2016 IL App (2d) 150574-U
No. 2-15-0574
Order filed March 17, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PANEL BUILT, INC.,	)	Appeal from the Circuit Court
	)	of De Kalb County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 11-CH-459
	)	
DE KALB COUNTY and THE DE KALB PUBLIC BUILDINGS COMMISSION,	)	
	)	
Defendants-Appellees	)	Honorable
	)	Thomas L. Doherty,
(Aggressive Industrial Structures, Defendant).	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court erred in denying plaintiff's motion for sanctions, as plaintiff did cite specific filings subject to Rule 137 and was entitled to assert that those filings supported an award of fees for the entire action; although plaintiff did not specify an amount of fees, the court on remand would have the discretion to permit an amendment to that effect and to determine an appropriate award; (2) the trial court properly denied plaintiff prejudgment interest: as to the Interest Act, the municipal defendants did not hold the money due to plaintiff; as to an equitable award, plaintiff forfeited its argument by failing to raise it below.

¶ 2 Plaintiff, Panel Built Inc., appeals the trial court's denial of its motion for sanctions against defendants De Kalb County and the De Kalb Public Buildings Commission (defendants)

based on the misconduct of defendants' attorney. Plaintiff also challenges the denial of its motion for prejudgment interest. We determine that the trial court erred when it found that none of the misconduct was tied to specific filings. Accordingly, we vacate the denial of sanctions and remand for further proceedings. However, we affirm the denial of prejudgment interest.

¶ 3 I. BACKGROUND

¶ 4 This action arises out of a building contract. In June 2009, the commission sought bids for the construction of a community outreach building. Defendant Aggressive Industrial Structures (AIS) submitted a bid and included a performance and payment bond. The bid was rejected, and the bond was returned to AIS.

¶ 5 In August 2009, the commission contracted with AIS to construct a two-story storage system for the building. On August 11, 2009, the commission entered into a contract with AIS for the system but, in violation of the Public Construction Bond Act (the Bond Act) (30 ILCS 550/1 *et seq*. (West 2008)), a valid performance and payment bond for the project was never obtained. AIS then entered into a contract with plaintiff for work on the storage system.

¶ 6 Plaintiff completed its work. The county paid AIS, but AIS failed to pay plaintiff. As a result, in August 2011, plaintiff filed suit seeking to recover under theories related to mechanics' liens, violation of the Bond Act, and breach of contract. The parties entered into an agreed order under which remaining funds from the project were turned over to plaintiff, which then released the mechanics' liens on those funds while preserving its other causes of action.

¶ 7 Through most of the course of the action, defendants did not inform plaintiff that a bond had never been obtained from AIS. However, correspondence from November 2010 between the architect for the project and Gary Hanson, the deputy county administrator, shows that the architect informed the county that, to its knowledge, a bond was never requested from AIS.

Further, then Assistant State's Attorney John Farrell, representing defendants, told plaintiff that a bond had been obtained. Farrell also sent to plaintiff partial copies of the bond that had been returned to AIS and he represented that those copies were the bond for the project. He further engaged in unauthorized settlement negotiations. Farrell later left the State's Attorney's office and was the subject of attorney disciplinary proceedings related in part to his misconduct in this action.

¶ 8 While Farrell was still working on the case, he signed the following responses to requests to admit:

"4. AIS did not furnish, supply or deliver to You a payment bond for the construction of the Community Outreach Building [in] DeKalb, Illinois.

RESPONSE: Defendants deny the allegations of Request to Admit No. 4.

5. You did not require AIS to furnish, supply or deliver to You a payment bond for the construction of the Community Outreach Building [in] DeKalb, Illinois.

RESPONSE: Defendants deny the allegations of Request to Admit No. 5.

6. You do not currently have in Your custody, control or possession a payment bond for the construction of the Community Outreach Building [in] DeKalb, Illinois.

RESPONSE: Defendants deny the allegations of Request to Admit No. 6.

7. You never have had in Your custody, control or possession a payment bond for the construction of the Community Outreach Building [in] DeKalb, Illinois.

RESPONSE: Defendants deny the allegations of Request to Admit No. 7.

8. No payment bond exists for the construction of the Community Outreach Building [in] DeKalb, Illinois.

RESPONSE: Defendants deny the allegations of Request to Admit No. 8."

A representative of the commission also signed the responses, which were filed with the court on March 8, 2012.

¶ 9 In August 2012, plaintiff filed an amended complaint adding theories of recovery based on *quantum meruit* and estoppel. Defendants, represented by Farrell, filed their answer in which they stated that they lacked sufficient knowledge or information about whether AIS canceled its original bond or whether they failed to obtain a bond. Plaintiff moved for summary judgment.

