2016 IL App (1st) 152139-U

FIRST DIVISION
September 26, 2016

No. 1-15-2139

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

VISTA HOME HEALTH, LLC, MARILOU LOZADA, and MARYANN ALABA,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellees,	)	
v.	)	No. 09 CH 50544
JOHN PANALIGAN, JENNETH PANALIGAN, JNJ MANAGEMENT GROUP LIMITED, VITAL WELLNESS HOME HEALTH, INC., and VITAL WELLNESS HOME HEALTH AT CHICAGO, INC.,	)	Honorable Kathleen M. Pantle, Judge Presiding.
Defendants-Appellants.	)	

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Connors and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's decision to issue sanctions against defendants for discovery noncompliance was not an abuse of discretion.

¶ 2 The circuit court entered an order for sanctions against defendants in this contract case pursuant to Illinois Supreme Court Rule 219(c) for failure to provide discovery, granted plaintiffs' petition for attorney fees and costs pursuant to the sanction order, and entered

judgment on the attorney fees and costs after defendants failed to pay in the time specified by the order. Defendants appeal on the basis that the circuit court abused its discretion. For the following reasons, we affirm the decision of the circuit court.

¶ 3 BACKGROUND

¶ 4 Plaintiffs in this case are Vista Home Health, LLC, Marilou Lozada, and Maryann Alaba. Defendants are John Panaligan, Jenneth Panaligan, JNJ Management Group Limited, Vital Wellness Home Health, Inc., and Vital Wellness Home Health at Chicago, Inc.

¶ 5 Vital Wellness Home Health at Chicago, Inc., (Vital Chicago) was created as a joint venture funded in equal parts by one of the plaintiffs, Vista Home Health, LLC, (Vista) and one of the defendants, JNJ Management Group Limited (JNJ). JNJ is a corporation comprised of the three individuals who own Vital Wellness Home Health at Chicago, Inc., including John and Jenneth, the latter of whom serves as the president of JNJ. The third amended complaint, which is the operative complaint for this appeal, states that under the operating agreement, Vista and JNJ would each initially contribute $20,000 to cover start-up costs for Vital Chicago, that the members of Vista would receive 50% of the shares in Vital Chicago, and that Vital Chicago would distribute profits quarterly to the shareholders. Plaintiffs allege that, on or about April 28, 2006, Vital Chicago was federally licensed to operate as a home health agency and was issued a unique branch identification number.

¶ 6 Plaintiffs' claims against defendants are as follows. Count I is a claim of breach of contract by Vista against JNJ, asserting that JNJ failed to share 50% interest in the joint venture's profits as required by the operating agreement. Counts II and III are claims of breach of fiduciary duty brought by Lozada and Alaba against John and Jenneth. Those two counts allege that John and Jenneth imposed a management fee upon Vital Chicago without plaintiffs' consent; failed to

keep accurate records of Vital Chicago's Medicare payments; misappropriated the income, assets, and property of Vital Chicago for their personal benefit; and refused plaintiffs' requests for access to Vital Chicago's financial books and records. Count IV is a claim of fraudulent inducement by Lozada against John and Jenneth, alleging that they intentionally made false statements to her to induce her to enter into the joint venture and remain a shareholder of Vital Chicago. Count V, brought by Lozada and Alaba, alleges tortious interference with prospective economic advantage by John and Jenneth for purposefully interfering with a potential sale of Lozada and Alaba's shares in Vital Chicago. Count VI, brought by Lozada and Alaba and pled in the alternative, is a claim of unjust enrichment against John, Jenneth, and JNJ for their monetary gains resulting from their breaches of fiduciary duties, fraud, and misrepresentations described in the previous counts. No specific claims are made against Vital Wellness Home Health, Inc., or Vital Chicago, other than to allege that they are owned and controlled by John and Jenneth.

¶ 7 On December 10, 2012, plaintiffs tendered identical second requests for production to John and Jenneth, which each consisted of 13 specific document requests and a request for an affidavit that production was complete. These are the discovery requests that led to the orders that are the subject of this appeal. The requests primarily sought financial documents, including copies of federal income tax returns, bank account statements, profit and loss statements, and monthly credit card statements for John, Jenneth, Vital Wellness Home Health, Inc., and Vital Chicago.

