2018 IL App (1st) 172360-U

FOURTH DIVISION
December 6, 2018

No. 1-17-2360

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

SOUTHSIDE LANDSCAPING, INC.,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellant,	)	
v.	)	
FIRST MIDWEST BANK AS TRUSTEE UNDER TRUST NUMBER 80-1680 DATED 1/28/1980; LIFESCAPES DEVELOPMENT, LLC.; LIFESCAPES@MONTEFIORI, LLC.; HERITAGE BANK, STEFANO MARCHETTI, AS TRUSTEE OF THE SELF DECLARATION OF TRUST DATED OCTOBER 3, 2005; UNKNOWN OWNERS; AND, NON-RECORD CLAIMANTS,	)	No. 2010 CH 50185
Defendants-Appellees.	)	Honorable Thomas R. Mulroy, Jr., Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice McBride and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County where the court did not abuse its discretion in denying plaintiff's motion for sanctions.

¶ 2 After prevailing at the bench trial below on its breach of contract action, plaintiff Southside Landscaping, Inc. (plaintiff) filed a motion for sanctions, arguing that Lifescapes Development, LLC (Lifescapes), Lifescapes@Montefiori (Montefiori), and their attorneys filed frivolous pleadings with no objective basis in fact where the pleadings were contradicted by the testimony of Joseph LePore (LePore), one of Lifescapes' and Montefiori's (collectively defendants) managing members. The circuit court denied the motion and a subsequent motion to reconsider, finding that plaintiff failed to demonstrate defendants or their attorneys did not have an objectively reasonable basis for making their arguments. Plaintiff now appeals, arguing the circuit court abused its discretion in denying the motion for sanctions where LePore's testimony contradicted defendants' pleadings and demonstrated defendants' attorneys failed to conduct a reasonable inquiry into the facts alleged in the complaint. For the reasons stated herein, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 As this matter is before us on review of an order denying a motion for sanctions, we recite only those facts pertinent to the appeal. We discuss additional relevant facts in the analysis.

¶ 5 After a bench trial, the circuit court concluded that plaintiff established it had entered into three landscaping contracts with defendants and that defendants were liable for the sums owed under the contracts. Plaintiff subsequently filed a motion for sanctions pursuant to Illinois Supreme Court Rule 137 (eff. July 1, 2013) against defendants and several of their agents and attorneys, including attorney Russel Kofoed (Kofoed). Plaintiff argued defendants filed frivolous pleadings by denying they entered into the contracts with plaintiff and by arguing plaintiff had contracted with another company owned by LePore known as Black Creek Canyon, Inc. (Black

Creek). Pertinent to this appeal, Black Creek also performed work for defendants at the property where plaintiff rendered its landscaping services. Plaintiff relied entirely upon the deposition and trial testimony of LePore wherein he stated Black Creek did not contract with plaintiff.

¶ 6 In response, Lifescapes argued sanctions were not warranted where (1) the contracts were addressed and mailed to Black Creek, (2) the contracts did not mention "Lifescapes Development," or "Lifescape@Montefiori," (3) one of the contracts was signed by an employee of Black Creek, (4) another contract was unsigned, and (5) plaintiff did not know which parties entered into the contracts, as evidenced by the trial testimony of Kevin McClain (McClain), the president of Southside Landscaping, Inc., wherein he stated he "made the contract out with Joe and Mike LePore."[1]

¶ 7 Kofoed made similar arguments on behalf of himself and additionally asserted he relied on information obtained from (1) Edward Krzyminski (Krzyminski), an attorney and legal advisor for defendants and an owner of Montefiori, who provided information regarding the relationship between Lifescapes, Montefiori, Black Creek, and plaintiff, (2) Allen Thompson (Thompson), a member and substantial investor in Montefiori who "was in charge of its financial decisions," and (3) his review of the contracts. Kofoed further observed that LePore was only one of five members of Montefiori and "was not empowered" by the other members to make financial decisions. Moreover, Kofoed noted that although plaintiff relied on LePore's testimony to support its motion and to refute Kofoed's pleadings, LePore actually verified one of the alleged offending pleadings filed by Kofoed.[2] Kofoed additionally observed that he did not represent defendants at trial, and neither Thompson nor Krzyminski were called at trial to support or refute his alleged offending pleadings.

[1] Michael LePore (Michael) is another managing member of Lifescapes and Montefiori.
[2] It appears LePore retroactively verified the answer to the complaint after Kofoed withdrew as counsel.