¶ 10 After Farrell was removed from the case, defendants filed papers admitting that they failed to obtain a bond and presented various legal arguments that a bond was not required. In December 2014, the trial court found that defendants had violated the Bond Act by failing to obtain a bond, granted plaintiff's motion for summary judgment, and allowed plaintiff leave to file a motion for sanctions.

¶ 11 Plaintiff moved for sanctions under Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994), alleging that sanctions were appropriate due to Farrell's general misconduct and pointing to the responses to requests to admit and the answer to the amended complaint as examples of documents not well grounded in law or in fact. Plaintiff did not specify the amount of fees resulting directly from the misconduct and instead, without stating an amount, sought fees covering the entire action. Plaintiff also moved for an award of prejudgment interest.

¶ 12 Defendants responded that Rule 137 applied only to documents filed with the court and not to general attorney misconduct. They also argued that plaintiff failed to specify the amount of fees incurred as the result of any specific court filings. Plaintiff responded that it did not have the burden to prove that fees and costs were reasonable until the court first found that sanctions were warranted; at that time, it would file a petition for specific fees.

¶ 13 The trial court denied both motions. The court specifically found that plaintiff was the victim of wrongful and vexatious acts by defendants through Farrell. The court also found that defendants were aware that, in violation of the Bond Act, they had not obtained a valid bond. The court further found that, had a bond been obtained in compliance with the law, there would have been no victim. However, the court then focused on the motion for summary judgment and found that defendants' legal arguments that a bond was not required, while not successful, were not made for an improper purpose. The court then wrote that, regrettably, Farrell's actions were not subject to Rule 137. The court did not address the responses to requests to admit or the answer to the amended complaint, nor did it address plaintiff's failure to specify the amount of fees sought. In regard to prejudgment interest, the court found that there was insufficient evidence that defendants wrongfully obtained the funds. Plaintiff appeals.

¶ 14 II. ANALYSIS

¶ 15 Plaintiff contends that the trial court abused its discretion when it denied the motion for sanctions despite the court's findings of wrongdoing on the part of defendants. Plaintiff also contends that it is entitled to prejudgment interest.

¶ 16 A. Sanctions

¶ 17 Plaintiff first argues that the trial court abused its discretion when it denied an award of Rule 137 sanctions. Defendants contend that it is not liable for Farrell's general misconduct, that plaintiff did not show that papers filed with the court were subject to sanctions, and that plaintiff failed to specify the amount of fees it was seeking.

¶ 18 Rule 137 provides in part:

> "Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address

> shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. *** 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 cause unnecessary delay or needless increase in the cost of litigation." Ill. S. Ct. R. 137 (eff. Feb. 1, 1994).

¶ 19 "By its terms, the rule authorizes the imposition of sanctions against a party or his attorney for filing a pleading, motion, or other paper that is not well grounded in fact and warranted by existing law or which has been interposed for any improper purpose." *In re Marriage of Adler*, 271 Ill. App. 3d 469, 476 (1995). "An appropriate sanction may include an order to pay the other party's reasonable expenses, including reasonable attorney fees, incurred as a consequence of the offending pleading, motion, or other paper." *Id.* Rule 137 does not authorize a trial court to impose sanctions for all acts of misconduct by a party or his attorney and instead authorizes sanctions only for the filing of pleadings, motions, or other papers in violation of the rule itself. *Id.* The purpose of the rule is to penalize attorneys and parties who abuse the judicial process by filing frivolous or false matters without a basis in law or fact, or for purposes of harassment. *Shea, Rogal & Associates, Ltd. v. Leslie Volkswagen, Inc.*, 250 Ill. App. 3d 149, 152 (1993). A trial court's decision whether to impose sanctions is entitled to significant deference, and we will not disturb the trial court's decision absent an abuse of discretion. *Feret v. Schillerstrom*, 363 Ill. App. 3d 534, 542 (2006).

¶ 20 Here, the trial court ruled that Farrell's misconduct was not subject to Rule 137 sanctions. Had Farrell's misconduct been purely outside of any papers filed with the court, this would be correct. However, the court never addressed the responses to requests to admit or the answer. In those, defendants denied that they did not have a bond from AIS and alleged that they lacked sufficient knowledge about the existence of the bond, when the record clearly shows that they knew in 2010 that no bond had been obtained. Those misrepresentations, which were made in papers filed with the court, were subject to Rule 137 sanctions.

