2012 IL App (1st) 111512-U

No. 1-11-1512

SIXTH DIVISION
September 28, 2012

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LINKCO, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant and Cross-Appellee,	)	Cook County
	)	
v.	)	No. 10 L 9000
	)	
LEWIS BRISBOIS BISGAARD & SMITH, LLP; LINDA UNGER; SIOBHAN MURPHY; and DEBRA RADE,	)	
	)	
Defendants-Appellees,	)	
	)	
SLUTZKY & BLUMENTHAL, and JEFFREY BLUMENTHAL,	)	
	)	Honorable
	)	Kathy M. Flanagan,
Defendants-Appellees and Cross-Appellants.	)	Judge Presiding.

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.
Justices Garcia and Robert E. Gordon concurred in the judgment.

O R D E R

¶ 1 Held: The circuit court's dismissal of plaintiff's malpractice claim was proper because plaintiff could not prove proximate cause where no alleged act or omission by defendants

concerning the litigation of a fraud claim in federal court would have allowed the federal court claim to proceed or plaintiff to prevail. Furthermore, the circuit court did not abuse its discretion in denying the cross-appellants' motion for sanctions, which alleged that plaintiff's claims against them were frivolous and brought in bad faith.

¶ 2 Plaintiff LinkCo, Inc., brought an action in federal court for relief from judgment, alleging that a business competitor had engaged in a fraudulent scheme to induce a settlement. The federal district court dismissed that case, and a federal circuit court affirmed that dismissal. Thereafter, plaintiff filed in the Circuit Court of Cook County the legal malpractice case against defendants at issue here, alleging that defendants had failed to properly plead a cause of action for fraud on the court in the federal court case. The circuit court granted defendants' motions to dismiss the malpractice claim and denied a motion by certain defendants for sanctions.

¶ 3 On appeal, plaintiff argues, *inter alia*, that the circuit court erroneously dismissed its legal malpractice claim and should not have relied upon the federal court decision because it was misleading and misapplied the law. On cross-appeal, certain defendants argue the circuit court abused its discretion by denying their motion for sanctions because plaintiff knew that there was no attorney-client relationship on which to base a malpractice claim and, thus, plaintiff attempted to allege a baseless and nonexistent claim for negligent referral. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 4 I. BACKGROUND

¶ 5 This legal malpractice action arose from plaintiff's litigation in federal court against a competitor for misappropriation of trade secrets and unfair competition. After a lengthy jury trial

in federal court in 2002, plaintiff received a $3.5 million award against the competitor, Fujitsu Limited. In April 2003, plaintiff and Fujitsu entered into a settlement agreement, and the case was dismissed with prejudice pursuant to their stipulation. However, more than five years later, in October 2008, plaintiff sued Fujitsu and its chief executive officer in federal court, alleging they had engaged in a coordinated scheme to defraud plaintiff and the court during the pendency of the previous litigation. Plaintiff asked the federal court to, *inter alia*, void the settlement and grant a new trial on damages pursuant to the court's authority to entertain either an independent action in equity for relief from judgment or a motion under Federal Rule of Civil Procedure (FRCP) 60(b)(6). Fed. R. Civ. P. 60(b)(6).

¶ 6 Fujitsu moved to dismiss the complaint on various grounds, including plaintiff's failure to timely bring an action for fraud by an opposing party under FRCP 60(b)(3); plaintiff's improper invocation of relief under FRCP 60(b)(6) and failure to seek that relief within a reasonable time; and plaintiff's failure to allege the type of fraud necessary to support an independent action for fraud on the court.

¶ 7 In March 2009, the United States District Court for the Southern District of New York granted Fujitsu's motion to dismiss. The district court ruled that plaintiff could not circumvent the one-year limitations period of FRCP 60(b)(3), which governs a claim of fraud by an opposing party, by seeking relief under FRCP 60(b)(6), which allows a court to relieve a party from a final judgment based on "any other reason that justifies relief." *LinkCo, Inc. v. Akikusa*, 615 F. Supp. 2d 130, 136 (S.D.N.Y. 2009). The district court also noted that plaintiff's independent action sought relief from alleged "grave injustice" and "unprecedented" and "extraordinary" fraud

perpetrated by Fujitsu on both plaintiff and the court, but the district court denied plaintiff any relief under either FRCP 60(d)(1), pursuant to the court's power to entertain an independent action to relieve a party from a judgment, or FRCP 60(d)(3), pursuant to the court's power to set aside a judgment for fraud on the court. *Id*. at 136.