¶ 8 The circuit court held a hearing on the motion wherein the parties argued consistently with the motion and responses. Plaintiff further argued Kofoed should have consulted with LePore regarding the contracts. The circuit court denied plaintiff's motion for sanctions, finding (1) defendants had multiple companies to accomplish their business goals, (2) the companies sometimes performed work as general contractors or subcontractors, (3) plaintiff mailed the contracts to Black Creek, (4) a Black Creek employee signed the first contract, and (5) plaintiff was confused as to which entities were a party to the contract. The circuit court ultimately found plaintiff "failed to show that Defendants did not have an objectively reasonable cause for making the argument that Black Creek Canyon, Inc. was the proper party to the contract."

¶ 9 Plaintiff thereafter filed a motion to reconsider. After the matter was fully briefed, the circuit court denied the motion, finding plaintiff failed to bring forth new evidence and failed to identify how the court misapplied the law relating to sanctions. This appeal followed.

¶ 10 ANALYSIS

¶ 11 On appeal, plaintiff argues the circuit court erred in denying its Rule 137 motion for sanctions and motion to reconsider directed at Lifescapes, Montefiori, and Kofoed.[3] Plaintiff maintains sanctions are warranted because defendants filed frivolous pleadings and purposefully extended the litigation by repeatedly arguing plaintiff entered into a contract with Black Creek and not with defendants. Plaintiff relies on the deposition and trial testimony of LePore, one of the managing members of defendants and the owner of Black Creek, wherein he conceded Black Creek never entered into a contract with plaintiff.

¶ 12 Prior to addressing the merits of plaintiff's argument, we observe the parties failed to comply with Rule 341 in numerous ways. See Ill. S. Ct. R. 341 (eff. May 25, 2018). First,

[3] We observe that although plaintiff filed the motion for sanctions against several other parties, mailed the notice of appeal to some of those parties, and on appeal makes general arguments applicable to each party, he names only Lifescapes, Montefiori, and Kofoed in the opening brief.

Kofoed, in *compliance* with Rule 341(i), declined to submit a statement of facts. Ill. S. Ct. R. 341(i) (eff. May 25, 2018). Instead, however, he includes in his response brief a section entitled "Revisions by Appellee, Russell M. Kofoed, an Attorney, to Appellant's Statement of Facts" wherein he identifies certain sentences located within certain paragraphs in plaintiff's statement of facts, and suggests that we substitute them for his alternative sentences. Kofoed further suggests that whole paragraphs should be inserted into various portions of plaintiff's statement of facts. Rule 341 does not allow a party to submit a revised statement of facts in such a fashion. See Ill. S. Ct. R. 341(h)(6), (i) (eff. May 25, 2018). Rule 341(h)(6) requires the appellant to provide a statement of facts "which shall contain the facts necessary to an understanding of the case," and Rule 341(i) allows an appellee to provide a statement of facts "to the extent that the presentation by the appellant is deemed unsatisfactory." Ill. S. Ct. R. 341(h)(6), (i) (eff. May 25, 2018). Kofoed was therefore permitted to include his own statement of facts if he believed plaintiff's statement was unsatisfactory. *Id*. He chose not to, and instead filed a confusing and unwarranted "revision." This court may strike a statement of facts when the improprieties hinder our review. *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶¶ 9, 15. Although Kofoed's request that we rewrite plaintiff's statement of facts for him using his preferred substitute sentences and paragraphs violates Rule 341, we have the benefit of the record before us as well as plaintiff's proper statement of facts. Ill. S. Ct. R. 341(h)(6), (i) (eff. May 25, 2018); see *Carter v. Carter*, 2012 IL App (1st) 110855, ¶ 12. Our review of the issues therefore is not hindered, and we will consider Kofoed's brief while disregarding the inappropriate content. See *City of Highwood v. Obenberger*, 238 Ill. App. 3d 1066, 1073 (1992).

¶ 13 Second, plaintiff failed to present any standard of review, authority, or argument in support of its assertion that the circuit court erred in denying the motion to reconsider the motion

for sanctions, in violation of Rules 341(h)(3) (see *Hall*, 2012 IL App (2d) 111151, ¶ 10) and 341(h)(7) (see *JPMorgan Chase Bank, N.A. v. East-West Logistics, L.L.C.*, 2014 IL App (1st) 121111, ¶ 58). Ill. S. Ct. R. 341(h)(3), (7) (eff. May 25, 2018). A reviewing court is entitled to have the issues clearly defined with pertinent authority cited and coherent arguments presented, or the inadequately presented argument is forfeited. *In re Estate of Doyle*, 362 Ill. App. 3d 293, 301 (2005). Because plaintiff failed to provide any authority or argument regarding the motion to reconsider, it has forfeited the issue. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018); *JPMorgan Chase*, 2014 IL App (1st) 121111, ¶ 58; *Estate of Doyle*, 362 Ill. App. 3d at 301. We now address plaintiff's contention that the circuit court abused its discretion in denying plaintiff's Rule 137 motion for sanctions.

