2013 IL App (1st) 113690-U

FOURTH DIVISION
June 13, 2013

No. 1-11-3690

**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

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| ROBERT ROSENBERG,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>B.H. KAHAN AND ASSOCIATES; BARRY KAHAN; and LAWYERS TITLE INSURANCE CORPORATION,<br><br>Defendants-Appellees,<br><br>(Katen Pabley, George Giou, Andrew C. Baker, Law Title Insurance Agency, Inc.-Chicago, and John Does 1-10, Defendants). | ) | Appeal from the Circuit Court of Cook County<br><br>No. 08 L 11235<br><br>Honorable Lee Preston, Raymond Mitchell, Judges Presiding. |

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

**ORDER**

¶ 1 *Held*: Summary judgment in favor of defendant-attorney on plaintiff's amended complaint alleging fraud, unjust enrichment and conspiracy is affirmed where plaintiff failed to show genuine issue of material fact existed and judgment was proper as a matter of law.

Trial court's order granting defendant-attorney's motion for sanctions is affirmed. Trial court's order granting motion to dismiss plaintiff's second amended complaint against defendant-title insurer is affirmed where (1) plaintiff failed to state a cause of action against title insurer for fraud, unjust enrichment or conspiracy, and (2) agency agreement demonstrated that codefendant-insurance agency was not acting on behalf of title insurer with respect to any closing or escrow services.

¶ 2 Plaintiff Robert Rosenberg filed a complaint against several defendants alleging that they engaged in "deceptive and fraudulent development, marketing, and financing" of a condominium property. Plaintiff filed the instant appeal contending that the circuit court should not have granted summary judgment to defendants, B.H. Kahan and Associates and Barry Kahan (collectively, Kahan), where there were genuine issue of material fact. Plaintiff also appeals from the circuit court order awarding sanctions in favor of Kahan against plaintiff. Plaintiff also contends that the court should not have granted defendant Lawyers Title Insurance Corporation's motion to dismiss. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 This appeal arises from several real estate transactions by a joint venture involving the conversion of a three-flat residential building located at 3221 W. Cortez Street in Chicago, Illinois (the Cortez property) to a condominium, and the sale of the condominium units. Plaintiff is the assignee of the mortgages for two of the units. On January 16, 2008, a mortgage owned by First Franklin Financial Corporation (First Franklin) was assigned to plaintiff and was recorded with the Cook County Recorder of Deeds on April 14, 2008. On January 24, 2008, a mortgage owned by New Century was assigned to plaintiff and was recorded on June 5, 2008. Plaintiff is now the sole owner of any and all claims or causes of action arising out of, or relating to, the loans underlying these mortgages.

¶ 5 On October 9, 2008, plaintiff filed a five-count complaint against several defendants including Kahan, Katen Pabley, George Giou, Andrew C. Baker, Law Title Insurance Agency, Inc.-Chicago, and John Does 1-10. As noted, plaintiff contended that defendants engaged in "deceptive and fraudulent development, marketing, and financing" of a condominium property. Specifically, plaintiff claimed that a non-party had purchased the undeveloped property and then conveyed it to defendant, Katen Pabley, a/k/a Keith Pabley. Plaintiff further contended that Pabley, along with Kahan (an Illinois attorney), commenced a scheme to fraudulently market the Cortez property as condominium units. Plaintiff asserted that Pabley and Kahan obtained title commitments for three nonexistent condominium units. Plaintiff alleged that defendant George Giou, and his sole proprietorship, fraudulently helped secure the financing for the subsequent purchaser of the property, a non-party "straw purchaser" who purportedly intended to "flip" the property.[1] Defendant Baker allegedly provided fraudulent appraisals in connection with the efforts to obtain the financing.

¶ 6 Plaintiff's allegations against Kahan included fraud, unjust enrichment, and conspiracy. On February 9, 2009, Kahan filed a motion for summary judgment in lieu of an answer. The basis of Kahan's motion was that he was retained as an attorney by a joint venture (between defendant Pabley and Rick Burgo), his role was strictly to render legal services related to the conversion of the apartment building to a condominium, and he had no involvement or interest in

[1]Plaintiff identified the alleged "straw purchaser" in his complaint as David Chicola. After Chicola obtained his mortgages from the two lenders, he failed to make any payments on either. Both loans were in default as of November 1, 2004. Plaintiff is now the assignee of those mortgages. On June 28, 2008, Chicola conveyed to plaintiff any interest he owned in the property.

the business of the joint venture. Kahan attached an affidavit in support of his motion.

¶ 7 According to Kahan's seven-page sworn affidavit, he had handled numerous conversions of apartment buildings to condominiums, and had represented sellers in the sale of their condominium units to buyers. Kahan was first contacted by defendant Pabley on or about July 2004. Kahan participated only as an attorney on behalf of the joint venture. Kahan attached to his affidavit a copy of the written joint venture agreement he prepared, dated August 18, 2004, which incorporated the terms that Pabley and Burgo had agreed upon.