¶ 21 Defendants argue that the requests for admissions lacked clarity or misstated facts such that the responses were not necessarily misrepresentations. But defendants point to only two examples among the eight requests and, given that the focal point of the lawsuit was that defendants failed to obtain a bond from AIS, it would be unreasonable to assume that the intent of the requests, which were clearly stated, could somehow have been misunderstood. The requests clearly sought admissions that defendants failed to obtain a bond from AIS and did not have a bond in their possession. Further, the trial court specifically found that defendants were aware that, in violation of the Bond Act, they had not obtained a valid bond. Thus, defendants' responses were misrepresentations. Accordingly, we find that the trial court erred when it found that none of Farrell's misconduct could make defendants liable for sanctions.

¶ 22 Defendants also argue that plaintiff failed to tie a specific amount of fees to the responses and answer and thus cannot recover. Plaintiff responds that it is seeking fees for the entire action, based on the gravity of the misrepresentations about the bond, which was the primary basis of the lawsuit.

¶ 23 Rule 137 permits sanctions for the amount of reasonable expenses incurred because of the sanctionable filing or pleading. *Heckinger v. Welsh*, 339 Ill. App. 3d 189, 192 (2003). Thus,

"a motion for attorney fees and costs must meet minimum requirements of specificity so that a responding party has an opportunity to challenge and defend against the allegations made and so that fees and costs may be fairly apportioned." *Geneva Hospital Supply, Inc. v. Sandberg*, 172 Ill. App. 3d 960, 965-66 (1988). This specificity requirement includes providing the amount of fees sought. See *Cretton v. Protestant Memorial Medical Center, Inc.*, 371 Ill. App. 3d 841, 867 (2007) ("In general, a petition for attorney fees must present the court with detailed records containing facts and computations upon which the charges are predicated and specifying the services provided, by whom they were performed, the time expended, and the hourly rate charged"). However, fees need not be "directly related" to the offensive filing. *Heckinger*, 339 Ill. App. 3d at 192. For example, specificity of the type sought by defendants is not required when false allegations made without reasonable cause are the cornerstone of an entire baseless lawsuit. *Dayan v. McDonald's Corp.*, 126 Ill. App. 3d 11, 23-24 (1984).

¶ 24 In *Dayan*, applying section 2-611 of the Code of Civil Procedure (Ill. Rev. Stat. 1981, ch. 110, ¶ 2-611), the predecessor to Rule 137,[1] the plaintiff filed pleadings with false allegations that created the central issues upon which the case was tried. *Dayan*, 126 Ill. App. 3d at 17. After the court granted the defendant's petition for sanctions, it ordered the defendant to submit a detailed breakdown of the fees and expenses that it sought. The plaintiff then argued that some of the legal work involved was not related to specific misrepresentations in the pleadings. The court rejected that argument, stating: "The isolated focus on each reimbursable component urged by plaintiff is not necessary where the false allegations made without reasonable cause are the cornerstone of the entire baseless lawsuit." *Id.* at 23-24. The court further noted that false

[1] Cases construing section 2-611 are relevant to the interpretation of Rule 137. *Edward Yavitz Eye Center, Ltd. v. Allen*, 241 Ill. App. 3d 562, 568 (1993).

allegations were the gravamen of the entire action, without which there would have been no dispute and no need for trial. *Id*. at 24. Thus, all of the fees incurred in defending the suit could properly be said to have been actually incurred by reason of the untrue pleadings. *Id*. The court also stated policy reasons for its decision, stating that "once it has been established that a litigant has abused his right of free access to our court system by intentionally or recklessly pleading false matters, no rational purpose is served by strictly construing the scope of the resulting [fee award]." *Id*. The court observed that a contrary holding would serve to aid those who would engage in such abusive practices and would seriously undermine the legislative intent of penalizing those who plead false matters. *Id*. Although *Dayan* involved sanctions against a plaintiff, its reasoning is equally applicable when a defendant's actions are the cornerstone of a baseless defense.

¶ 25 Here, plaintiff was permitted to assert that defendant's specific filings were the cornerstone of a baseless defense and supported reimbursement of all of its fees. It did not specify the amount of fees, but the trial court had the discretion to permit an amendment to that effect. See *In re Petition of Village of Kildeer*, 191 Ill. App. 3d 713, 720 (1989) (discussing the trial court's discretion to allow amendments). Given that the trial court initially determined that none of the misconduct was subject to sanctions, it never exercised that discretion.

¶ 26 Because that initial determination was error, we vacate the denial of sanctions and remand the cause. The trial court on remand has the discretion to allow plaintiffs to file an amended motion that specifies the amount of fees sought for the entire action, along with the amount resulting directly from the specific filings should the court find that those filings were not the cornerstone of a baseless defense. The court may then exercise its discretion to determine the appropriate award of fees as a sanction.