¶ 8 On May 7, 2013, after obtaining multiple extensions, John and Jenneth responded separately but identically to the requests. John and Jenneth's responses were, for the most part, a collection of generic objections. For example, plaintiffs' first request was for "[c]opies of federal

income tax returns for the year 2008 for the entity known as Vital Wellness Home Health, Inc. (Naperville)." Both John and Jenneth provided the same answer to that request, as follows:

> "Objection; relevance, unduly burdensome, seeks information which may be subject to privilege, not reasonably calculated to lead to admissible evidence. Further objecting, any financials regarding Vital Wellness Home Health, Inc. are irrelevant to the finances of Vital Chicago, which is the subject of this litigation. Without waiving any objection, this Defendant states that Plaintiffs have yet to allege and/or demonstrate a proper purpose in seeking to examine the documents set forth in Request No. 1."

That answer is typical of the responses John and Jenneth provided for each of plaintiffs' requests. In response to nearly all of the requests, John and Jenneth objected based on "relevance," because the requests were "unduly burdensome" or "overly broad," or because plaintiffs were "seek[ing] information which may be subject to privilege" and was not "reasonably calculated to lead to admissible evidence."

¶ 9 On June 25, 2013, asserting that defendants had not fully complied with the discovery requests, plaintiffs filed a motion to compel. The circuit court granted their motion on August 5, 2013, rejecting defendants' relevancy objections and ordering defendants to produce "all documents" sought in the second requests for production. This order, like the other circuit court orders discussed below, was directed to "defendants" as a group. Plaintiffs' motion to compel also included a request for sanctions, which the court initially took under advisement.

¶ 10 In a three-page order dated September 6, 2013, the circuit court found that "sanctions [were] not warranted at [that] stage of proceedings." The court stated that it believed the delay was caused by a "disagree[ment] as to the scope and relevancy of discovery" and that defendants

did not "intend[ ] to be obstructionists or disrespectful of the Supreme Court Rules or the Court." However, the court also clarified that the requested documents are "both relevant and within the scope of the lawsuit" and stated:

> "The Court will caution Defendants, however, that it will not tolerate any further delays in the case or any attempts to impede[ ] the flow of discovery. Defendants are to promptly respond to requests for 201(k) conferences in the event of future discovery disputes. Defendants are also not to engage in obstructionist, evasive, or otherwise dilatory tactics in written or oral discovery. Answers given in the course of depositions must be complete, truthful, and non-evasive."

¶ 11 On September 19, 2013, plaintiffs filed a "Petition for Order for Rule to Show Cause and for Sanctions." Plaintiffs claimed that, as of that date, defendants had still failed to comply with the August 5, 2013 order requiring production in response to plaintiffs' requests. On October 1, 2013, all five defendants jointly served their "Amended Responses to Plaintiffs' Second Request for Production of Documents" and, in open court, defense counsel tendered to plaintiffs' counsel an envelope ostensibly containing documents produced in connection with those amended responses. On November 5, 2013, all five defendants jointly served their "Supplement to Amended Responses to Plaintiffs' Second Request for Production of Documents."

¶ 12 The record is unclear as to precisely what documents defendants produced in connection with their October 1, 2013 amended responses to plaintiffs' requests and their November 5, 2013 supplement to those responses. It is clear, however, that the circuit court found the responses to be inadequate. In a November 19, 2013 order, the court directed defendants to provide documents responsive to 4 of the original 13 specific requests and then, in a December 11, 2013

order, 7 of those requests, by specific dates. The December 11, 2013 order also granted plaintiffs leave to file a petition for attorney fees and costs relating to their motions to compel and petitions.

¶ 13 On January 15, 2014, the circuit court ordered defendants to produce "missing responses," as required by its December 11, 2013 order, or provide affidavits attesting to the unavailability of the documents by February 13, 2014. At the January 15 hearing, defense counsel tendered an affidavit from Jenneth in which she claimed to be unable to obtain various records, including bank account statements for Vital Wellness Home Health, Inc. from January 2006 through April 2007, and bank account statements for her and John at TCF Bank between January 2006 and April 2006. She stated that it was "[her] understanding that according to TCF Bank, said statements are unavailable after seven (7) years." This statement was confirmed in an affidavit from a TCF Bank representative, attached to a motion for protective order subsequently filed by defendants, in which the representative stated, "[b]anks are only required to retain records for 7 years. Any records prior to March 2007 are unavailable."

¶ 14 On March 6, 2014, the circuit court granted plaintiffs' petition for attorney fees and costs totaling $13,323.48, based on the fee petition that plaintiffs had filed on January 2. Defendants were ordered to make this payment within 60 days. This payment was apparently eventually made, albeit belatedly, and is not a part of this appeal.