¶ 8 Paragraph 5 of the agreement stated that each party to the joint venture agreement, *i.e.* Pabley and Burgo, agreed that Kahan represented the joint venture only, and did not represent either Pabley or Burgo, individually. It further stated: "Each party acknowledges that Barry Kahan's participation in this matter is [as the] attorney and agent for the joint venture and that Barry Kahan is not otherwise involved in the business of the joint venture or the saleability of the condominium units proposed to be created or sold by the joint venture."

¶ 9 In his motion for summary judgment, Kahan stated that he drafted the condominium documents required to convert the Cortez property to a condominium, drafted a condominium declaration and bylaws, ordered a commitment for a policy of title insurance from Law Title Insurance Agency, and ordered a condominium survey of the property from a surveyor. Kahan's compensation for the preparation of the joint venture, the creation of the condominium documents, overseeing the conversion of the title of the Cortez property from an apartment building to a condominium, and closing the sale of the condominium units was $11,500.

¶ 10 Kahan further stated in his affidavit that the joint venture and David Chicola entered into

contracts of sale for Unit #1 and Unit #2, but Kahan was not involved in advertising the units or procuring the buyer, and the contracts of sale were not prepared, or negotiated, by Kahan. On August 18, 2004, the closing for Unit #2 took place; the closing for Unit #1 was on August 19, 2004. Kahan represented the joint venture at the closings which took place at the offices of codefendant, Law Title Insurance Agency, Inc.-Chicago. Kahan prepared deeds, bills of sale, closing statements and other documents required to close the sale. He also ordered a commitment for title insurance for each unit. The buyer, Chicola, was unrepresented. Kahan had no involvement in selecting Chicola's mortgage broker or lender, nor in engaging the appraiser. The selling price for each unit was disbursed pursuant to the closing statement. Kahan attached copies of the closing statements for both units to his affidavit. Kahan averred that the closing of neither sale was unusual. After the sale of those units, Kahan also handled the closing of Unit #3 which was similarly uneventful. Kahan stated in his affidavit that he then closed his file in this matter and had no further dealings with the Cortez property until this lawsuit was filed against him (approximately four years later).

¶ 11 Plaintiff filed his response. He did not file a counteraffidavit but relied on the allegations in his complaint and argued that Kahan's affidavit confirmed, in part, some of these facts. Plaintiff also argued that "Kahan's failure to file an Answer to Plaintiff's Complaint and the fact that no discovery [had] taken place render[ed] consideration of Kahan's Motion for Summary Judgment inappropriate at this juncture." Plaintiff also noted that it was highly likely that he would seek leave to file an amended complaint after discovery (*i.e.* production of Kahan's file and Kahan's deposition) to add additional defendants, including Rick Burgo and Monica Pawlik

who were named in the joint venture agreement that Kahan had provided. Plaintiff also stated that he "believe[d] that Kahan has knowledge of the identity and location of these additional parties which will be revealed in his discovery responses." Plaintiff conceded that he did not have "personal first hand knowledge of the facts" but argued "that limitation does not compel the Plaintiff or this Court to accept Kahan's version of the facts."

¶ 12 On April 23, 2009, Kahan filed his reply and argued that every fact contained in Kahan's affidavit was uncontroverted, plaintiff had not attached any affidavits to his response, plaintiff had relied only on the allegations in his unsworn, unverified complaint, and plaintiff had not presented any evidentiary facts to support the elements of fraud, unjust enrichment, or civil conspiracy.

¶ 13 Hearing on Kahan's motion for summary judgment was scheduled and then rescheduled several times over the next few months while discovery occurred. On August 26, 2009, plaintiff sought leave to file an amended complaint. On September 15, 2009, the court granted plaintiff's motion for leave to file his amended complaint *instanter*. The court also ruled that Kahan's previous response would stand as his response to the amended complaint.

¶ 14 The amended complaint was filed against the same defendants as the original complaint, but added Lawyers Title Insurance Corporation, (Lawyers Title). Count I alleged fraud against Pabley, Giou, Baker and Law Title Insurance Agency, Inc.-Chicago. Count II alleged unjust enrichment against these same defendants. Count III alleged negligent misrepresentation against Baker. Count IV alleged conspiracy against Pabley, Giou, Baker, Law Title Insurance Agency, Inc.-Chicago, and Lawyers Title. Count V alleged breach of contract against Law Title Insurance

Agency, Inc.-Chicago, and Lawyers Title.

¶ 15 On October 26, 2009, plaintiff filed a supplemental memorandum in opposition to Kahan's motion for summary judgment.

