

FOURTH DIVISION
June 26, 2014

No. 1-13-2236

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

CASABLANCA LOFTS, LLC,)	Appeal from the
)	Circuit Court of
Plaintiff,)	Cook County.
)	
v.)	
)	
MOSHE BLAUVISE; DWG, INC.; RICHARD)	
ABRHAM; CLAY P; ANE CORP.;)	
DESIGN 21 CO. INC.; JOSEPH MATIELLO; NISSIM)	
NESHER; VAN TOMARAS; ATLAS 21)	
CONSTRUCTION CO., INC.; S & S GENERAL)	
CONTRACTORS, INC. and STANLEY FERON,)	
)	
Defendants,)	
)	No. 05 CH 2701
)	
ANE CORP. and NISSIM NESHER,)	
)	
Petitioners-Appellants,)	
)	
v.)	
)	
CASABLANCA LOFTS, LLC, MIKE WIER, and)	Honorable

DOUGLAS LOHMAR,

Respondents-Appellees.

) Jeffrey Lawrence,
) Judge Presiding.
)

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's finding that Casablanca had a reasonable basis for filing fraud claims against ANE and Nesher and order denying Rule 137 sanctions is affirmed.

¶ 2 Rule 137 Petitioners ANE Corp. (ANE) and Nissim Nesher (hereinafter collectively referred to as petitioners) filed a joint petition for Illinois Supreme Court Rule 137 (eff. Aug. 1, 1989) sanctions against Casablanca Lofts, LLC, Mike Wier and Douglas Lohmar. The petition alleged that the fraud claims made against ANE and Nesher in complaints filed by respondents were not well grounded in fact and law. The trial court denied petitioners' request for Rule 137 sanctions. Petitioners now appeal the trial court's denial of Rule 137 sanctions. For the reasons that follow, we affirm the trial court's ruling.

¶ 3 **BACKGROUND**

¶ 4 Casablanca hired a general contractor as well as several subcontractors to develop a warehouse located in Chicago into condominiums (the project). ANE was the initial electrical subcontractor on the project, and Nesher was the President of ANE. In 2005, Casablanca filed a complaint against numerous defendants involved in the project, alleging claims of fraud and breach of contract arising out of design and construction defects. Wier was the owner and managing member of Casablanca and signed the complaint. Attorney Lohmar, one of the Rule 137 respondents in this case, was the attorney of record for Casablanca. ANE and Nesher were not named as parties in this initial lawsuit.

¶ 5 On July 12, 2007, that matter went to arbitration. The record shows that Lohmar represented Casablanca in the arbitration hearing. Following the hearing, an arbitration panel entered an arbitration award of approximately \$1.5 million in Casablanca's favor and against the project's general contractor, DWG Construction, and architect, Richard Abrham.

¶ 6 In its decision, the arbitration panel made a finding of fact that Casablanca paid ANE \$135,000 for electrical labor and materials. However, the panel found the value of the labor and materials provided by ANE was only worth \$19,000.

¶ 7 Casablanca then filed second, third and fourth verified amended complaints, which named ANE and Nesher as defendants. The complaints alleged that ANE and Nesher fraudulently misrepresented the amount ANE was owed for labor and materials on the project; that these misrepresentations were made in the form of three waivers of lien; that Casablanca relied to its detriment on ANE's waivers of lien; and that as a result Casablanca paid more to ANE and Nesher than was owed.

¶ 8 ANE and Nesher filed a joint motion to dismiss the verified second amended complaint arguing in part that the fraud claims should be dismissed for a lack of specificity. The trial court denied the joint motion to dismiss.

¶ 9 ANE and Nesher then filed a joint motion for summary judgment. In this motion, ANE and Nesher argued that Wier approved the amounts to be paid to ANE before the allegedly fraudulent waivers of lien were created and that the numbers that Wier approved had been calculated by the architect, Richard Abrham, and not ANE or Nesher. Accordingly, ANE and Nesher argued that Casablanca could not prove that it relied on ANE's waivers of lien as alleged in the complaint because the alleged overpayments had been approved by Wier prior to preparation of the waivers of lien, which was fatal to the reliance element of its fraud claims.

