶ 14 In October 2013, Susan moved to dismiss Mazutis's counterclaim pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2012)), requesting that the court: (1) strike the counterclaim as to Dorothy, arguing that she was "mentally challenged" and "[did] not have the legal capacity to sue or be sued"; and (2) dismiss the counterclaim in its entirety for failure to state a claim upon which relief can be granted. The court granted the motion and dismissed Mazutis's counterclaim, finding that Mazutis, in her counterclaim, had "not a single allegation that addresses Dorothy Michael individually or shows in any way how she could be liable" and that she had failed to state a claim against the remaining counterdefendants.

¶ 15 Subsequently, in July 2014, Mazutis filed her third amended affirmative defenses and second amended counterclaims against Susan, George, and Robert (counterdefendants). She asserted one new affirmative defense and generally re-alleged the same causes in her amended counterclaims, seeking set-off and relief for fraud, conversion, breach of fiduciary duty, and breach of contract.

¶ 16 In September 2014, Mazutis moved to compel discovery and for a rule to show cause, arguing that R&G had "continued a pattern of abuse of discovery and the litigation process." Asserting her belief that "Mr. Michael, who clearly initiated this litigation, has done so for secondary gain—he wants into the all-nude stripper business," Mazutis asked the circuit court to compel counterdefendants "to answer all written discovery and present George and Robert Michael for discovery deposition with special instructions from the Court compelling them to respond to interrogation relating to their business practices, prior bad acts and the subject matter of the complaint and counterclaims."

¶ 17 Trial was set to begin on October 6, 2014. Four days before trial, Susan requested leave of the court to file a second amended complaint against defendants, *instanter*, solely alleging a claim for conversion of the past due rent in the amount of \$552,594.20.

¶ 18 The following day, Mazutis filed a motion for sanctions pursuant to Illinois Supreme Court Rule 137 (Ill. S. Ct. R. 137 (eff. July 1, 2013)), alleging that counsel for R&G, Michael Realty, George, and Susan had failed to undertake "any investigations into the conversion allegations as required by Rule 137." Mazutis complained that "[n]ow, three days before trial, [Susan] attempts to file a Second Amended Complaint when [she] knew or should have known that the allegations relating to Mazutis's alleged conversion of personal property were untrue and without any factual basis." Mazutis requested that the court impose sanctions against Susan and her counsel, and that her attorneys' fees and costs in defending the conversion claim be paid.

¶ 19 On October 6, 2014, the trial court granted Susan's request for leave to file her second amended complaint, *instanter*. The trial in this matter also commenced on this date.

¶ 20 George testified that Mazutis and R&G had entered into a lease for the Premises and that both he and Mazutis had signed the lease and the attached addendums. George further stated that Mazutis had separately "invested" \$1 million in R&G, to be paid back to Mazutis. This loan was documented by a "promissory note," memorializing the investment and the time frame to repay the investment, which was signed by both George and Mazutis. George testified that Mazutis never paid rent, real estate taxes, or insurance on the Premises, and this testimony was supported by handwritten accountings that showed each occasion during which Mazutis did not pay rent, taxes, or insurance; these amounts were deducted from the amount that R&G had to re-pay Mazutis for her investment in the business. The April 2010 accounting, signed by Mazutis, showed that George had paid her back for her investment in R&G but that he still owed her the interest on her investment. The written accountings following the April 2010 accounting showed that George continued deducting the unpaid rent and taxes from the balance he owed until June 2010, at which point, according to the handwritten accountings, the entire investment plus interest had been paid back and Mazutis began to owe George. The trial was then continued to

the next day. Although George did not finish testifying about the handwritten accountings before dismissing the case, they appear to show that Mazutis continued to not pay rent and taxes, or insurance on the Premises through January 2011, at which time Mazutis would have allegedly owed George \$171,082.37 (which allegedly includes other expenses paid by him on her behalf).

¶ 21 The following morning, with counsel for both sides present, Susan's attorney informed the court that he had been directed to move for a dismissal, with prejudice, of the case. The court dismissed the cause with prejudice on Susan's motion, and also dismissed Mazutis's counterclaims.

¶ 22 On November 3, 2014, Mazutis filed a petition for an award of attorney fees and costs in the amount of \$85,987.83, pursuant to Rule 137. She alleged that count II against her had been maintained "throughout almost the entire litigation," but dismissed pursuant to the second amended complaint, filed "on the eve of trial" and that the attorneys for plaintiffs throughout the litigation failed to undertake "any investigations into the conversion allegations as required by Rule 137." Mazutis additionally claimed that during trial, George "presented evidence that the rent had, in fact, been paid. Which unequivocally proves that Plaintiff pled statements which he knew to be untrue in violation of Illinois Supreme Court Rule 137." Mazutis demanded attorney fees and costs of the litigation be paid by Susan.

¶ 23 The trial court dismissed Mazutis's petition for fees and costs on November 18, 2014, and Mazutis filed a timely notice of appeal on November 19, 2014.

¶ 24 ANALYSIS

¶ 25 On appeal, Mazutis contends that the trial court abused its discretion because "there was substantial evidence that the plaintiffs and their counsel had actual knowledge that the pleadings were false at the time they were filed." Following our review of the record, we disagree with this proposition and affirm the trial court's order denying Rule 137 sanctions.

¶ 26 Supreme Court Rule 137 requires that every pleading submitted by a represented party "shall" be signed by "at least one attorney of record" and further provides:

"The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other document; 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 document 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" (Emphasis added.) Ill. S. Ct. R. 137(a) (eff. July 1, 2013).

"Furthermore, Rule 137 provides that circuit court judges *may* impose sanctions when the rule is violated; they are not required to do so." (Emphasis in original.) *Lake Environmental, Inc. v. Arnold*, 2015 IL 118110, ¶ 15.