¶ 15 On June 17, 2014, plaintiffs filed the motion for sanctions that led to the orders that are the subject of this appeal. Relevant to this appeal, plaintiffs argued that certain bank records had been lost forever because of the delay in production, that defendants had still not fully produced the documents requested, that they continued to make frivolous objections to production, and that they had filed a false affidavit of completeness under Illinois Supreme Court Rule 214. The

specific sanctions plaintiffs sought included barring defendants from filing pleadings, calling witnesses, or making claims related to the discovery requests and ordering defendants to compensate plaintiffs for attorney fees and costs associated with their motion for sanctions and related pleadings.

¶ 16 On December 29, 2014, the circuit court granted plaintiffs' motion and found that "further sanctions [were] warranted" for defendants' "failure to fully and completely respond to the Plaintiffs' Second Request for Production of Documents" and "for Defendants' failure to make sure that the various banking institutions at which Defendants had their accounts did not destroy documents." In its seven-page order, the court explained in detail its rationale for issuing sanctions against defendants (discussed below), and concluded with the following warning and instructions:

> "If Defendants have not complied with the discovery that is called for in Plaintiff's Second Request for Production of Documents ("Second Request") on or before 5:00 p.m. on January 15, 2015, the Court will bar Defendants (1) from eliciting testimony from any witness, whether that witness was called by Plaintiffs or Defendants, about any issue related to the discovery sought in the Second Request; (2) from filing any other responsive pleading regarding any issue to which the discovery sought in the Second Request relates; and (3) from making any particular claim, counterclaim, third party complaint or defense relating to any issue to which the discovery sought in the Second Request relates. This is a self-executing Order.

> Additionally, Defendants are ordered to pay Plaintiffs their attorney fees and costs incurred in connection with this Motion for Sanctions even if they comply with the outstanding discovery in the Second Request by January 15, 2015. Plaintiffs are directed to prepare a Petition for Attorney Fees."

Defendants' motion to reconsider that order was denied on February 20, 2015.

¶ 17 On January 16, 2015, plaintiffs filed a petition for attorney fees as directed by the circuit court. The court accepted plaintiffs' petition in full in an order dated June 3, 2015, finding the petition sufficient to show plaintiffs were entitled to the amount requested and that the fees sought were reasonable. The court awarded plaintiffs $15,269.46 and directed defendants to pay that amount within 21 days of the order. The order stated, "[s]hould defendants fail to pay the attorney fees and costs within that time period, this Order will be converted to a Judgment in favor of Plaintiffs on this issue." Defendants' motion to reconsider this order was denied.

¶ 18 On July 21, 2015, the court entered a "Judgment Order" which stated that (1) defendants failed to comply with the June 3, 2015 order; (2) the June 3, 2015 order was self-executing and converted to judgment upon noncompliance by defendants, and (3) judgment was entered in the amount of $15,269.46. The order also included language providing for its immediate enforcement or appeal pursuant to Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Feb. 10, 2010)).

¶ 19 ANALYSIS

¶ 20 Defendants' notice of appeal references the following orders: (1) the December 29, 2014 order granting plaintiffs' motion for sanctions and the February 20, 2015 order denying defendants' motion for reconsideration; (2) the June 3, 2015 order granting plaintiffs' petition for attorney fees and costs and the July 21, 2015 order denying defendants' motion for

reconsideration; and (3) the July 21, 2015 entry of judgment. Although only the July 21, 2015 order of judgment includes language conferring the right to an immediate appeal, the other four orders directly relate to the circuit court's July 21, 2015 order and are a part of this appeal. We thus have jurisdiction pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010).

¶ 21 A. Defendants' Motion to Strike

¶ 22 We first address defendants' March 8, 2016 "Motion to Strike Facts and Arguments in Appellees' Brief." In that motion, defendants assert that plaintiffs fail to properly cite to the record, misrepresent facts in the record, and reference exhibits purportedly attached to the brief that are not actually attached. Defendants also contend that plaintiffs acted improperly by raising arguments on appeal that were not made to the circuit court, and by citing an unpublished decision, which has no precedential value.