¶ 10 On February 10, 2012, the trial court entered a written order denying ANE and Nesher's joint motion for summary judgment. In its order, the trial court judge stated: "Defendants submitted three lien waivers, in the name of ANE, and signed by Mr. Nesher, stating that Defendants had received \$10,000, \$75,000, and \$50,000 from Plaintiff. Conversely, Plaintiff's pleadings allege facts that show that ANE performed, in total, \$4,000 worth of work and left approximately \$15,000 worth of uninstalled equipment on the site. This alone establishes a genuine issue of material fact rendering summary judgment improper."

¶ 11 The matter then proceeded to trial. On the first day of trial, ANE and Nesher filed a motion *in limine* to bar evidence of anything other than direct evidence of ANE's waivers of lien to show how payments were dispersed to ANE. The trial court judge denied the motion *in limine* after Casablanca's attorney made representations to the court that Casablanca relied on an escrow agent who relied on ANE's waiver of lien when making the payments to ANE.

¶ 12 Following Casablanca's case in chief, ANE and Nesher moved for a directed finding pursuant to section 2-1110 of the Code of Civil Procedure (the Code). 735 ILCS 5/2-1110 (West 2010). On June 25, 2012, the trial court judge granted the defendants' motions for a directed finding. During the trial court's oral ruling, the judge made the following comments:

"So I'm really just answering the question did the plaintiff present sufficient evidence to prove the fraud case, and he has to prove that defendant made a false statement with knowledge it was false by clear and convincing evidence, and I just don't think that the plaintiff met this burden with respect to any of the defendants. ***
I mean, he would know something about it, but I just didn't feel that there was clear and convincing evidence that ANE hadn't

earned the 135,000. But even if plaintiff had proved that, there was still no statement by ANE that was false. Because the mechanics liens waivers don't say anything about the amount of work done; and even if they did as Mr. Jaskula pointed out, those lien waivers that ANE signed were signed after Mr. Wier had certified with his owner's sworn statement the payments of those amounts. So he couldn't have relied on the lien waivers. You know, I know that I indicated in pretrial that the escrow agent's reliance could service the plaintiff's reliance, but after considering that further, I don't think that's the case. I couldn't find any law that addressed that specifically and the plaintiff didn't provide me with any, but fraud is a personal tort, I couldn't find any cases where the misrepresentation was made to someone else. *** But, in any event, I think the representation would have to have been made to Mr. Wier as the sole representative of Casablanca Loft. So I don't think the claim was proved against ANE."

¶ 13 After trial, the judge who presided over the trial proceedings retired. ANE and Nesher filed a joint petition for Rule 137 sanctions, as did several other defendants. The case was assigned to a new judge (hereinafter the hearing judge) to conduct the proceedings on the Rule 137 petitions. In their Rule 137 petition, ANE and Nesher argued that Rule 137 sanctions were warranted because Casablanca's fraud claims were not well grounded in fact and law. Specifically, ANE and Nesher argued that Casablanca knew prior to filing any of the complaints that it could not prove the element of reliance, which was fatal to its fraud claims. On October

30, 2012, the hearing judge issued an order denying ANE and Nesher's petition for Rule 137 sanctions. ANE and Nesher then filed successive motions to reconsider their petition for Rule 137 sanctions, which were denied in a written order on August 1, 2013 and a subsequent order on June 19, 2013. Relevant to this appeal, the hearing judge made the following statements in his August 1, 2013 written order:

"It is undisputed, however, that lien waivers were executed by ANE and that they were a condition precedent to payment. [] It is undisputed that ANE received \$135,000. Although Judge McDonald was skeptical about whether ANE actually preformed \$135,000 worth of electrical work, she held that Casablanca failed to prove fraud by clear and convincing evidence, because the lien waivers were silent about the percentage of work completed []. If the procedure described in the arbitration award was followed, the lien waivers would have been given directly to Wier, along with the contractor's sworn statement, by Abrham, and he would have relied upon both the lien waivers and the contractor's statement in approving payments. However, there was a failure of proof in this regard, and Judge McDonald ruled that reliance had not been shown.