¶ 8 Concerning the denial of relief under FRCP 60(d)(3) for a fraud on the court, the district court found, after drawing all reasonable inferences in favor of plaintiff, that the allegations in plaintiff's second amended complaint suggested "nothing more than a fraud upon [plaintiff] rather than a fraud upon the Court." *Id*. at 136. Although the complaint and proposed amendments to the complaint contained allegations of misconduct by Fujitsu's counsel, the court concluded that plaintiff's allegations suggested only the possibility of obstruction of discovery and witness perjury, which were "insufficient for an independent action based upon a fraud on the court." *Id*. at 137. Specifically, the allegations failed to "suggest knowing misconduct by Fujitsu's counsel" and indicate any "attorney collaboration or involvement in the alleged fraudulent scheme." *Id*. at 137-38.

¶ 9 Finally, the district court concluded that it would not exercise its discretion to grant plaintiff relief under FRCP 60(d)(1) because plaintiff failed to show that it had no adequate remedies at law or that its own neglect was not the cause of its predicament. *Id*. at 139-42. Specifically, the court noted that plaintiff, with more diligence, could have uncovered enough of Fujitsu's fraudulent scheme to have timely brought it to the court's attention during the litigation or by filing a FRCP 60(b)(3) motion within the year thereafter. *Id*. at 139. Furthermore, even though plaintiff actually began investigating Fujitsu's alleged manipulation of the litigation

process in 2003, uncovered certain information in 2004, and confronted Fujitsu with all of that evidence in September 2005, plaintiff still failed to seek any equitable relief until October 2008. *Id*. at 140-41.

¶ 10 Plaintiff appealed the district court's ruling, and the Second Circuit of the United States Courts of Appeals affirmed the district court, finding no abuse of discretion. *LinkCo, Inc. v. Akikusa*, 367 Fed. App'x 180 (2d Cir. 2010), *certiorari denied by*, 131 S. Ct. 388, 178 L. Ed. 2d 33 (2010).

¶ 11 In August 2010, plaintiff filed in the Circuit Court of Cook County the legal malpractice lawsuit against defendants that is the subject of this appeal. Plaintiff alleged that defendants, the law firm of Lewis Brisbois Bisgaard & Smith, LLP (LBBS), LBBS attorneys Linda Unger and Siobhan Murphy, Debra Rade, the law firm of Slutzky & Blumenthal, and Jeffrey Blumenthal, failed to: recommend that plaintiff file the fraud lawsuit against Fujitsu earlier; name Fujitsu's attorneys as defendants in that case; properly investigate the facts and draft sufficient allegations necessary to support the claim of fraud on the court; and present facts that would have defeated Fujitsu's defense of *laches*.

¶ 12 Defendants LBBS, Unger and Murphy moved to dismiss the complaint under section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2010)), contending plaintiff's claim was barred by affirmative matter avoiding the legal effect of or defeating the claim. Specifically, those defendants stated that the federal district judge acted within her discretion to deny any relief to plaintiff based on plaintiff's failure to timely seek relief from the settlement agreement by 2005 when plaintiff knew all of the essential facts alleged in its

complaint. Accordingly, defendants LBBS, Unger and Murphy argued that plaintiff's malpractice claim against them must be dismissed for lack of proximate cause because plaintiff did not retain them until September 2008 and, thus, they did not cause plaintiff to suffer any loss.

¶ 13 Defendants Slutzky & Blumenthal and Jeffrey Blumenthal (the Blumenthal defendants) moved to dismiss the complaint under section 2-619(a)(9) of the Code, contending they did not represent plaintiff in the action that sought relief from the settlement agreement and did not refer plaintiff to defendant LBBS. The Blumenthal defendants also adopted the arguments raised in LBBS's motion to dismiss.

¶ 14 Defendant Rade moved to dismiss the complaint under section 2-619 of the Code, contending no cause of action exists in Illinois for negligent referral to another attorney. Defendant Rade also adopted the arguments raised in LBBS's motion to dismiss.