¶ 23 Illinois Supreme Court Rules 341(h)-(j) (eff. Feb. 6, 2013) detail what each party's brief on appeal must contain and how the information must be presented. Compliance with this rule is mandatory and an appellate court may strike a party's brief for noncompliance with it. *In re County Treasurer*, 2015 IL App (1st) 133693, ¶ 19. Furthermore, "[a]ttachments to briefs that are not otherwise of record are not properly before this court and will not be considered." *In re Marriage of Kuyk*, 2015 IL App (2d) 140733, ¶ 21. However, striking a brief, in whole or in part, is "a harsh sanction and is appropriate only when the violations hinder our review." *Gruby v. Department of Public Health*, 2015 IL App (2d) 140790, ¶ 12.

¶ 24 We agree with defendants that plaintiffs blatantly ignored Rule 341(h)(6) by rarely citing to the record and often citing to exhibits to their own brief without any record citations, leaving this court to guess which of these exhibits were in the record and where they might be found. We are also aware that plaintiffs cited some documents that do not appear to be in the record at all.

However, we do not find it necessary to strike plaintiffs' brief in whole or in part, since these improprieties did not hinder our review, although they did make it considerably more burdensome. Instead, we have simply ignored any references to plaintiffs' "Exhibits," since it is not clear which of them are in the record. We have also disregarded any statements that draw support from an unpublished order issued pursuant to Illinois Supreme Court Rule 23 (eff. Jan. 1, 2011).

¶ 25 Defendants also argue that plaintiffs improperly raise arguments that were not presented to the circuit court when it rendered its decisions. However, the cases cited by defendants support only the proposition that an *appellant* is precluded from raising new arguments on appeal. See *In re the Visitation of J.T.H.*, 2015 IL App (1st) 142384, ¶ 27; *Allstate Property & Casualty Insurance Co. v. Trujillo*, 2014 IL App (1st) 123419, ¶ 17; *People v. Smith*, 2012 IL App (1st) 113591, ¶ 20. As the appellees, plaintiffs are seeking to uphold the circuit court's judgment, and therefore "may urge any point in support of the judgment on appeal, as long as a factual basis for such point was before the trial court." *Jinkins v. Lee*, 337 Ill. App. 3d 403, 417 (2003).

¶ 26 B. The Circuit Court's Sanctions Orders

¶ 27 A court may impose sanctions pursuant to Illinois Supreme Court Rule 219(c) (eff. July 1, 2002) against any party which "unreasonably fails to comply" with discovery or any court order. Rule 219(c) grants the court the authority to stay proceedings, prohibit a party from raising specific claims or defenses, enter default judgment, or dismiss the action. Ill. S. Ct. R. 219(c) (eff. July 1, 2002). Additionally, courts "may impose upon the offending party or his or her attorney, or both, an appropriate sanction, which may include an order to pay to the other party

or parties the amount of reasonable expenses incurred as a result of the misconduct, including a reasonable attorney fee." *Id.*

¶ 28 The purpose of imposing sanctions under this rule is to "coerce compliance with discovery rules and orders, not to punish the dilatory party." *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 123 (1998). Sanctions are used "to combat abuses of the discovery process and maintain the integrity of the court system." *Locasto v. City of Chicago*, 2014 IL App (1st) 113576, ¶ 27. Sanctions imposed by a court for discovery violations "must be just and proportionate to the offense." *Gonzalez v. Nissan North America, Inc.*, 369 Ill. App. 3d 460, 464 (2006).

¶ 29 In deciding whether to issue sanctions, the circuit court must consider the following factors: "(1) surprise to the adverse party; (2) the prejudicial effect of the proffered evidence; (3) the nature of evidence being sought; (4) diligence of the adverse party in seeking discovery; (5) timeliness of the adverse party's objection to the testimony or evidence; and (6) the good faith of the party offering the evidence." *Locasto*, 2014 IL App (1st) 113576, ¶ 26. Those same factors are considered by the reviewing court in determining whether the circuit court abused its discretion to issue sanctions. *Id.* No single factor controls whether a court may issue sanctions; "each situation presents a unique factual scenario that bears on the propriety of a particular sanction." *Id.*

¶ 30 The decision to impose a sanction under Rule 219(c) is discretionary and, therefore, "only a clear abuse of discretion justifies reversal." *Shimanovsky*, 181 Ill. 2d at 120. A trial court abuses its discretion only when its decision is "fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it." *People v. Ortega*, 209 Ill. 2d 354, 359 (2004). This is the standard that applies to this appeal.