A failure of proof is not the same thing as failure to conduct a reasonable inquiry before a complaint is filed, especially where the standard is clear and convincing evidence. Memories fade. Documents are lost. Witnesses become unavailable. In this court's

view, the arbitrator's description of the payment system and the escrow agreement itself created a reasonable factual basis for concluding that Wier relied at least partially on the owner's sworn statement to the escrow agent.

Judge McDonald did not buy Casablanca's argument that the escrow agent was its agent for the purpose of reviewing the lien waivers. However, this does not mean that it is totally without legal basis. *** This court finds that there was an adequate factual basis to support Casablanca's claim that it relied upon the lien waivers and that its agency theory was warranted by existing law."

¶ 14 Several other defendants also filed Rule 137 petitions for sanctions. The final pending petition for sanctions was disposed of on June 19, 2013. On July 16, 2013, ANE and Nesher timely filed a notice of appeal from the order denying their petition for Rule 137 sanctions. For the reasons that follow, we affirm the trial court's denial of sanctions.

¶ 15 ANALYSIS

¶ 16 Standard of Review

¶ 17 Prior to addressing the merits of this appeal, we must first determine what standard of review to apply as the parties disagree on this issue. ANE and Nesher argue that we should apply the *de novo* standard of review because the hearing judge that ruled on its petition for Rule 137 sanctions did not hear live testimony and, therefore, his rulings were solely based on the pleadings, depositions, transcript, or evidence otherwise documentary. Appellees argue that we should apply the abuse of discretion standard because this is the standard of review that Illinois

courts have adhered to when reviewing a ruling on a petition for Rule 137 sanctions, even where an evidentiary hearing was not held.

¶ 18 Here, the hearing judge did not preside over any proceedings prior to the petitions for Rule 137. The hearing judge also did not hold an evidentiary hearing on ANE and Nesher's Rule 137 petition. As such, because the hearing judge's ruling was based entirely on the same documentary record now before us, we find that a deferential standard of review is not warranted, and apply the *de novo* standard of review here. See *Mohica v. Cvejic*, 2013 IL App (1st) 111695, ¶ 50; *Alderson v. Southern Co.*, 321 Ill. App. 3d 832, 846 (2001) ("When the trial court hears no courtroom testimony and determines jurisdiction solely on the basis of documentary evidence, the trial court is not in a better position than the reviewing court to assess credibility or weigh the evidence. Therefore, in this situation, the standard of review is *de novo*.").

¶ 19 In *Mohica*, the court noted that the "deferential standard is applied because generally the conduct at issue occurred before the judge issuing the sanctions, who, therefore, is in the best position to determine whether the challenged conduct warranted penal sanctions or because the trial court heard testimony from individuals involved in the challenged conduct." *Mohica*, 2013 IL App (1st) 111695. However, in *Mohica*, like in this case, "the second judge neither observed the conduct underlying the sanctions ***, nor heard live testimony related to the challenged filing." As a result, the court in *Mohica*, although ultimately reversing the trial court's issuance of sanctions under either the abuse of discretion or *de novo* standard, questioned the applicability of the abuse of discretion standard in that case. For the same reasons that were emphasized in *Mohica*, we now find that the abuse of discretion standard is not appropriate in this case and apply the *de novo* standard of review.

¶ 20

Denial of Rule 137 Sanctions

¶ 21 ANE and Nesher argue that Rule 137 sanctions were warranted here because they claim that Casablanca knew prior to filing its complaints that it could not prove the element of reliance, which made it impossible for Casablanca to succeed on its fraud claims. The trial court disagreed and found that there was a reasonable basis in fact and law for Casablanca to allege fraud claims against ANE and Nesher. Like the trial court, we now find that there was a sufficient basis in fact and law for Casablanca to file its fraud claims against ANE and Nesher.

¶ 22 Rule 137 provides in pertinent part the following:

“Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name * * *. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” Ill. S. Ct. R. 137 (eff. Aug. 1, 1989).