¶ 16 In his supplemental memorandum, plaintiff argued:

> "The Defendants' scheme for the fraudulent marketing of the Cortez property was a blatant fraud. After acquiring the property for $354,000.00, they fabricated the conversion of the three unit apartment building into a condominium; obtained grossly inflated appraisals; utilized mortgage brokers to submit bogus loan applications to lenders on behalf of straw buyers; retained a title company to: (a) issue title commitments on the units, (b) establish escrow accounts, and (c) conduct closings; and obtained and/or recorded various mortgages as vehicles for funneling money to the Defendants. Defendant Kahan created and oversaw the structuring of the alleged conversion, title documents, closing of the straw sales, and the mortgage used to distribute funds to Rick Burgo. As set forth herein, each of these components of the Defendants' scheme is reflected in the public record, the documents produced by Law Title [Insurance Agency, Inc.-Chicago], Kahan's deposition, and the deposition testimony of David Chicola, the purchaser of 'Units 1 and 2.' Each of these deceptive and fraudulent acts are sufficient to sustain Plaintiff's fraud, unjust enrichment, and conspiracy claims."

¶ 17 Plaintiff argued that it was undisputed that "Kahan's power and authority far exceeded that of an attorney representing a client in a real estate transaction" based upon the language in

paragraph 5 of the joint venture agreement wherein Kahan agreed to act as the attorney and agent for the joint venture, and attorney-in-fact for Burgo and Pabley, and had "the right to do all things he deemed necessary to accomplish the aims of the joint venture described above." Plaintiff argues that Kahan exercised that authority to accomplish the "aims" of the joint venture, but apparently contends that the true "aim" of the joint venture was the fraudulent scheme described by plaintiff, and additionally imputes knowledge of that alleged scheme to Kahan.

¶ 18 Plaintiff also argued that there were disputed issues of material fact including the following: (1) in his affidavit, Kahan stated that he was first contacted about the Cortez property in July 2004, but stated in his deposition that he commenced working on the Declaration of Condominium for the Cortez property on February 25, 2004; (2) in his affidavit, Kahan stated that he had not previously represented Pabley, but the joint venture agreement states that Kahan had previously represented Pabley in other matters; (3) in his affidavit, Kahan states that "I have reviewed my entire real estate file in this matter," but testified in his deposition that "his entire file(s) were discarded" and his only files were those on his computer which do not include any correspondence, emails or communications between or among Kahan, Pabley, and Burgo." Plaintiff noted that Kahan had refused to provide information regarding the addresses of Pabley or Burgo. Plaintiff argued that it was "reasonable for the trier of fact to conclude that Kahan sanitized his files in order to conceal the true scope of his involvement in the Defendants' scheme" and that his statement in his affidavit that he had reviewed his "entire real estate file in this matter" was intended to mislead the Court as to the basis for the facts alleged in his affidavit. Plaintiff asserted that there were also disputed issues of material fact regarding the amount of

Kahan's compensation where he stated he received $11,500 for his legal services but that Law Title's records indicated he received $18,300 in attorney fees and $2,750 for title agent fees.

¶ 19 Plaintiff also argued that David Chicola was the "straw purchaser" for Units 1 and 2 at the Cortez property and that Chicola testified at his deposition that "Kahan was present when he signed the papers" at the closing and that "he was introduced to Kahan by Pabley." Chicola also stated in his deposition that Burgo gave him two checks, each in the amount of $2,000, which he turned over to the title company for his down payment on the units, and plaintiff argued that it was "reasonable to infer" that these checks came from Pabley or Kahan. In sum, plaintiff asserted that "Kahan's misrepresentations under oath as to his relationship with Pabley, the amount of his compensation, the review of his entire file, and his relationship with Law Title leave no doubt as to his knowing participation and critical role in carrying out the fraudulent scheme initiated by Pabley and Burgo designed and implemented by Kahan regarding the Cortez property."

¶ 20 On January 19, 2010, Kahan filed his reply. Kahan argued that whether he had represented Pabley prior to the Cortez property transaction was not a genuine issue of material fact. Kahan further argued that he had retained his files on his computer, had reviewed and produced all of those documents, and that plaintiff had presented no evidence, other than his baseless conclusion, that Kahan destroyed his files. Finally, Kahan noted that he was *not* a title agent for Law Title at the time of the closings on the Cortez property and attached a copy of his registration as a title agent for Law Title dated December 7, 2005. Moreover, Kahan asserted that whether he was a title agent of Law Title at the time of the Cortez property closings was

immaterial to plaintiff's claim. Kahan also attached a supplemental affidavit to his reply and stated that he did not prepare the joint venture mortgage dated August 17, 2004 [which plaintiff had argued was "the vehicle created by him to funnel money from the closing proceeds on Unit 1 to Burgo"]. Kahan also averred that he "did not deal with the terms of the joint venture mortgage nor review its terms." He stated that Pabley prepared the joint venture mortgage using a form copy of a mortgage Kahan had prepared in a different transaction, namely, a "mortgage foreclosure recovery" transaction. Kahan stated that Pabley did not remove that language and replace it with "joint venture transaction" nor did Pabley remove the language that stated the mortgage had been "prepared by" Kahan. On February 11, 2010, the trial court granted Kahan's motion for summary judgment. On August 16, 2010, the trial court granted Kahan's motion for sanctions pursuant to Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994).

¶ 21 Meanwhile, on November 25, 2009, Lawyers Title filed a combined motion to dismiss plaintiff's amended complaint pursuant to section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1) (West 2008)). Plaintiff filed his response on January 5, 2010; Lawyers Title filed its reply on January 19, 2010.