¶ 31 1. The Order of December 29, 2014

¶ 32 We begin with a review of the circuit court's December 29, 2014 order. The order states that plaintiffs sought sanctions because of defendants' failure to "fully and completely respond" to plaintiffs' second requests for production and defendants' "failure to make sure that the various banking institutions at which Defendants had their accounts did not destroy documents." The court explained its justification for sanctions in relation to the *Locasto* factors:

> "Defendants cannot claim to be surprised because the discovery sought by Plaintiffs has been the subject of numerous Court Orders. The prejudicial effect of the evidence is plain—Plaintiffs seek, among other things, damages for various breaches of fiduciary duty, *e.g.* misappropriating the income and assets of Vital Chicago for Defendants' personal benefit and causing or permitting revenue and property belonging to Vital Chicago to be delivered to Defendants and/or other entities owned or controlled by Defendants. Certainly, the records sought by Plaintiffs could shed light on whether Defendants are misappropriating funds. The nature of the evidence is important because Plaintiffs are seeking an accounting, among other things, and a full and fair accounting cannot be completed without these records. Plaintiffs could not fully and fairly assess the accuracy of any accounting produced by Defendants that may be ordered by the Court without the records.
>
> Defendants have not timely sought discovery. Defendants' objections are not timely and they often repeat objections that the Court has ruled upon. Defendants have not been proceeding in good faith, either.

> They repeat baseless objections and meritless arguments; they ignore Court Orders; they mis-cite the Committee Comments to Rule 219; they tried to mislead the Court that Plaintiffs have not reserved the right to reconvene depositions even though on several occasions, Plaintiffs did reserve the right to reconvene depositions; they failed to ask the banks to preserve the records; they failed to timely request records from the banks, the result of which some of the records have been destroyed due to the banks' federally authorized document destruction policy; and they fail to pay the fees necessary to obtain bank records from Inland Bank and then falsely claim that Inland Bank destroyed the records.
>
> In short, in weighing all the factors, sanctions are appropriate."

¶ 33 We find that the circuit court's analysis is fully supported by the record and not an abuse of discretion. The court thoughtfully weighed the factors outlined in *Locasto* and concluded that sanctions in the form of attorney fees and costs were appropriate. Prior to entering the December 29, 2014 order, the court had already issued several orders compelling discovery and one order requiring defendants to pay attorney fees. In its December 29, 2014 order, the court did not take any action to impede defendants' ability to litigate the case, although it made clear such sanctions would be considered in the future. The order reflects a measured response to a party's evasive, inappropriate, and dilatory behavior in discovery.

¶ 34 Defendants make a myriad of arguments as to why the imposition of sanctions was an abuse of discretion. Most of them are some variation on their theme that they should have never been ordered to produce this discovery. None of these arguments have merit.

¶ 35 First and foremost, defendants continue in this appeal to persist in their argument that the discovery sought by plaintiffs was irrelevant. This argument hinges on defendants' contention that Vital Chicago was not a licensed home health agency and therefore could not legally generate a profit. As part of this argument, defendants contend that viewing this discovery as relevant would be "inconsistent with the court's own prior rulings." We find this relevance argument unpersuasive.

¶ 36 The Illinois Supreme Court discovery rules require parties to provide "full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party." Ill. S. Ct. R. 201(b)(1) (eff. July 1, 2014). The circuit court is given "great latitude in determining the scope of discovery" and the range of discoverable information includes not only what is admissible at trial, but also what may lead to admissible evidence. *D.C. v. S.A.*, 178 Ill. 2d 551, 555 (1997).

¶ 37 Defendants have raised relevance objections to plaintiffs' second discovery requests beginning with their initial response in May 2013. In its September 2013 order, the circuit court "agreed with Plaintiffs that the discovery they sought was both relevant and within the scope of the lawsuit." In its December 2014 sanctions order, the court again addressed relevance, explaining that the bank records sought were necessary to assess "damages for various breaches of fiduciary duty" alleged by plaintiffs and "could shed light on whether Defendants are misappropriating funds." The court noted that plaintiffs were seeking an accounting and they "could not fully and fairly assess the accuracy of any accounting produced by Defendants that may be ordered by the Court without the records." All of these findings appear to be correct and certainly none of them are an abuse of discretion.

¶ 38 The complaint includes allegations that defendants imposed improper fees, failed to keep accurate financial records, and misappropriated income and assets for personal benefit. The relevance of financial records such as bank accounts, credit cards, and income tax statements seems obvious. Defendants' argument that Vital Chicago was not a licensed home health agency and therefore could not legally generate a profit that plaintiffs would be entitled to part of, while perhaps a factual issue related to what plaintiffs can ultimately recover, does not control whether these financial records are discoverable. Given the "great latitude" given to circuit courts in determining the scope of discovery, the court here surely did not commit a reversible error in compelling this production.