¶ 27 B. Prejudgment Interest

¶ 28 Plaintiff next contends that the trial court erred when it denied its request for prejudgment interest under the Interest Act (Interest Act) (810 ILCS 205/0.01 *et seq*. (West 2010)).

¶ 29 "Generally, interest is not recoverable absent a statute or agreement providing for it." *Raintree Homes, Inc. v. Village of Long Grove*, 389 Ill. App. 3d 836, 871 (2009). "The Interest Act *** does not authorize the imposition of interest against a municipality." *Id.*, see 815 ILCS 205/2 (West 2010). "An exception to this rule applies where a municipality has wrongfully exacted money and holds it without just right or claim." *Raintree Homes*, 389 Ill. App. 3d at 871. The law is unclear whether the money must first be wrongfully obtained or whether it need be only wrongfully withheld. Compare *id*. (using the conjunction "and") with *Northwest Water Comm'n v. Carlo V. Santucci, Inc*., 162 Ill. App. 3d 877, 896 (1987) (using the disjunction "or"). However, regardless of that distinction, the municipal party must actually possess money that is determined to belong to another. *Kozak v. Retirement Board of Firemen's Annuity & Benefit Fund of Chicago*, 128 Ill. App. 3d 678, 681 (1984); see also *Raintree Homes, Inc.*, 389 Ill. App. 3d at 871 ("The exception applies where the wrongful party actually has money in its possession that is determined to belong to another"). We will reverse a determination about prejudgment interest only if it is against the manifest weight of the evidence. *Krantz v. Chessick*, 282 Ill. App. 2d 322, 327 (1996).

¶ 30 Here, the trial court found that the money, while wrongfully withheld, was not wrongly obtained. Plaintiff did not present evidence that the initial funds for the project were wrongly acquired. Instead, its complaint was about defendant's inability to later pay money due because of their failure to obtain a bond from AIS, which ultimately is the party that failed to pay plaintiff. Further, aside from any argument that the violation of the Bond Act caused defendants

to wrongfully obtain money, the record is clear that defendants do not actually possess money that belongs to plaintiff. Instead, defendants paid AIS, which then failed to pay plaintiff. What money defendants had left in the building fund was turned over to plaintiff as part of the agreed order.

¶ 31 Plaintiff relies on *Santucci* to argue that the failure to pay subcontractors may be subject to prejudgment interest. However, in that case, the municipality actually withheld money and earned interest on it in an amount sufficient to pay interest to the subcontractors. *Santucci*, 162 Ill. App. 3d at 897. Here, there is no evidence that defendants held the money due and earned interest on it. Instead, it paid AIS and AIS then failed to pay plaintiff.

¶ 32 Finally, plaintiff indicates in a footnote that equitable principles should also entitle it to interest. Prejudgment interest may be recovered when warranted by equitable considerations, including for breach of fiduciary duty. See, *e.g.*, *In re Estate of Wernick*, 127 Ill. 2d 61, 87 (1989). Such an award is a separate remedy from an award of interest under the Interest Act. *Id.* at 89. A determination of an equitable award of interest will not be set aside absent an abuse of discretion. *Kozak*, 128 Ill. App. 3d at 682.

¶ 33 Here, while plaintiff pled various equitable causes of action and argued that it was a third-party beneficiary under the Bond Act, plaintiff never argued to the trial court that it was entitled to interest as an equitable remedy. Instead, plaintiff sought interest under the Interest Act. Even on appeal, plaintiff mentions equitable interest only in a footnote. An issue not presented to the trial court is forfeited and may not be raised for the first time on appeal. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996). "To allow a party to change his or her trial theory on review would weaken the adversarial process and the system of appellate jurisdiction, and could also prejudice the opposing party, who did not have an opportunity to

respond to that theory in the trial court." *In re Marriage of Schneider*, 214 Ill. 2d 152, 172 (2005); see also *R. W. Boeker Co. v. Eagle Bank of Madison County*, 170 Ill. App. 3d 693, 696 (1988) (equitable lien could not be sought for first time on appeal). Here, plaintiff never presented an equitable argument for interest to the trial court. Accordingly, to the extent plaintiff seeks such an equitable interest award on appeal, its argument is forfeited.

¶ 34 III. CONCLUSION

¶ 35 The judgment of the circuit court of De Kalb County is affirmed in part and vacated in part, and the cause is remanded for further proceedings.

¶ 36 Affirmed in part and vacated in part; cause remanded.