¶ 15 In March 2011, the circuit court granted defendants' motions to dismiss plaintiff's complaint with prejudice, finding that plaintiff's legal malpractice claim could not stand because plaintiff could never prove proximate cause. Specifically, the court concluded that plaintiff's damages with regard to the loss of the federal court fraud claim occurred well prior to the time of any representation by defendants, so nothing defendants did or did not do would have allowed the claim to proceed or plaintiff to prevail. The court also found that plaintiff failed to show that Rade and the Blumenthal defendants owed a duty to plaintiff because plaintiff's allegations against those defendants involved only their assistance in selecting LBBS to prosecute the federal court fraud case and did not allege any participation by Rade and the Blumenthal defendants in that case. Plaintiff filed a motion to reconsider the dismissal, which the circuit court denied in

May 2011.

¶ 16 In June 2011, the Blumenthal defendants moved the court to sanction plaintiff under Illinois Supreme Court Rule 137 (eff. February 1, 1994), arguing that they were not retained to represent plaintiff in the federal court action, plaintiff concocted a theory of liability for negligent referral, and no such cause of action exists in Illinois.

¶ 17 In August 2011, the circuit court denied the motion for sanctions filed by the Blumenthal defendants. The court concluded that they failed to show that plaintiff or its counsel either made any untrue assertions of fact or bad faith arguments, or engaged in any sanctionable conduct regarding the pleadings or prosecution of the case.

¶ 18 Plaintiff timely appealed the dismissal of its complaint, and the Blumenthal defendants timely cross-appealed on the issue of the Rule 137 sanctions.

¶ 19 II. ANALYSIS

¶ 20 A. Fraud on the Court and *Laches*

¶ 21 Before reaching the merits of this case, we address defendants' assertion that in the Second Circuit of the United States Courts of Appeals, unlike the other federal circuit courts, independent actions in equity for fraud on the court are subject to the doctrine of *laches*. We do not agree with defendants' interpretation of the case law in the Second Circuit.

¶ 22 The power to vacate a judgment that has been obtained by fraud upon the court is inherent in courts. *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946). Moreover, the federal civil rule governing relief from judgment does not grant anyone standing to bring independent actions but, rather, merely does not restrict any standing that party otherwise

has. *Herring v. Federal Deposit Insurance Corp.*, 82 F.3d 282, 285 (9th Cir. 1995). Independent actions to relieve a party from a judgment, order or proceeding are subject to the doctrine of *laches*. *In the Matter of Whitney-Forbes, Inc.*, 770 F.2d 692, 698 (7th Cir. 1985); 11 Wright, Miller & Kane, *Federal Practice & Procedure: Civil 2d* § 2868 at 401-02 (2d ed. 1995). However, independent actions to set aside a judgment for fraud on the court are not barred by *laches*. See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944), *overruled on other grounds*, *Standard Oil Co. of California v. United States*, 429 U.S. 17 (1976). See also 11 Wright, Miller & Kane, *supra* § 2870 at 412 ("There is no time limit on setting aside a judgment on [the ground of fraud upon the court], nor can laches bar consideration of the matter.").

¶ 23 In *Hazel-Atlas Glass Co.*, 322 U.S. at 246, the Court granted the petitioner relief from a judgment even though the petitioner may not have exercised the highest degree of diligence because the fraud at issue did not concern only private parties but, rather, involved issues of great moment to the public and tampered with the administration of justice by institutions set up to protect and safeguard the public. Specifically, the petitioner established that when its competitor had applied for a patent, the attorneys for the competitor prepared an article for publication in a trade journal, falsely attributed the authorship of that article to an ostensibly disinterested expert, interfered with petitioner's investigation to uncover the fraudulent scheme, and used the article to procure not only a patent from a hostile patent office but also a judgment by the circuit court of appeals upholding the patent. *Id*. at 240-43.

¶ 24 Because the power to vacate a judgment for fraud on the court is so great and free from procedural limitations, only a certain type of conduct falls into this category. 11 Wright, Miller & Kane, *supra* § 2870 at 413-14. "Indeed, 'fraud upon the court' as distinguished from fraud on an adverse party is limited to fraud which seriously affects the integrity of the normal process of adjudication." *Gleason v. Jandrucko*, 860 F.2d 556, 559 (2d Cir. 1988). "The concept of 'fraud upon the court' embraces 'only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases.' " *Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1325 (2d Cir. 1995) (quoting *Kupferman v. Consolidated Research & Manufacturing Corp.*, 459 F.2d 1072, 1078 (2d Cir. 1972). "Fraud upon the court must be established by clear and convincing evidence." *King v. First American Investigations, Inc.*, 287 F.3d 91, 94 (2d Cir. 2002).