Rule 137 was adopted to discourage false and frivolous pleadings and to punish those who file groundless lawsuits. *Gershak v. Feign*, 317 Ill. App. 3d 14, 23 (2000); see also *Olsen v. Staniak*, 260 Ill. App. 3d 856, 864 (1994) (the purpose of imposing the sanction is to prevent abuse of the judicial process and punish a party who brings vexatious litigation predicated upon false

statements). The party requesting the imposition of Rule 137 sanctions bears the burden of proof and must show that the opposing party made untrue and false allegations without reasonable cause for the mere purpose of invoking harassment or undue delay of the proceedings. See *Technology Innovation Center Inc. v. Advanced Multiuser Corp.*, 315 Ill. App. 3d 238, 243-44 (2000). Courts should use an objective standard in determining what was reasonable under the circumstances as they existed at the time of filing. *Sanchez v. City of Chicago*, 352 Ill. App. 3d 1015, 1020 (2004); *Whitmer v. Munson*, 335 Ill. App. 3d 501, 514 (2002). Because of Rule 137's penal nature, courts must construe it strictly, must make sure the proposing party has proven each element of the alleged violation with specificity, and should reserve sanctions for the most egregious cases. See *Dowd & Dowd v. Gleason*, 181 Ill. 2d 460, 487 (1998); *Technology Innovation*, 315 Ill. App. 3d at 244; *Webber v. Wight & Co.*, 368 Ill. App. 3d 1007, 1032 (2006). "The rule is not intended to penalize litigants and their attorneys because they were zealous but unsuccessful in pursuing an action." *Nelson v. Chicago Park District*, 408 Ill. App. 3d 53, 67-68 (2011). "A court should not impose sanctions on a party for failing to conduct an investigation of facts and law when the party presents objectively reasonable arguments for his or her position, regardless of whether those arguments are unpersuasive or incorrect." *Patton v. Lee*, 406 Ill. App. 3d 195, 202 (2010); *Webber*, 368 Ill. App. 3d at 1034.

¶ 23 There Was A Reasonable Basis for Filing Fraud Claims Against ANE and Nesher

¶ 24 Based upon our review of the record, we find that there was a reasonable basis for filing fraud claims against ANE and Nesher such that Rule 137 sanctions are not warranted here.

Courts should use an objective standard in determining what was reasonable under the circumstances as they existed at the time of filing. *Sanchez*, 352 Ill. App. 3d at 1020; *Whitmer*, 335 Ill. App. 3d at 514. At the time of filing the claims against ANE and Nesher, it is undisputed

that attorney Lohmar attended the arbitration in 2007, and that from the findings issued by the panel of arbitrators at the arbitration, it was discovered that ANE collected \$135,000 from Casablanca for only \$19,000 worth of electrical work. Although the arbitration findings are not binding upon us, those facts that became known to attorney Lohmar, Casablanca and Wier following the arbitration are relevant because they form part of the reasonable inquiry and knowledge that the Rule 137 respondents had when filing the complaints. Further, even though there was some dispute about when and how the information contained in the waivers of lien was presented to Wier, it is also undisputed that the waivers of lien, which were in ANE's name and signed by Nesher, were a condition precedent to ANE receiving payment from Casablanca for any electrical work, meaning that the waivers of lien were prerequisites to the overpayments being made. Moreover, Casablanca was the only named plaintiff in the lawsuit and, as a limited liability company, any actions of payment had to be made through its agents. When reviewing a petition for Rule 137 sanctions, "[a] court should not impose sanctions on a party for failing to conduct an investigation of facts and law when the party presents objectively reasonable arguments for his or her position, regardless of whether those arguments are unpersuasive or incorrect." *Patton*, 406 Ill. App. 3d at 202. Here, at the time Casablanca filed its fraud claims, it knew that ANE created and Nesher signed the waivers of lien, which were a condition precedent to any payments being made to ANE, and it knew that it had paid ANE \$135,000 for only \$19,000 worth of work. We believe these facts establish "objectively reasonable arguments" for filing fraud claims against ANE and Nesher. See *id.*