¶ 39 Defendants' argument that ordering production of this discovery was "inconsistent with the court's prior rulings" also misses the mark. Defendants cite to the circuit court's February 18, 2011 order dismissing portions of plaintiffs' first amended complaint:

> "To the extent that Plaintiffs seek profits and distributions from home health care services, those claims for damages are stricken as it would be unlawful for Vital Chicago to receive such payments without a license. If Vital Chicago is licensed as a home health agency, Plaintiffs are granted leave to amend to include that allegation."

¶ 40 This order did *not* make a finding that Vital Chicago was not a licensed home health agency, but instead gave plaintiffs leave to make that allegation, which plaintiffs did in the operative complaint. It appears that the question of whether Vital Chicago is a licensed home health agency is an ongoing one in this litigation.

¶ 41 Moreover, even if Vital Chicago is found not to be a licensed home health agency that could generate profits, this would not render the requested financial information irrelevant, as the court made clear in next paragraph of the same February 2011 dismissal order:

> "However, in any event, Plaintiffs correctly argue that, even if they are not entitled to home health care profits, Plaintiffs have still sufficiently alleged that they are entitled to examine the books and records and to also receive distributions as they are shareholders. Plaintiffs' Complaint is not limited to a claim that they are entitled to profits from home health care; Plaintiffs allege they are entitled to profits. The exact amount of distributions, if any, Plaintiffs are entitled to receive can only be determined after trial."

¶ 42 In addition to their relevance objections, defendants argue that they should not have been required to produce this discovery, both because the circuit court was requiring them to create new evidence and because they had no obligation to obtain documents from the banks since plaintiffs could have subpoenaed those documents themselves. Neither of these arguments is persuasive.

¶ 43 First, defendants were never required to create documents. The present case is completely different from *Trannel v. Prarie Ridge Media, Inc.*, 2013 IL App (2d) 120725, which defendants cite for the proposition that a party has no obligation to create records that simply do not exist. *Trannel*, 2013 IL App (2d) 120725, ¶ 30. In contrast, the documents plaintiffs sought in this case already existed. Defendants just needed to obtain them.

¶ 44 Second, a party need not physically possess a document in order to have possession and control of it. *Hawkins v. Wiggins*, 92 Ill. App. 3d 278, 282 (1980). As the court noted in

Hawkins, "[p]ossession *** may be constructive as well as physical." (Internal quotation marks omitted.) *Id.* Where a party has the right to obtain certain documents, it is "no defense" to the failure to comply with the discovery request "that the records were not in [the party's] actual physical control." *Id.*; see also *Franzen v. Dunbar Builders Corp.*, 132 Ill. App. 2d 701, 709 (1971) (finding the trial court acted "well within its discretion" in sanctioning a party who did not produce evidence which was, at the time the party received the discovery request, "not in [the party's] possession, [but] was in its power").

¶ 45 Here, the circuit court noted in its December 2014 sanctions order:

> "[A]s the Court has reminded Defendants on numerous occasions, Plaintiffs do not have an obligation to subpoena documents; it is Defendants' obligation to produce documents requested pursuant to [Rule 214].
>
> *** The requested records were the *Defendant's* [*sic*] records, not the records of a third party. Defendants have, and have always had, a right to copy records of their various accounts from the banks." (Emphasis in original.)

Defendants point to nothing in the record to contradict this finding.

¶ 46 The cases that defendants rely on all involve circumstances in which the recipient of the discovery request had no greater ability to obtain the items than the requesting party. See *Mykytiuk v. Stamm*, 196 Ill. App. 3d 928, 934 (1990) (hair from the defendants' car taken by police as evidence was "as accessible to [the] plaintiff as it was to [the] defendants"); *Wiebusch v. Taylor*, 97 Ill. App. 3d 210, 214-15 (1981) (the defendant "did not have custody, possession, or control of the automobile in question" because it was owned by his sister and therefore he

should not have been barred from using evidence because of his failure to produce the automobile); *City Savings Ass'n v. Mensik*, 124 Ill. App. 2d 34, 39-42 (1970) (reversing the trial court's contempt order where no evidence was produced to show that the defendants had control over the corporate records at issue). These cases are of no help to defendants here, where the records at issue were their own financial records that they had a right to copy.