¶ 25 Defendants cite an unpublished case, *Ford v. New York City Transit Authority*, 81 Fed. App'x 385, 387 (2d Cir. 2003), to support the proposition that the Second Circuit, unlike other federal circuit courts, applies *laches* to claims of fraud on the court. Defendants' reliance on *Ford*, however, is misplaced. Notwithstanding *Ford*'s lack of precedential value as an unpublished case, *Ford* did not apply *laches* to dismiss the plaintiff's claim. In *Ford*, the plaintiff sought relief from a judgment by arguing that the defendants' attorney committed a fraud upon the court, but the court merely held that the plaintiff failed to allege facts that could support such an action. *Id*. In a summary of the applicable law, the *Ford* court stated:

> "An 'independent action' based upon 'fraud upon the court' may, however, be brought at any time, *see Gleason v. Jandrucko*, 860 F.2d at 556, 558 (2d Cir. 1988), so long as it is not barred by the doctrine of laches, *see Simons v. United States*, 452 F.2d 1110, 1116 (2d Cir. 1971)." *Ford*, 81 Fed. App'x at 387.

Simons, however, does not support the proposition that *laches* applies to claims of fraud on the court. In *Simons*, the plaintiff, a divorced woman, sought a judgment annulling the naturalization of her deceased husband and herself entered 22 years before. *Simons*, 452 F.2d at 1111-12. First, the court found that the plaintiff failed to allege a claim for relief under either FRCP 60(b)(3) or (b)(6). *Id*. at 1115. Concerning whether the plaintiff was entitled to any relief under the court's equitable powers, the court noted that an action to set aside the judgment based upon a fraud on the court was not applicable because "the allegations in the complaint showed only a fraud upon the United States, not 'upon the court,' within the strict construction *** given that phrase." *Id*. at 1116 & n.8. Accordingly, the court analyzed the plaintiff's claim under the court's power to relieve a party from a judgment, order or proceeding and concluded that denial of relief was proper on the ground of *laches*. *Id*. at 1116.

¶ 26 Contrary to defendants' arguments here on appeal, the Second Circuit in *Simons* applied the doctrine of *laches* to an independent action for relief from a judgment, order, or proceeding –which corresponds to FRCP 60(d)(1)–and did not apply *laches* to any claim for relief based on a fraud on the court–which corresponds to FRCP 60(d)(3). That application of the law by the Second Circuit is consistent with the other federal courts of appeal. See*, e.g.*, *In the Matter of Whitney-Forbes, Inc.*, 770 F.2d at 698 (the doctrine of *laches* applies to independent actions for

relief from an order or judgment, but actions to set aside a judgment for fraud on the court are not barred by *laches*).

¶ 27 Defendants cite other cases to support its theory of a Second Circuit split from federal precedent, but those cases do not support defendants' theory. Specifically, *Cornwall Press, Inc. v. Ray Long & Richard R. Smith, Inc.*, 75 F.2d 276 (2d Cir. 1935), was decided before the Court's 1944 ruling in *Hazel-Atlas Glass Co.* that a lack of diligence would not bar a claim of fraud on the court. Furthermore, *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 661 (2d Cir. 1997), did not involve a claim of fraud on the court but, rather, a request for relief from a judgment due to fraud perpetrated upon a party. Finally, *Apotex Corp. v. Merck & Co., Inc.*, 507 F.3d 1357, 1361-62 (Fed. Cir. 2007), which is not a Second Circuit case, did not apply *laches* when it found that the plaintiff failed to supply the rigorous proof necessary to support a claim of fraud on the court. We also note that the *Apotex Corp.* court did not cite any authority to support its statement that fraud upon the court issues "must be raised within a reasonable time of discovery of the fraud." *Id*. at 1361.

¶ 28 B. Legal Malpractice

¶ 29 Turning to the merits of this case, the "purpose of a 2-619 motion is to provide a means to dispose of issues of law and easily proved issues of fact." *Serafin v. Seith*, 284 Ill. App. 3d 577, 583 (1996). Under section 2-619(a)(9) of the Code, an action may be dismissed on the ground that a claim asserted is barred by other affirmative matter avoiding the legal effect or defeating the claim. 735 ILCS 5/2-619(a)(9) (West 2010). "A trial court's dismissal of a complaint is proper where the affirmative matter refutes crucial conclusions of law or conclusions of material

fact that are unsupported by allegations of specific facts." *Serafin*, 284 Ill. App. 3d at 583.