¶ 22 On April 5, 2010, plaintiff filed a motion for leave to file a second amended complaint which the court granted. Plaintiff subsequently filed a five-count second amended complaint on May 5, 2010. As he had in the first amended complaint, plaintiff alleged that Lawyers Title was responsible for all of the alleged actions and conduct of defendant, Law Title Insurance Agency, Inc.-Chicago. The second amended complaint included additional paragraphs specific to the relationship between defendant, Law Title Insurance Agency, Inc.-Chicago and Lawyers Title.

¶ 23 On May 24, 2010, Lawyers Title filed a combined motion to dismiss plaintiff's second amended complaint pursuant to section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1) (West 2008)). Plaintiff filed his response on June 16, 2010; Lawyers Title filed its reply on July 14, 2010. On August 16, 2010, the trial court granted Lawyers Title's motion and dismissed all of plaintiff's claims against it.

¶ 24 On November 16, 2011, plaintiff voluntarily dismissed his action against the remaining defendants, George Giou, Andrew Baker, and John Does 1-10.[2] On December 9, 2011, plaintiff filed a timely notice of appeal.

¶ 25 ANALYSIS

¶ 26 I. Kahan's Motion for Summary Judgment

¶ 27 Plaintiff first argues that summary judgment in favor of Kahan was not proper in this case and also contends that the trial court employed the wrong standard in deciding to grant summary judgment. "We review *de novo* an order granting summary judgment, without any deference to the judgment of the circuit court." *Pajic v. Old Republic Ins. Co.*, 394 Ill. App. 3d 1040, 1043 (2009).

¶ 28 As noted, in lieu of filing an answer to plaintiff's original complaint, Kahan filed a motion for summary judgment on February 9, 2009. A defendant may file a motion for summary judgment at any time. 735 ILCS 5/2-1005(b)(West 2008). By filing a summary judgment motion before filing an answer, the defendant admits only those well-pleaded facts "which it leaves

[2]Plaintiff obtained a default judgment against Katen Pabley on May 26, 2011, which is not a subject of this appeal.

*uncontradicted*." (Emphasis in original.) *Bank of Waukegan v. Epilepsy Foundation of America*, 163 Ill. App. 3d 901, 905 (1987). "Summary judgment is appropriate 'where the pleadings, affidavits, depositions, admissions, and exhibits on file, when viewed in the light most favorable to the nonmovant, reveal that there is no issue as to any material fact and that the movant is entitled to judgment as a matter of law.' [Citation.]" *MC Baldwin Financial Co. v. DiMaggio, Rosario & Veraja, LLC*, 364 Ill. App. 3d 6, 13 (2006); 735 ILCS 5/2–1005(c) (West 2008).

¶ 29 "A defendant moving for summary judgment bears the initial burden of coming forward with competent evidentiary material which, if uncontradicted, entitles him to judgment as a matter of law." *Paul H. Schwendener, Inc. v. Jupiter Electric Co., Inc.*, 358 Ill. App. 3d 65, 78 (2005). "Only if the defendant satisfies his initial burden of production does the burden shift to the plaintiff to present some factual basis that would arguably entitle it to a favorable judgment." *Id*. "*If* the defendant fails to support his motion for summary judgment with evidentiary facts, the plaintiff may rely on its complaint to establish a genuine issue of fact." (Emphasis added.) *Id.* However, "[i]f a party moving for summary judgment includes an affidavit containing facts which, if not contradicted, would entitle it to judgment as a matter of law, the opposing party cannot rely upon his pleadings to raise a genuine issue of material fact." *Id*. "To withstand a summary judgment motion, the nonmoving party need not prove his case at this preliminary stage but must present some factual basis that would support his claim." *Freedberg v. Ohio National Insurance Co.*, 2012 IL App (1st) 110938, ¶ 26.

¶ 30 It has long been established that "[w]here facts contained in the affidavit in support of a motion for summary judgment are not contradicted by counteraffidavit, such facts are admitted

and must be taken as true." *Heidelberger v. Jewel Companies, Inc*., 57 Ill. 2d 87, 92-93 (1974) (citing *Fooden v. Board of Governors of State Colleges and Universities*, 48 Ill.2d 580, 272 N.E.2d 497(1971)). As the trial court here correctly noted "[w]here the party moving for summary judgment supplies well-alleged facts in an affidavit that are not contradicted by counteraffidavit, such allegations must be taken as true, notwithstanding the existence of contrary averments in the nonmovant's pleadings which merely purport to establish bona fide issues of fact." See *Steiner Electric Co. v. NuLine Technologies, Inc.*, 364 Ill. App. 3d 876, 882 (2006). Therefore, the trial court concluded that plaintiff could not rely on his amended complaint to defeat Kahan's motion. The court rejected plaintiff's argument that Kahan's deposition testimony contradicted the assertions in his affidavit, noting that plaintiff failed to provide the court with the various citations to Kahan's deposition and only provided two pages of the transcript. Similarly here, plaintiff refers to Kahan's deposition testimony but cites only to his own supplemental memorandum in opposition to Kahan's motion for summary judgment. In any event, we agree with Kahan that the purported discrepancies between the statements in his affidavit and his deposition testimony did not create a genuine issue of material fact as to plaintiff's claims. The trial court also struck several exhibits attached to plaintiff's response noting that "[i]n ruling on a motion for summary judgment, the court cannot consider any evidence that would be inadmissible at trial." See *Brown, Udell and Pomerantz v. Ryan*, 369 Ill. App. 3d 821, 824 (2006). The court further noted that even if the documents were considered, they would not defeat Kahan's motion for summary judgment. Finally, the trial court rejected plaintiff's contentions that Chicola's deposition established that Kahan was engaged in a