¶ 47 In addition to putting forth reasons why they should not have had to produce these records, defendants argue that the circuit court abused its discretion by blaming them for the banks' destruction of records. Defendants claim that the court misread the Illinois Supreme Court's decision in *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112 (1998), as imposing a burden on them to take reasonable measures to preserve records in the hands of a third party, where *Shimanovsky* instead addresses the pre-suit destruction of evidence by a party to the lawsuit. Although defendants are correct that *Shimanovsky* does not directly apply to this case, defendants' argument has no viability.

¶ 48 In *Shimanovsky*, the Illinois Supreme Court held that the trial court had the authority to issue discovery sanctions for plaintiffs' pre-suit destructive testing of an allegedly defective power-steering mechanism. *Shimanovsky*, 181 Ill. 2d at 122-23. In its December 2014 order, the circuit court in this case agreed with plaintiffs that defendants had a duty to ensure that the requested records were not destroyed by the banks. The court also noted that, in *Shimanovsky*, the supreme court imposed an obligation even on *potential* litigants to preserve evidence. The court went on to state that, in this case:

> "Defendants were parties who had received specific production requests (and Court Orders compelling production) for the very documents that Defendants allowed to be destroyed. Despite their obligations, Defendants

> purposefully failed to insure that the records would not be destroyed by not timely obtaining the records from their banks and by not asking the banks to preserve the records."

¶ 49 It was clear long before *Shimanovsky* that a party who has a discovery request pending has an obligation to preserve and not to destroy evidence. See, *e.g.*, *People v. Newberry*, 166 Ill. 2d 310, 317 (1995) (a party in receipt of a discovery request "is on notice that the evidence must be preserved" and if the party "proceeds to destroy the evidence, appropriate sanctions may be imposed even if the destruction is inadvertent"); *Petrik v. Monarch Printing Corp.*, 150 Ill. App. 3d 248, 258-59 (1986) (a party's destruction of evidence "obviously nullifies" the purpose of the discovery rules, and it would be a "large loophole" if a party could "avoid the effect of the rules simply by ending the existence" of evidence); *In re Estate of Soderholm*, 127 Ill. App. 3d 871 (1984) (finding that entry of default judgment against the plaintiffs to be an appropriate sanction where the plaintiffs had destroyed physical evidence during the course of discovery). The circuit court's use of *Shimanovsky* to illustrate that defendants would face the obligation not to destroy evidence even as potential litigants does not change their obligation as actual litigants.

¶ 50 Defendants cite two later cases that they argue limit *Shimanovsky* by holding that there is no duty to preserve evidence in the hands of third parties and no duty to preserve evidence once suit has been filed. See *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270; *Dardeen v. Kuehling*, 213 Ill. 2d 329 (2004). However, in both *Martin* and *Dardeen*, the supreme court held that *Shimanovsky* had no application because the party that destroyed the evidence was not a potential litigant and because those appeals involved lawsuits for the negligent spoliation of evidence, not sanctions. *Martin*, 2012 IL 113270, ¶ 51; *Dardeen*, 213 Ill. 2d at 339-40. Neither case suggests that there is no duty to preserve evidence once a suit is filed, that a party with control over

documents that have been requested in discovery does not have an obligation to ensure that those documents will not be destroyed, or that sanctions would be inappropriate in this case.

¶ 51 We are also unpersuaded by defendants' arguments that sanctions are inappropriate because the bank did the actual destroying of the records, not defendants, and that defendants were never directed by court order to preserve evidence. First, there is "no caveat in the preservation rule for [parties] who knew or should have known that the evidence should have been preserved, neglected to preserve it, but did not happen to personally destroy it." *Kambylis v. Ford Motor Co.*, 338 Ill. App. 3d 788, 795-96 (2003). Second, while a court may levy sanctions for the destruction of evidence in violation of a court order, "it is similarly sound that sanctions may also be imposed despite the absence of a court order barring destruction." *American Family Insurance Co. v. Village Pontiac-GMC, Inc.*, 223 Ill. App. 3d 624, 626 (1992).