¶ 30 In ruling upon a 2-619 motion, a court must accept as true all well-pled facts in the complaint, and draw all inferences from those facts which are favorable to the plaintiff. *Mayfield v. ACME Barrel Company*, 258 Ill. App. 3d 32, 34 (1994). However, conclusions of fact or law in the complaint which are not supported by specific factual allegations are not taken as true and are not considered by the court in ruling on the motion. *Id*. A 2-619 motion to dismiss should only be granted in those cases where there are no material facts in dispute and the defendant is entitled to the dismissal as a matter of law. *Id*. Our review of a section 2-619 dismissal is *de novo*. *Solaia Technology, LLC v. Specialty Publishing Co*, 221 Ill. 2d 558, 579 (2006). An appellate court can affirm a section 2-619 dismissal on any grounds supplied by the record, regardless of the trial court's reasons. *Wilson v. Coronet Insurance Company*, 293 Ill. App. 3d 992, 994 (1997).

¶ 31 To prevail in an action for legal malpractice, a plaintiff must plead and prove the following elements: (1) an attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that, but for the attorney's malpractice, the plaintiff would have prevailed in the underlying action; and (4) actual damages. *Mitchell v. Schain, Fursel & Burney, Ltd.*, 332 Ill. App. 3d 618, 620 (2002). The basis for such a claim is that the plaintiff would have been compensated for an injury caused by a third party, absent negligence on the part of the plaintiff's attorney. *Eastman v. Messner*, 188 Ill. 2d 404, 411 (1999). Where an attorney's negligence is alleged to have occurred during the representation of a client in an underlying action that never

reached trial because of that negligence, the plaintiff is required to prove counsel's negligence resulted in the loss of the underlying action. *Sheppard v. Krol*, 218 Ill. App. 3d 254, 257 (1991).

¶ 32 Plaintiff argues the circuit court erroneously dismissed plaintiff's legal malpractice complaint. According to plaintiff, the circuit court's misplaced reliance on the federal district court case resulted in the circuit court's erroneous conclusion that plaintiff could never show that defendants' alleged acts or omissions proximately caused the federal district court to deny plaintiff's request to set aside the settlement agreement. Plaintiff asserts the fraud case in federal court was dismissed because defendants failed to properly allege a claim of fraud on the court as opposed to a claim of fraud on a litigant. Plaintiff contends that if defendants had properly pled a fraud on the court claim under FRCP 60(d)(3), the federal judgment would have been set aside and plaintiff would have recovered because *laches* does not apply to a claim of fraud on the court.

¶ 33 To support its claim of malpractice, plaintiff complains defendants failed to file in federal court a complaint that: alleged a claim of fraud on the court under FRCP 60(d)(3); named Fujitsu's counsel as defendants in the lawsuit; and contained sufficient allegations about the conduct of Fujitsu's counsel to support a fraud on the court claim. According to plaintiff, the missing allegations would have informed the federal court that: Fujitsu and its counsel represented that Fujitsu used the misappropriated information from plaintiff in one product that was sold only in Japan unsuccessfully; plaintiff later discovered that information was false and that Fujitsu and its counsel changed the date on evidence used to determine the date of the misappropriation; and the false information induced plaintiff to enter into a settlement agreement

well below the amount of actual damages fraudulently concealed by Fujitsu and its counsel. Plaintiff contends on appeal that defendants cannot use the federal court dismissal of the fraud case to exonerate themselves from negligence in failing to raise a 60(d)(3) claim because the federal court never adjudicated a 60(d)(3) claim.

¶ 34 Plaintiff's argument lacks merit and misconstrues the ruling of the federal district court, which did adjudicate the issue of 60(d)(3) relief. In this appeal, plaintiff has rephrased the allegations concerning the misconduct by Fujitsu's counsel; nevertheless, the district court rejected–as insufficient to support a fraud on the court claim–essentially the same allegations of misconduct by Fujitsu's counsel that plaintiff now claims were never put before the federal court. Although plaintiff accurately states that defendants did not name Fujitsu's counsel as defendants in the fraud case and defendants may not have specifically cited to 60(d)(3) in its request for relief, the district court's opinion clearly establishes that it reviewed the allegations of Fujitsu's counsel's misconduct in the context of a 60(d)(3) claim of fraud on the court.