conspiracy with the other defendants. As the trial court noted, Chicola's deposition testimony merely established that Kahan was present at the closing when Chicola purchased Units 1 and 2 of the Cortez property and did not contradict the statements in Kahan's affidavit.

¶ 31 We agree with the trial court's conclusion in all respects. Nonetheless, on appeal, plaintiff now asserts that the trial court erred in relying on "normal" summary judgment law, *i.e.* that "[w]here facts contained in the affidavit in support of a motion for summary judgment are not contradicted by counteraffidavit, such facts are admitted and must be taken as true." *Heidelberger*, 57 Ill. 2d at 92-93. Instead, citing *American National Bank and Trust Co. v. Edgeworth*, 249 Ill. App. 3d 52, 54 (1993) plaintiff argues that, since Kahan filed his motion for summary judgment in lieu of an answer, the trial court was required to conduct a two-prong analysis showing that the facts contained in Kahan's affidavit: (1) established facts upon which summary judgment could be granted; and (2) demonstrated that the facts alleged in the complaint could not be proven.

¶ 32 *American National Bank* is distinguishable. There, the court was faced with an unusual procedural posture. Although the defendant there, similar to Kahan in the instant case, had filed a motion for summary judgment in lieu of an answer, the basis of the motion in *American National Bank*, and what defendant actually argued was that the plaintiff's complaint "fail[ed] to state a cause of action." *Id*. at 53. Therefore, the court treated the motion as a motion to dismiss. As the court explained: "where a defendant files a motion for summary judgment, as opposed to a motion to strike or dismiss, in lieu of an answer, *the trial court should consider whether the complaint, standing alone, states a cause of action*, accepting all plaintiff's uncontradicted

allegations as true, *unless defendant establishes by affidavit that such allegations cannot be proven*." *Id.*

¶ 33 We do not believe that *American National Bank* stands for the proposition that "normal" summary judgment law does not apply whenever a defendant moves for summary judgment prior to filing an answer. Kahan did not argue that plaintiff's complaint failed to state a cause of action. Rather, he argued that he was entitled to summary judgment as a matter of law. As we have noted that "even though the party opposing the motion for summary judgment fails to file counteraffidavits, the moving party should not be awarded summary judgment unless the affidavits filed in support of the motion *establish the judgment as a matter of law*." (Emphasis added.) *Marquette National Bank v. Heritage Pullman Bank & Trust Co.*, 109 Ill. App. 3d 532, 535 (1982); see also *Motz v. Central National Bank*, 119 Ill. App. 3d 601, 605 (1983). The trial court applied this standard. We agree with the trial court's conclusion that Kahan was entitled to summary judgment as a matter of law.

¶ 34 II. Kahan's Motion for Sanctions

¶ 35 Plaintiff next argues that the trial court erred in granting sanctions under Rule 137 against him in favor of Kahan in the amount of $39,552.91. Rule 137 provides:

> "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. *** If a pleading, motion, or other paper 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, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney fee." Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994).

The purpose of Rule 137 is "to engender an additional remedy to parties who are victimized by frivolous filings and to protect courts from lawsuits, filed without a good-faith basis, intended only to harass." *Sterdjevich v. RMK Management Corp.*, 343 Ill. App. 3d 1, 19 (2003). "Rule 137 is not a means by which trial courts should punish litigants whose arguments do not succeed; instead, it is a tool which they can employ to prevent future abuse of the judicial process or discipline in the case of past abuses." *Schneider v. Schneider*, 408 Ill. App. 3d 192, 200 (2011). "Courts are instructed to use an objective standard in evaluating what was reasonable under the circumstances as they existed at the time of filing." *Sterdjevich*, 343 Ill. App. 3d at 19. "It is not sufficient that the plaintiff 'honestly believed' that the allegations raised were grounded in fact or law." *Id*.