¶ 14 Rule 137 provides, in pertinent part:

> "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 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 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." Ill. S. Ct. R. 137 (eff. July 1, 2013).

Rule 137 thus allows a court to impose sanctions against a party or attorney who files a pleading which is not well grounded in fact, is not warranted by existing law, or is filed for any improper purpose. Ill. S. Ct. R. 137 (eff. July 1, 2013); *Pritzker v. Drake Tower Apartments, Inc.*, 283 Ill.

App. 3d 587, 590 (1996). The rule makes clear that the signature of a litigant or an attorney on a pleading is a certificate that the signing party has read the pleading and made a "reasonable inquiry" into the facts alleged. *Whitmer v. Munson*, 335 Ill. App. 3d 501, 514 (2002).

¶ 15 The purpose of Rule 137 is to prevent abuse of the judicial process by penalizing parties who file vexatious and harassing pleadings based upon unsupported allegations of fact or law. *Fremarek v. John Hancock Mutual Life Insurance Co.*, 272 Ill. App. 3d 1067, 1074 (1995). It is not intended to penalize litigants for the lack of success; rather, its aim is to restrict litigants who plead frivolous or false matters without any basis in law. *Thomas v. Hileman*, 333 Ill. App. 3d 132, 139-40 (2002). In evaluating the conduct of a signing party, the court must determine what was reasonable at the time the pleading was filed rather than engage in hindsight. *In re Estate of Hanley*, 2013 IL App (3d) 110264, ¶ 80. Therefore, the standard to be employed in applying the rule is an objective one. *Technology Innovation Center, Inc. v. Advanced Multiuser Technologies Corp.*, 315 Ill. App. 3d 238, 244 (2000). Subjective good faith is not sufficient to meet the burden of Rule 137. *Id*. This standard is met when the relevant legal paper has a reasonable basis in fact. *Edwards v. Estate of Harrison*, 235 Ill. App. 3d 213, 221 (1992). Courts should not impose sanctions "solely because the facts ultimately determined in a particular case are adverse to the facts set forth originally in the pleadings." *Father & Sons Home Improvement II, Inc. v. Stuart*, 2016 IL App (1st) 143666, ¶ 57.

¶ 16 Generally, the determination of whether to impose sanctions under Rule 137 rests with the sound discretion of the circuit court. *Id*. ¶ 58. The decision to impose or deny sanctions is entitled to great weight on appeal and will not be disturbed absent an abuse of discretion. *Pritzker*, 283 Ill. App. 3d at 590. Plaintiff, however, relying on *Heckinger v. Welsh*, 339 Ill. App. 3d 189, 191 (2003), contends we should review the denial of its motion for sanctions *de novo*

where the motion was dismissed without an evidentiary hearing. Plaintiff's reliance on *Heckinger* is misplaced because the circuit court in that case did not merely deny a motion for sanctions; it struck the motion without considering its merits because it determined the movant did not have a viable cause of action under Rule 137 where the movant had failed to respond to the offending pleading. *Id*. On appeal, the court held such an interpretation of Rule 137 was a legal one, and therefore reviewed that determination *de novo*. *Id*.

¶ 17 In this case, by contrast, the parties fully briefed the issue and the circuit court held a hearing where it considered the merits of plaintiff's motion. See *id*. We therefore review the circuit court's determination in this case for an abuse of discretion. See *Pritzker*, 283 Ill. App. 3d at 590. A circuit court abuses its discretion only where its ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by it. *Commonwealth Edison Co. v. Munizzo*, 2013 IL App (3d) 120153, ¶ 33. "If reasonable people would differ as to the propriety of the court's action, a reviewing court cannot say that the trial court exceeded its discretion." *Fremarek*, 272 Ill. App. 3d at 1074.

¶ 18 Here, plaintiff argues defendants and Kofoed did not have an objective basis to assert plaintiff entered into the contracts with Black Creek. Plaintiff relies entirely upon the deposition and trial testimony of LePore, wherein he conceded Black Creek did not enter into the contracts with plaintiff. LePore, however, contradicted this testimony by verifying the answer and affirmative defenses filed by Kofoed wherein defendants denied they entered into the contracts with plaintiff and argued that "Black Creek appears to be the contractor." Moreover, although defendants do not rely on this fact, we observe that LePore made additional contradictory statements during his deposition, such as "I hired [plaintiff] under Black Creek, but I never signed [the contracts] as Black Creek," and that plaintiff was hired by "Joe LePore and d/b/a

Black Creek." These statements suggest that LePore may not have had a definitive understanding of which parties entered into the contracts.