¶ 35 As summarized above, the federal district court concluded that plaintiff was not entitled to relief pursuant to either a FRCP 60(b)(6) motion or an independent action under either FRCP 60(d)(1) or 60(d)(3). First, the district court denied plaintiff any relief under 60(b)(6) because plaintiff's fraud claim could only proceed under 60(b)(3), which requires the filing of a request for relief within one year of the complained-of judgment, and, thus, was time-barred. *LinkCo, Inc.*, 615 F. Supp. 2d at 136.

¶ 36 Then, the district court analyzed, under the same subheading in its opinion, the basis of any relief under either 60(d)(1) or (3). *Id*. Although Fujitsu's counsel was not a named party, the

district court considered the allegations of misconduct by Fujitsu's counsel and conducted an analysis pursuant to a 60(d)(3) claim of fraud on the court. *Id*. at 136-38. The district court concluded that plaintiff could not proceed under 60(d)(3) because the allegations suggested nothing more than a fraud upon plaintiff rather than a fraud upon the court. *Id.* at 136. Specifically, the allegations suggested only the possibility of obstruction of discovery and witness perjury; even plaintiff's allegation that Fujitsu's counsel had engaged in an email exchange with a Fujitsu witness about the date of a presentation failed to indicate any collaboration or involvement by Fujitsu counsel in the alleged fraudulent scheme to market a product that used plaintiff's technology and, thus, failed to suggest knowing misconduct by Fujitsu's counsel. *Id*. at 137-38. Moreover, the district court noted that, in an exhibit to plaintiff's second amended complaint, plaintiff had stated that "Fujitsu's counsel did not know about Fujitsu's purported fraudulent scheme." *Id*. at 138 n.61.

¶ 37 The district court then distinguished plaintiff's claim, which involved merely possible witness perjury and obstruction of discovery and concerned only private parties, from *Hazel-Atlas*, which involved attorneys perpetrating a fraudulent scheme to obtain a patent for a client and impacted issues of great importance to the public. *Id*. at 138-39. Finally, the district court noted that plaintiff wanted to amend its complaint again to add allegations that Fujitsu's counsel hired a certain third party and withheld some documents from plaintiff, but the court concluded that those proposed allegations would not affect the court's denial of 60(d)(3) relief because the proposed allegations did not suggest that Fujitsu's counsel knowingly collaborated with Fujitsu in a scheme to defraud the court. *Id*. at 139 n.67

¶ 38 Thereafter, the district court conducted an analysis of relief under 60(d)(1) and applied *laches* to conclude, in the exercise of its discretion, that relief was not warranted because plaintiff, with more diligence, could have discovered enough of Fujitsu's scheme to bring a timely 60(b)(3) motion (*id*. at 139-40), and plaintiff waited until 2008 to bring a 60(d)(1) independent action even though plaintiff had sufficient information by September 2005 to seek relief from judgment (*id*. at 140-42).

¶ 39 Plaintiff, in order to support its claim that the district court dismissed the fraud claim solely on the basis of *laches*, relies on the district court's statement that the complaint could not "proceed under either Rules 60(d)(3) or 60(d)(1) because" plaintiff failed to show that it had no adequate remedies at law or that its own neglect was not the cause of its predicament. *Id*. at 139. Defendant's reliance on that statement, however, is misplaced; the district court's lengthy analysis of the 60(d)(3) fraud on the court claim, as summarized above, establishes that the district court concluded that plaintiff's allegations of misconduct by Fujitsu's counsel failed to meet the rigorous standard of support for a claim of fraud on the court.

¶ 40 Although not dispositive of this appeal, we note that the record contains emails and correspondence between plaintiff and defendants which indicate that before plaintiff retained LBBS, LBBS had informed plaintiff of the firm's policy not to sue other law firms and that LBBS would not be able to handle that aspect of the suit if it was concluded that the law firms were a viable target. Because plaintiff pursued the federal district court fraud action with LBBS as its attorney, plaintiff cannot credibly argue now that it had wanted to sue Fujitsu's counsel for fraud on the court since the inception of the federal case but defendants failed to properly plead that

claim. Furthermore, plaintiff mistakenly assumes that any alleged act of fraud perpetrated by an attorney constitutes a claim of fraud on the court. To the contrary, the extraordinary relief of setting aside a judgment based upon a fraud on the court requires clear and convincing evidence of the type of fraud "perpetrated by officers of the court *so that the judicial machinery cannot perform in the ususal manner its impartial task of adjudging cases*." (Emphasis added.) *Hadges*, 48 F.3d at 1325.