¶ 36 The appellate court will not overturn a trial court's ruling on Rule 137 sanctions absent an abuse of discretion. *Schneider v. Schneider*, 408 Ill. App. 3d at 199. A trial court abuses its discretion when "its ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person

would take the view adopted by the trial court." *Patton v. Lee*, 406 Ill. App. 3d 195, 199 (2010). "[I]f reasonable people would differ as to the propriety of the court's [imposition of Rule 137 sanctions], a reviewing court cannot say that the trial court exceeded its discretion." *Senese v. Climatemp, Inc*, 289 Ill. App. 3d 570, 582 (1997). The abuse of discretion standard "is the most deferential standard of review — next to no review at all." *In re D. T.*, 212 Ill. 2d 347, 356 (2004).

¶ 37 Plaintiff contends, however, that the abuse of discretion standard presupposes that the trial court has followed the requirements of Rule 137 which specifically states: "Where a sanction is imposed under this rule, the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order." Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994). Here, the trial court's order states: "Kahan's Motion for Rule 137 Sanctions is granted as to [plaintiff] and denied as to counsel." Plaintiff also argues that, while Rule 137 sanctions are based on pleadings, part of Kahan's motion for sanctions was a request for attorney fees in connection with the declaratory judgment action with his insurer regarding coverage of plaintiff's claims.

¶ 38 As we have explained, the predicate to this court's deference to the trial court's decision to impose sanctions "is that the trial court make an informed and reasoned decision." *In re Estate of Baker*, 242 Ill. App. 3d 684, 687 (1993). "For that reason, it has been noted that a hearing ought to be held to give the parties involved an opportunity to present any evidence needed to substantiate or rebut the claim for sanctions, and an opportunity to argue their positions." *Id.* "Furthermore, a trial court's decision on sanctions must clearly set forth the factual basis for the

result reached in order to be afforded deferential treatment. *Id*. at 687-88.

¶ 39 The record does not indicate if a hearing was held on Kahan's motion and, assuming one was held, plaintiff has failed to include a transcript. It is well established that an appellant has the burden on appeal to present a sufficiently complete record of the proceedings at trial to support a claim of error, and, in the absence of such a record, this court presumes that the trial court's order was in conformity with the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill.2d 389, 391-92 (1984). Any doubts arising from the incompleteness of the record will be resolved against the appellant. *Id*. at 392. In the instant case, the record before us allows us to make "an informed and reasoned review of [the trial court's] imposition of sanctions." *In re Marriage of Thomsen*, 371 Ill. App. 3d 236, 246 (2007).

¶ 40 Here, although the trial court did not state its reasons for imposing sanctions in its written order, the order was entered pursuant to Kahan's written motion, which was fully briefed. "[R]eviewing courts have relaxed [the] requirement [that a trial court set forth its specific reasons for sanctioning plaintiff] in cases where sanctions were entered pursuant to written motions, because it is assumed that the reasons for the sanction were those set out in the motions." *Rosen v. Larkin Center, Inc*. 2012 IL App (2d) 120589, ¶ 16 n.3; see also *Chabowski v. Vacation Village Ass'n*, 291 Ill. App. 3d 525, 528 (1997) (although Rule 219(c) requires the court to state its reasons in writing, the failure of the court to do so is not "*per se* reversible error" where order granted a written motion that spelled out the reasons for the dismissal and those reasons are supported by the record). By granting Kahan's motion, we can assume that the court accepted Kahan's arguments and rejected those of plaintiff. *Cf. Chabowski,* 291 Ill. App. 3d at 528 (court

"can assume that the reasons for the [imposition of sanctions pursuant to Rule 219(c)] are those set out in defendants' motion").

¶ 41 As Kahan argued in his motion for sanctions, at the outset of the case, he had informed plaintiff's former counsel that he was acting only as the attorney and any insinuation that he was involved in some fraud or conspiracy was unfounded. Kahan also argued that "[p]laintiff never presented any evidence that there was anything fraudulent or improper with the [condominium] conversion and sale." Kahan further noted that "[i]t is the duty of the lender to investigate the creditworthiness of its borrower and the value of the property being offered as collateral." Kahan asserted that plaintiff filed a "bogus claim" in an attempt to gain compensation for himself for his own failure, and that of his predecessors to perform these duties. Kahan further contended that, rather than voluntarily dismiss Kahan from the suit, plaintiff went on a "fishing expedition." Due to the "unfounded" claims against him, Kahan had to expend a large amount of money to defend himself which involved "ten months [that plaintiff spent] engaging in discovery that was completely irrelevant" to the motion for summary judgment that Kahan had brought. Kahan also expended money to defend himself in a declaratory judgment action brought against him by his malpractice insurer. He argued that none of these costs would have been expended but for plaintiff's counsel's failure to make a reasonable inquiry into the law and facts before filing suit.