¶ 25 Although ANE and Nesher argue that it was improper for the trial court to consider the arbitration findings when determining whether there was a reasonable basis for Casablanca to file fraud claims against them, we find no case law that stands for this proposition, and the cases

offered by ANE and Nesher in support of this argument are distinguishable as they do not deal with sanctions under Rule 137 (or Rule 137's predecessor section 2-611 of the Code) where the court is tasked with determining whether there is a reasonable basis for filing a lawsuit. See *Daniel Woodward Senior v. Daniel Woodward Junior*, 14 Ill. 370 (1853) (in dispute over ownership of a mare, court found that findings made by arbitrators could not be used in a separate matter against a third party where the findings of the arbitrators did not decide the issue at hand); *Knox Motor Service, Inc. v. Illinois Commerce Commission*, 77 Ill. App. 3d 390 (1979) (Illinois Commerce Commission's findings which were found to have an insufficient factual basis could not be part of the record on appeal.). Further, the cases cited by ANE and Nesher dealt with arbitration findings that were used against a party in a separate proceeding when that party was not present at the arbitration in the initial proceedings. Here, however, the arbitration findings are not being used against ANE or Nesher in a separate proceeding. Rather, they are being used to determine whether there was a reasonable basis for *Casablanca* to file its fraud claims in the context of Rule 137 proceedings.

¶ 26 Moreover, as noted by Appellees, the arbitration findings were attached to the complaints as support for *Casablanca*'s fraud claims. ANE and Nesher never objected to this attachment, which made the findings a part of the record. Further, throughout the course of this litigation, both parties referred to the arbitration findings in their motions, responses, replies etc. Accordingly, we do not agree with petitioners' argument that it was improper for the hearing judge to consider the arbitration findings when determining whether there was a reasonable basis for *Casablanca* to file its fraud claims.

¶ 27 It should also be noted that *Casablanca* defeated ANE and Nesher's motion to dismiss the fraud claims and motion for summary judgment on the fraud claims. Neither of these rulings

was appealed. Only after ANE and Nesher were granted a directed verdict in their favor did they seek Rule 137 sanctions and appeal the trial court's denial of those sanctions. Accordingly, for all the reasons stated in this order, we find that Casablanca had a reasonable basis for filing fraud claims against ANE and Nesher such that the trial court was correct in denying Rule 137 sanctions.

¶ 28 Notwithstanding our finding above that Rule 137 sanctions are not warranted here, we note that ANE and Nesher made several additional arguments that we address below. First, a large part of ANE and Nesher's argument is based upon their allegations that the hearing judge's ruling on Rule 137 sanctions improperly made findings that differed from the trial court's findings that were made when ruling on the directed verdict motions. We disagree with this argument. When the trial court judge made findings in her ruling on ANE and Nesher's motion for a directed finding pursuant to section 2-1110 of the Code, she had to determine whether Casablanca had fulfilled all the elements of fraud by clear and convincing evidence. *Baker v. Jewel Food Stores, Inc.*, 355 Ill. App. 3d 62, 62-68 (2005) (Generally, in ruling on a section 2-1110 motion, such evidence must prove plaintiffs' case by a preponderance of the evidence; however, when the underlying cause of action requires a clear and convincing standard of proof, the evidence must meet the higher standard); *Los Amigos Supermarket, Inc. v. Metropolitan Bank & Trust Co.*, 306 Ill. App. 3d 115, 127 (1999) (Fraud must be proven by clear and convincing evidence.). As such, when the trial court judge found that there was no false statement or that Casablanca could not have relied on the lien waivers, she was doing so in the context of determining whether Casablanca had proven reliance by clear and convincing evidence. Consequently, in her ruling, the trial court judge specifically stated: "So I'm really just answering the question did the plaintiff present sufficient evidence to prove the fraud case,

and he has to prove that defendant made a false statement with knowledge it was false by clear and convincing evidence, and I just don't think that the plaintiff met this burden with respect to any of the defendants."