¶ 41 We conclude that the circuit court properly dismissed plaintiff's legal malpractice claim with prejudice based on plaintiff's inability to prove proximate cause where no alleged act or omission by defendants concerning the litigation of the fraud claim in federal court would have allowed that claim to proceed or plaintiff to prevail. Like the circuit court, we conclude that plaintiff's malpractice claim against defendants is barred by the district court's finding that plaintiff, by September 2005, had amassed enough information about Fujitsu's alleged fraud and should have brought an action at that time under FRCP 60(d)(1) instead of waiting three more years until October 2008 to attempt to set aside the settlement agreement. Because none of the defendants represented plaintiff in the federal court fraud case before 2008, none of the defendants could be responsible for plaintiff's failure to seek relief by 2005. In addition, we conclude that plaintiff's malpractice claim against defendants is barred by the district court's adjudication of the issue of FRCP 60(d)(3) relief based on essentially the same allegations of misconduct by Fujitsu's counsel that plaintiff erroneously claims here on appeal were not presented to the federal court.

¶ 42 Finally, plaintiff contends defendants LBBS, Unger and Murphy are liable for malpractice because they should have advised plaintiff that the federal court proceeding was doomed to failure due to *laches* before plaintiff paid thousands of dollars to litigate a case that could not succeed. This argument lacks merit because plaintiff's federal court claim was not dismissed solely on the basis of *laches*. Moreover, defendants advised plaintiff that timeliness was an issue and sought to persuade the federal court that there were sufficient reasons to permit plaintiff to proceed. Although the federal judge, in the exercise of her discretion, decided to the contrary, it was not malpractice to litigate a cause of action that ultimately did not succeed.

¶ 43 Because the opinion of the district court establishes (1) that defendants did not cause or contribute to the delay in plaintiff filing suit, and (2) that the district court adjudicated the issue of 60(d)(3) relief based on essentially the same allegations of misconduct by Fujitsu's counsel that plaintiff here on appeal accuses defendants of failing to present to the district court, the circuit court's dismissal of plaintiff's malpractice claim was correct and must be affirmed as a mater of law.

¶ 44 Because the lack of proximate cause is dispositive of this case, we do not address the arguments of the Blumenthal defendants and Rade that dismissal was also proper because no cause of action exists in Illinois for negligent referral to another attorney. We also note that plaintiff, by failing to offer any reasoned argument or supporting legal authority, has forfeited review of the circuit court's ruling that the Blumenthal defendants owed no duty to plaintiff. *Zdeb v. Allstate Insurance Co.*, 404 Ill. App. 3d 113, 121 (2010).

¶ 45 C. Cross-Appeal for Sanctions

¶ 46 First, the Blumenthal defendants argue that the circuit court's denial of Supreme Court Rule 137 attorney fees and costs was an abuse of discretion because plaintiff's malpractice complaint was not well-grounded in fact and was not warranted by existing law or a good faith extension thereof. The Blumenthal defendants contend plaintiff manufactured a non-existent cause of action for negligent referral and knew the Blumenthal defendants had provided no representation to plaintiff in the federal court fraud case.

¶ 47 Plaintiff responds that it made a good faith argument for the extension of a cause of action for negligently referring a client to another attorney. Plaintiff argues the Blumenthal defendants failed to present to the circuit court any evidence to support the imposition of sanctions. Plaintiff also argues the Blumenthal defendants simply regurgitate on appeal the same generalized allegations against plaintiff that have already been rejected by the circuit court.

¶ 48 Rule 137 permits the circuit court to impose sanctions on a party or 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). The purpose of the rule is to discourage the pleading of frivolous or false matters and the assertion of claims without any basis in the law, by penalizing attorneys and parties who engage in such conduct. *Baker v. Daniel S. Berger, Ltd.*, 323 Ill. App. 3d 956, 963 (2001).