¶ 42 Plaintiff filed a response and a memorandum in opposition to Kahan's motion for sanctions, setting forth his argument as to how he exercised reasonable inquiry in determining that the pleading was sufficiently well grounded in fact and was warranted by existing law. He contended that he retained the services of attorney Stephen D. Richek to represent him. Based

upon Richek's review of documents and information received from Chicola's attorney, Richek concluded that the closings were conducted in express violation of the lenders' closing escrow instructions and contrary to the provisions of the Illinois Condominium Act. As to Kahan, Richek determined that he "knew or should have known the prerequisites for disbursement of the loan proceeds and conducted the closings in full knowledge that no Condominium Declaration had been recorded." Based upon Richek's advice that a reasonable basis existed in fact and law to file an action, plaintiff retained the services of attorney J. Stephen Walker to pursue his claims. However, although Kahan was responsible for putting documents in proper order and delivering them to defendant Law Title Insurance Agency, Inc.-Chicago, plaintiff acknowledged in his response that defendant Law Title Insurance Agency, Inc.-Chicago was the party responsible for recording the Condominium Declaration and deeds.

¶ 43 In his reply, Kahan asserted, among other things, that plaintiff's counsel's "main concern with Kahan was that he may have had a potentially deep pocket, if Kahan had insurance coverage." Kahan also argued that plaintiff's counsel relied on the language of the joint venture agreement's indemnification clause whereby Pabley and Burgo had a duty to indemnify Kahan, but plaintiff's counsel "chose to completely ignore" the section that "clearly stated Kahan had no interest in the business of the joint venture." As Kahan noted, the trial court's ruling on summary judgment was clear: "It is undisputed that Kahan's only involvement with the other defendants was to provide legal services for a joint venture between Pabley and Rick Burgo." Kahan contended that "[n]either Plaintiff nor his attorney can argue in good faith that they did not know more than a year ago that Plaintiff's claims against Kahan were meritless and unfounded." We

find no abuse of discretion in the trial court's award of sanctions in favor of Kahan.

¶ 44 We take note, however, that the trial court's order states: "Kahan's Motion for Rule 137 Sanctions is granted as to [plaintiff] and denied as to counsel." Where a pleading is signed in violation of Rule 137, the Rule's express language allows sanctions to be imposed against "the person who signed it, a represented party, or both." Here, Kahan asked that sanctions be imposed against *both* plaintiff and his attorney J. Stephen Walker. We cannot tell from the record why sanctions were imposed only as to plaintiff, but plaintiff has not raised this as an issue on appeal. Having determined that the trial court did not abuse its discretion, we affirm the award of sanctions in favor of Kahan and against plaintiff.

¶ 45 III. Lawyers Title's Motion to Dismiss

¶ 46 We next address plaintiff's argument that the trial court erred in granting Lawyers Title's combined motion to dismiss that was filed under section 2-619.1 of the Code of Civil Procedure. 735 ILCS 5/2-619.1 (West 2008). Our review is *de novo*. *Thomas v. Fuerst*, 345 Ill. App. 3d 929, 933 (2004).

¶ 47 In plaintiff's second amended complaint, Count I alleged fraud against Lawyers Title; count II alleged unjust enrichment; count IV alleged conspiracy; and count V alleged breach of contract. Plaintiff contended that Lawyers Title was liable based on the actions of codefendant, Law Title Insurance Agency, Inc.-Chicago, which was the company that issued the title commitment and handled escrow and other settlement activities at closing. On August 16, 2010, the trial court dismissed plaintiff's claims of fraud, unjust enrichment, and conspiracy claims pursuant to section 2-615 of the Code of Civil Procedure and dismissed plaintiff's breach of

contract claim pursuant to section 2-619. The court concluded that: (1) the fraud claim had not been pled with specificity; (2) the unjust enrichment claim had not adequately alleged that Lawyers Title retained a benefit to plaintiff's detriment; (3) the conspiracy claim lacked allegations that Lawyers Title was acting in "concerted action" with the other defendants; and (4) based on an agency agreement between Lawyers Title and Law Title Insurance Agency, Inc.-Chicago, Lawyers Title was not liable for breach of contract because Law Title Insurance Agency, Inc.-Chicago was not acting as Lawyers Title's agent for the closing and escrow activities.

¶ 48 The crux of plaintiff's allegations connecting Lawyers Title to the alleged fraudulent scheme was the application for registration of a title insurance agent with the Illinois Department of Financial Institutions that was approved on October 5, 1998. Plaintiff also acknowledged the existence of an agency agreement between Lawyers Title and Law Title Insurance Agency, Inc.-Chicago that the parties entered into on September 1, 1998. Plaintiff alleged that Law Title Insurance Agency, Inc.-Chicago, pursuant to its agreements with the lenders, First Franklin and New Century was expressly prohibited from requesting loan proceeds or disbursing any of the loan proceeds until it (Law Title Insurance Agency, Inc.-Chicago) had secured and confirmed clear title to the lenders' collateral (*i.e.* the condominiums). Plaintiff further alleged that Law Title Insurance Agency, Inc.-Chicago dispersed the loan proceeds in violation of that contractual duty. Plaintiff additionally alleged that "Law Title [Insurance Agency, Inc.-Chicago]'s breach of its Escrow Agreement and the lender's closing instructions was knowing and intentional with a blatant disregard for the interests of the lenders, and was done in furtherance of Law Title

[Insurance Agency, Inc.-Chicago]'s and [Lawyers Title]'s financial interests and to facilitate Kahan and Pabley's scheme."