¶ 27 The purpose of Rule 137 is "to prevent parties from abusing the judicial process by filing vexatious or harassing actions lacking legal or factual support." *Benz v. Department of Children & Family Services*, 2015 IL App (1st) 130414, ¶ 44. In addition, the "party requesting sanctions bears the burden of showing that sanctions are warranted." *Id.* The circuit court must then determine, under an objective standard, "whether a party made a reasonable inquiry into the facts and law supporting their allegations to meet the burden of Rule 137." *Dismuke v. Rand Cook Auto Sales, Inc.*, 378 Ill. App. 3d 214, 217 (2007).

¶ 28 "The determination of whether to impose sanctions under Rule 137 rests with the sound discretion of the trial court; the 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) (citing *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 487 (1998)). "Under the abuse of discretion standard, the question is not whether this court might have decided the issue differently, but whether any reasonable person could have taken the position adopted by the trial court." *In re Marriage of Samardzija*, 365 Ill. App. 3d 702, 708 (2006); see also *Arnold*, 2015 IL 118110, ¶ 16 (noting that an abuse of discretion occurs when "no reasonable person" would agree with that court's decision).

¶ 29 Initially, we note that Mazutis's appellate brief relies, in large part, on documents she included in a separate appendix, including: transcripts of the depositions of George and Robert, and three "group exhibits" that Mazutis says she had "tendered" during the "overnight [trial] break" and "with which she intended to cross-examine [George]." However, none of these documents were included in the record on appeal. "Attachments to briefs not included in the record on appeal are not properly before the reviewing court and cannot be used to supplement the record." *Revolution Portfolio, LLC v. Beale*, 341 Ill. App. 3d 1021, 1024 (2003); see also Ill. S. Cr. R. 342(a) (eff. Jan. 1, 2005) (requiring an appendix to the brief to include materials "*from the record* which are the basis of the appeal or pertinent to it" (emphasis added)). Moreover, there is no indication that the trial court had the opportunity to review the appended documents. We are reviewing the trial court's decision for an abuse of discretion, and decline to consider documents that were not properly submitted to the trial court or made a part of the trial record.

¶ 30 In addition, Susan claims that Mazutis forfeited review of the trial court's denial of her request for Rule 137 sanctions because the record "includes no written ruling, transcript of the hearing on the petition or a certified bystander's report." The only grounds Susan relies on for this assertion of forfeiture is the well-settled rule that "any doubt arising from the incompleteness of the record will be resolved against the appellants." *Koppel v. Michael*, 374 Ill. App. 3d 887,

1008 (2007) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). However, although a presumption against the appellant arises from an incomplete record, Susan has not cited any case law to suggest that Mazutis has "forfeited the issue on appeal." See Ill. S. Ct. R. 341(h)(7), (i) (requiring that a party's brief "shall contain the contentions of the [party] and the reasons therefor, with citation of the authorities *** relied on"). Moreover, as Mazutis points out, the deferential standard of abuse of discretion "does not prevent a reviewing court from independently reviewing the record and finding an abuse of discretion where the facts warrant." (Internal quotations omitted.) *Mohica v. Cvejin*, 2013 IL App (1st) 111695, ¶ 47.

¶ 31 Mazutis argues that the trial court abused its discretion because "there was substantial evidence that the plaintiffs and their counsel had actual knowledge that the pleadings were false at the time they were filed." Mazutis focuses her argument on George's trial testimony. George testified at trial that R&G received a check for \$1 million from Mazutis, but that the purpose of that check was an "investment" to be repaid to Mazutis. He further testified that when Mazutis did not pay rent, real estate taxes, or insurance for the Premises as provided by the lease, he decreased the amount R&G owed to Mazutis on her investment accordingly. He also maintained that Mazutis never paid rent, taxes, or insurance for the Premises. Moreover, according to the written accountings, Mazutis continued to not pay the rent, taxes, or insurance for the Premises after the R&G debt was repaid in full in June 2010, through the final written accounting in January 2011. Mazutis claims that the trial testimony shows the plaintiffs had "actual knowledge" that their claim was false at the time of filing. However, at best, this record shows that Mazutis loaned R&G \$1 million, from which George deducted the unpaid rent, taxes, and insurance until the debt was repaid, after which time the rent, taxes, and insurance still were not paid by Mazutis. Although facts in the record arguably support Mazutis's demand for sanctions, other facts in the record could equally compel a different conclusion. As such, based on the

record before us, we cannot say that no reasonable person would have denied Mazutis's motion for sanctions. We conclude that the trial court did not abuse its discretion.

¶ 32 In reaching this conclusion, we again note that, even when Rule 137 has been violated, a trial court is not *required* to impose sanctions. *Arnold*, 2015 IL 118110, ¶ 15. Over the three years and eight months this litigation was before the trial court, the parties filed, briefed, and presented before the court multiple pleadings, motions to dismiss, motions for sanctions, and discovery motions; the trial court also entered multiple orders on the various motions presented. We note that this court is deferential to a trial court's determination on sanctions because "generally the conduct at issue occurred before the judge issuing the sanctions, who, therefore, is in the best position to determine whether the challenged conduct warranted penal sanctions or because the trial court heard testimony from individuals involved in the challenged conduct." *Mohica*, 2013 IL App (1st) 111695, ¶ 50. The trial court here had plenty of opportunity to observe the proceedings and, where there is evidence both for and against the imposition of sanctions, we defer to the trial court's assessment of the parties' knowledge and motivations in pursuing the litigation. Accordingly, the trial court did not abuse its discretion.

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 35 Affirmed.