¶ 19 In addition, McClain, the president of plaintiff, testified at trial that he entered into the contracts with LePore and Michael. He further testified he had no knowledge of the various entities he was working with and did not know where Lifescapes "enter[s] this picture." McClain additionally testified he had daily contact "with either the owners or a representative from Joe's company," but he did not specify whether the representative was from Lifescapes, Montefiori, or Black Creek. The testimony of LePore and McClain, and the pleading verified by LePore, therefore supports the circuit court's determination that defendants and Kofoed had an objectively reasonable basis to assert Black Creek was the proper party to the contracts. Moreover, sanctions are not warranted "solely because the facts ultimately determined in a particular case are adverse to the facts set forth originally in the pleadings." *Father & Sons*, 2016 IL App (1st) 143666, ¶ 57. We therefore cannot say the circuit court abused its discretion in declining to impose sanctions against defendants or Kofoed based solely upon the fact that portions of LePore's testimony were adverse to defendants' pleadings. See *id*; *Commonwealth Edison Co.*, 2013 IL App (3d) 120153, ¶ 33; *Pritzker*, 283 Ill. App. 3d at 590.

¶ 20 Plaintiff maintains, however, that Kofoed was required to perform a reasonable inquiry regarding the facts of the operative complaint, which required him to consult with LePore. In response, Kofoed argues he performed a reasonable inquiry by consulting with Thompson, a managing member of Montefiori, and Krzyminski, a legal advisor to defendants and a partial owner of Montefiori. We observe that Krzyminski was present when plaintiff first met with LePore and Michael and agreed to perform landscaping work. This fact supports Kofoed's reliance on Krzyminski regarding his reasonable inquiry into the proper parties to the contracts.

In addition, LePore was only one of several members of Montefiori. Although Kofoed's reasonable inquiry could have included a consultation with LePore, the circuit court determined that Kofoed's consultation with Thompson and Krzyminski, coupled with his review of the contracts, satisfied the requirements of Rule 137. If reasonable people could differ as to the propriety of the circuit court's action, including its determination regarding Kofoed's reasonable inquiry, a reviewing court cannot say the circuit court exceeded its discretion. See *Fremarek*, 272 Ill. App. 3d at 1074.

¶ 21 We acknowledge plaintiff's argument, raised for the first time in its reply brief, that Kofoed did not actually consult with Thompson or Krzyminski. Plaintiff maintains that had Kofoed interviewed these individuals, he would have learned that Thompson did not become a managing member of defendants until several years after plaintiff terminated its work at the property, and Krzyminski merely handled the incorporation of the defendants and was a silent partner. Although such arguments are noteworthy, plaintiff points to no evidence in the record to support his assertion. Such evidence is not contained in the record because plaintiff failed to present this argument or any supporting evidence to the circuit court despite Kofoed presenting the same defenses throughout the proceedings. Generally, arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal. *In re Estate of Chaney*, 2013 IL App (3d) 120565, ¶ 8. Because plaintiff failed to raise this argument before the circuit court, it has forfeited the argument on appeal. See *id*.

¶ 22 Moreover, arguments raised for the first time in a reply brief are forfeited. *Franciscan Communities, Inc. v. Hamer*, 2012 IL App (2d) 110431, ¶ 19. Plaintiff cannot say it was responding to Kofoed's brief, because Kofoed's reliance on Thompson and Krzyminski was already known to plaintiff when it filed its opening brief. Plaintiff's argument is therefore

forfeited on this additional basis. See *id*. Regardless, we cannot say the circuit court abused its discretion in denying plaintiff's motion for sanctions based on arguments plaintiff could have made before the circuit court but failed to present. See *Commonwealth Edison Co.*, 2013 IL App (3d) 120153, ¶ 33; *Pritzker*, 283 Ill. App. 3d at 590.

¶ 23 Based on the foregoing, we find the circuit court did not abuse its discretion in denying plaintiff's motion for sanctions against Lifescapes, Montefiori, and Kofoed. See *Commonwealth Edison Co.*, 2013 IL App (3d) 120153, ¶ 33; *Pritzker*, 283 Ill. App. 3d at 590.

¶ 24 CONCLUSION

¶ 25 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 26 Affirmed.