¶ 49 The burden of proving entitlement to fees and costs rests on the party seeking sanctions. *Laurence v. Flashner Medical Partnership*, 206 Ill. App. 3d 777, 788 (1990). A determination of

whether to grant a party's motion for sanctions is a matter committed to the sound discretion of the circuit court. *Century Road Builders, Inc. v. City of Palos Heights*, 283 Ill. App. 3d 527, 531 (1996). The circuit court's decision will not be disturbed on appeal absent an abuse of discretion. *Wagener v. Papie*, 242 Ill. App. 3d 354, 363 (1993). "A trial court abuses its discretion when its finding is against the manifest weight of the evidence [citation] or if no reasonable person would take the view adopted by it [citation]." *Technology Innovation Center, Inc. v. Advanced Multiuse Technologies Corp.*, 315 Ill. App. 3d 238, 244 (2000). Upon review, the court should consider the following factors: (1) whether the trial court made an informed ruling; (2) whether the court based its ruling on valid reasons that fit the case; and (3) whether the trial court's ruling followed logically from the application of the reasons stated to the particular circumstances of the case. *Kubiak v. City of Kewanee*, 228 Ill. App. 3d 605, 607 (1992).

¶ 50 The circuit court ruled that the Blumenthal defendants failed to show that plaintiff or its counsel made any assertions of fact that were untrue, made any bad faith arguments, or engaged in any sanctionable conduct with regard to the pleadings or prosecution of the instant case. The circuit court concluded that "the fact that the evidence was on the Defendants' side, causing the action against them to be dismissed, does not require the imposition of sanctions."

¶ 51 We find plaintiff's citation to case law unpersuasive to support its argument for the recognition of a cause of action for negligent referral in this case. Specifically, plaintiff relied on *Gonzalzles v. American Express Credit Corp*, 315 Ill. App. 3d 199 (2000), and *Weisblatt v. Chicago Bar Ass'n*, 292 Ill. App. 3d 48 (1997), where the plaintiffs' claims of negligent referral were dismissed because the defendants were nonattorney referral services. Nevertheless, we do

not deem unreasonable the conclusion by the circuit court that plaintiff made a good faith argument and, thus, we conclude that the circuit court did not abuse its discretion by denying the Blumenthal defendants' request for Rule 137 sanctions.

¶ 52 Next, the Blumenthal defendants urge this court to impose sanctions under Supreme Court Rule 375(b) (eff. Feb. 1, 1994) because plaintiff's appeal as to them was frivolous where it lacked any challenge to the circuit court's finding that the Blumenthal defendants did not owe plaintiff a duty of care in the federal fraud case. The Blumenthal defendants complain that plaintiff never voluntarily dismissed them from this appeal despite filing a brief that never challenged their dismissal by the circuit court, only mentioned them three times, and failed to provide any basis for keeping them in this case.

¶ 53 Supreme Court Rule 375(b) provides that a reviewing court may impose a sanction upon a party or its attorney where the court deems it appropriate for frivolous appeals that are not taken in good faith. *Thompson v. Buncik*, 2011 IL App (2d) 100589, ¶¶ 21-22. "In determining whether an appeal is frivolous, we apply an objective standard; the appeal is considered frivolous if it would not have been brought in good faith by a 'reasonable, prudent attorney.' " *Id*. ¶ 21, quoting *Dreisilker Electric Motors, Inc. v Rainbow Electric Co.*, 203 Ill. App. 3d 304, 312-13 (1990). This court, however, "does not mean to discourage attorneys from zealously representing their clients or from bringing appeals that have even arguable merit." *First Federal Savings Bank of Proviso Township v. Drovers National Bank of Chicago*, 237 Ill. App. 3d 340, 347 (1992).

¶ 54 We agree with the Blumenthal defendants that although plaintiff's appellate brief included a challenge to the circuit court's ruling regarding the level of Rade's involvement in the federal fraud case, no similar argument was raised concerning the ruling about the Blumenthal defendant's level of involvement. While we agree with the Blumenthal defendants that plaintiff has forfeited any review of that ruling, such forfeiture could be attributed to the quality of the representation provided to plaintiff and, thus, we do not conclude that the primary purpose of including the Blumenthal defendants in this appeal was to delay, harass or cause needless expense. Accordingly we deny the Blumenthal defendants' request for sanctions under Rule 375(b).

¶ 55 III. CONCLUSION

¶ 56 For the foregoing reasons, we affirm the judgment of the circuit court dismissing the complaint and denying Rule 137 sanctions and attorney fees. We also deny the cross-appellants' request for Rule 375(b) sanctions.

¶ 57 Affirmed.