¶ 49 Although Law Title Insurance Agency, Inc.-Chicago was Lawyers Title's agent, a principal is liable for the deceit of its agent only if the agent's alleged conduct was committed "in the very business the agent was appointed to carry out, even where the agent's specific conduct was carried out without knowledge of the principal." *Peddinghaus v. Peddinghaus*, 314 Ill. App. 3d 900, 904 (2000). Here, paragraph 8 of the agency agreement between Lawyers Title and Law Title Insurance Agency, Inc.-Chicago expressly excluded escrow and closing activities from the scope of Law Title Insurance Agency, Inc.-Chicago authority:

> "Although any escrow or closing business conducted by Agent is not within the scope of this Agreement, Principal may, from time to time, in its sole discretion, as an accommodation to Agent in the promotion of Agent's title insurance agency business, issue a "Closing Protection Letter" (or any similar letter or agreement0 to a prospective insured or other party to a real estate transaction being processed by Agent, the effect of which is to bind Principal to indemnify the addressee thereof against certain losses resulting from Agent's errors, omissions, or misconduct in acting as escrow, settlement or closing agent for the parties to the transaction."

Plaintiff does not claim that Lawyers Title submitted a "Closing Protection Letter."

¶ 50 Where the language of a contract is clear and unambiguous, the court must determine the intent of the parties solely from the language of the contract itself, which must be given its plain,

ordinary and popular meaning. *1324 W. Pratt Condominium Ass'n v. Platt Construction Group, Inc.*, 2012 IL App (1st) 111474, ¶ 31. Plaintiff does not contend that the relevant contractual language is ambivalent. Instead, he seeks to avoid the consequences of this express agreement with his contention that the Illinois Title Insurance Act, 215 ILCS 155 *et seq*. (West 2008) and its various provisions, supercede any agreement between Lawyers Title and Law Title Insurance Agency, Inc.-Chicago. However, as the trial court correctly noted, section 17(g) of the Illinois Title Insurance Act clearly states that the "authority granted to a title insurance agent may be limited or revoked at any time by the title insurance company." 215 ILCS 155/17(g). Moreover, as Lawyers Title now notes in its brief, and as it argued in the trial court, to the extent that plaintiff contends that Lawyer's Title's "application" for registration of a title insurance agent somehow "trumps" the agency agreement, the application is *not inconsistent* with the agency agreement or Illinois Title Insurance Act. Moreover, as Lawyers Title notes the applications sworn affidavit specifically states that the agency agreement is *attached* to the application (and is therefore a part of the application). Thus, the application does not constitute evidence of any actual or apparent authority inconsistent with the clear terms of the agency agreement.

¶ 51 As Lawyers Title noted in its motion to dismiss, Law Title [Insurance Agency, Inc.-Chicago] served as escrow agent and settlement agent at the closings for Unit 1 and Unit 2, and issued the title insurance policies (from Lawyers Title). According to Lawyers Title, Law Title Insurance Agency, Inc.-Chicago "was acting – in part – pursuant to an Agency Agreement where Lawyers Title appointed Law Title [Insurance Agency, Inc.-Chicago] as 'its agent solely for the purpose of issuing, on [Lawyers Title's] forms, title insurance commitments, policies and

endorsement . . . in Illinois." Lawyers Title also noted that its agency agreement with Law Title Insurance Agency, Inc.-Chicago expressly excluded escrow and closing activities from the scope of Law Title Insurance Agency, Inc.-Chicago. The trial court correctly granted Lawyers' Title motion to dismiss count V (breach of contract) pursuant to section 2-619 of the Code of Civil Procedure.

¶ 52 We also hold that the trial court correctly dismissed plaintiff's counts against Lawyers Title based on fraud (count I), unjust enrichment (Count II), and conspiracy (Count IV) for failure to state a cause of action pursuant to section 2-615 of the Code of Civil Procedure. Plaintiff failed to plead the fraud count with specificity; plaintiff's unjust enrichment claim failed to adequately allege that Lawyers Title retained a benefit to plaintiff's detriment; and the conspiracy claim lacked allegations that Lawyers Title was acting in "concerted action" with the other defendants.

¶ 53 CONCLUSION

¶ 54 In accordance with the foregoing, we conclude that the trial court properly granted summary judgment in favor of Kahan on plaintiff's amended complaint alleging fraud, unjust enrichment and conspiracy, because plaintiff failed to show that there was a genuine issue of material fact and judgment was proper as a matter of law. The order granting Kahan's motion for sanctions is affirmed. Lawyers Title's motion to dismiss is affirmed where (1) plaintiff failed to state a cause of action against Lawyers Title for fraud, unjust enrichment or conspiracy, and (2) agency agreement demonstrated that Law Title Insurance Agency, Inc.-Chicago was not acting on behalf of the title insurance company with respect to any closing or escrow services. We

affirm the circuit court's orders granting summary judgment and awarding sanctions to Kahan. We affirm the dismissal of plaintiff's second amended complaint against Lawyers Title.

¶ 55 Affirmed.