¶ 29 Proving fraud by clear and convincing evidence carries a significantly higher evidentiary burden than merely showing that there was a reasonable basis for filing a fraud claim in the first place, and one can certainly have a reasonable basis for pleading fraud, but then fail to prove it by clear and convincing evidence at trial.¹ If we were to adopt ANE and Nesher's argument here—that findings of fact and law made during a directed verdict ruling and subject to the clear and convincing evidentiary standard must dictate whether there was a reasonable basis for filing the claim when ruling on a Rule 137 petition—then every party that fails to meet its burden at trial would be sanctioned under Rule 137. Not only would this be an absurd result, but it would erode the very purpose of Rule 137 altogether as "[t]he rule is not intended to penalize litigants and their attorneys because they were zealous but unsuccessful in pursuing an action." *Nelson*, 408 Ill. App. 3d at 67-68.

¶ 30 Moreover, the trial court judge's directed verdict findings, which were made after plaintiff's case at trial, were made well after the complaints were filed. Therefore, because a petition for Rule 137 sanctions is to be decided based on the "circumstances as they existed at the time of filing," (*Whitmer*, 335 Ill. App. 3d at 514), and the trial court judge's directed verdict findings were made in hindsight, such hindsight findings should not be considered when

¹ "Although a [sanctions] award is necessarily tied to allegations and denials made by a litigant who pleads false or frivolous matter, it is clear that a finding under the provision of the section requires an independent determination distinct from any previous judgment or order entered in the suit." *Withall v. Capitol Federal Savings of America*, 164 Ill. App. 3d 851, 854 (1987); see also *Marsh v. Evangelical Covenant Church of Hinsdale*, 138 Ill. 2d 458, 462 (1990).

determining whether to issue Rule 137 sanctions. *Shea, Rogal & Associates, Ltd. v. Leslie Volkswagen, Inc.*, 250 Ill. App. 3d 149, 153 (1993) ("In evaluating the signing party's conduct in this regard, a court must consider reasonableness based upon circumstances existing at the time the pleading was filed, rather than engage in hindsight.").

¶ 31 ANE and Nesher also argue that the hearing judge erred in considering Casablanca's agency theory of reliance—that its escrow agent relied on ANE's lien waivers to make payments to ANE—because: (1) the trial court judge found no law to support that theory and (2) because the theory was never plead in any of the complaints. First, while the trial court found that no case law existed to support Casablanca's agency theory of reliance, this finding holds little weight when ruling on a Rule 137 petition. Rule 137 clearly disallows sanctions where a party makes a good faith effort "for the extension, modification, or reversal of existing law." Ill. S. Ct. R. 137 (eff. Aug. 1, 1989). Thus, even if there was absolutely no case law to support Casablanca's agency theory of reliance, we find that the theory would be a good faith basis to extend the existing law on reliance, especially in light of the fact that sanctions are not to be imposed where "a party presents objectively reasonable arguments for his or her position, *regardless of whether those arguments are unpersuasive or incorrect.*" (Emphasis added.) *Patton*, 406 Ill. App. 3d at 202; *Webber*, 368 Ill. App. 3d at 1034.

¶ 32 With respect to ANE and Nesher's argument that Casablanca's agency based theory of reliance needed to be plead within the complaint in order for it to argue the theory, we find that this argument holds little weight as well given that: (1) ANE and Nesher never properly challenged the failure to plead the theory in a motion to dismiss, and (2) the theory had been discussed at various times throughout the litigation. Further, Rule 137 does not limit what facts can establish a reasonable basis for filing a claim to only those allegations contained within the

complaint. Rather, as long as there is an objective reasonable basis for filing the claim, regardless of whether those arguments are unpersuasive or incorrect, Rule 137 sanctions are inappropriate. See *Patton*, 406 Ill. App. 3d at 202; *Webber*, 368 Ill. App. 3d at 1034. As such, we find that the hearing judge did not improperly alter any of the findings made by the trial court judge and did not improperly consider facts outside the complaints.

¶ 33 CONCLUSION

¶ 34 For the reasons stated above, we affirm the trial court's denial of petitioners' request for Rule 137 sanctions against Casablanca, Wier and Lohmar.

¶ 35 Affirmed.