¶ 52 Defendants further contend that the circuit court's award of sanctions without holding an evidentiary hearing to determine whether they had complied with the discovery requests constitutes an abuse of discretion. A circuit court is afforded "sound discretion" in determining whether to grant a motion for sanctions, and "must base its determination upon evidence taken at a hearing *or matters of record which justify foregoing an evidentiary hearing*." (Emphasis added.) *Century Road Builders, Inc. v. City of Palos Heights*, 283 Ill. App. 3d 527, 531 (1996). The court does not abuse its discretion by declining to hold a separate evidentiary hearing where it is already sufficiently informed to come to a decision. See *Hess v. Loyd*, 2012 IL App (5th) 090059, ¶ 26 (not holding an evidentiary hearing on the issue of sanctions based on an untrue statement made in a pleading allowable if "the court's determination can be made on the basis of the pleadings or trial evidence"). In this case, the circuit court was informed by over two years of litigation that took place between plaintiffs' December 2012 discovery requests and the

December 2014 sanctions order, during which time there were numerous hearings, filings by the parties, and orders entered on this specific issue. The record does not indicate, and defendants have not shown, that the court was required to hold a separate evidentiary hearing before making its decision to impose sanctions.

¶ 53 Defendants also argue that the circuit court abused its discretion by ordering document production by all defendants and then imposing sanctions on all defendants when the discovery requests were directed only to the individual defendants, John and Jenneth. Defendants offer no authority to suggest that the court lacked authority to order all defendants to provide these documents to the extent that they had custody or control of them. Indeed, the court's "discretionary powers regarding pretrial discovery are extremely broad." *Hayward v. C.H. Robinson Co.*, 2014 IL App (3d) 130530, ¶ 45; see Ill. S. Ct. R. 201 (eff. July 1, 2014).

¶ 54 All of the orders entered by the circuit court regarding compliance with plaintiffs' second requests, beginning with the order of August 5, 2013, granting plaintiffs' motion to compel, were directed to all defendants. Although the initial responses to these requests were filed by John and Jenneth, the amended responses to the same requests, which were also found by the court to be deficient and evasive, were filed by all defendants.

¶ 55 There is nothing in the record that explains why the circuit court entered the discovery orders and ultimately the sanctions orders against all of the defendants when the original discovery requests were only to John and Jenneth. Plaintiffs suggest this was because the court understood that John and Jenneth were the "door, lock and key to the records sought from every Defendant." That could be, or it could be that the court was aware that a sanction that barred defendants from relying on certain evidence would only have meaning if it were imposed against all defendants. Ultimately, it does not matter why the court entered its orders against all

defendants. Rule 219(c) allows the court to enter sanctions against *even a nonparty* who acts in collusion with a party for the failure to comply with "any order entered" under the discovery rules. Ill. S. Ct. R. 219(c) (eff. July 1, 2002). It is clear that, in this case, all defendants violated court orders and all defendants were signatories to at least some of the discovery responses that gave rise to the orders on appeal.

¶ 56 To reverse the court's imposition of a particular sanction, the burden is on defendants to show that "the record establishes a clear abuse of discretion." *Shimanovsky*, 181 Ill. 2d at 123. That showing has not been made in this case.

¶ 57 2. The Order of June 3, 2015

¶ 58 The December 2014 order directed plaintiffs to prepare a petition for attorney fees, which they filed on January 15, 2015. The circuit court granted plaintiffs' petition in full on June 3, 2015. Defendants argue that the fees approved by the court were excessive and not adequately supported, that plaintiffs should not have been allowed to file their affidavit in support of their petition with their reply brief, and that the court improperly considered a dissenting opinion cited by plaintiffs in support of their petition. We find merit in none of those arguments.

¶ 59 The petition for attorney fees stated that all fees and costs sought were "directly connected to the matters contained in Plaintiffs' Motion for Sanctions and the Order of December 29, 2014." Attached to the petition was a detailed breakdown of each expense included in the petition; each entry included the date the task was performed, a description of the task, the person who completed the task, the time it took to complete the task measured in tenths of hours, and the amount billed for the task. In plaintiffs' petition, which included fees and costs through January 2015, the total amount of attorneys fees requested was $9,287.50. The petition

also included a list of costs incurred in connection with the motion for sanctions that totaled $272.51, bringing the amount requested in the petition to $9,560.01.

¶ 60 On February 6, 2015, defendants filed their response to plaintiffs' petition for attorney fees and costs, and plaintiffs filed their reply on February 23, 2015. Defendants also filed a motion to reconsider the December 2014 sanctions order, to which plaintiffs filed a response. In their reply brief in support of their fee petition, plaintiffs attached updated tables of fees and costs to reflect the additional effort spent responding to defendants' two filings. With this additional work, the total amount plaintiffs sought was $15,269.46. Plaintiffs also included in their reply an affidavit of plaintiffs' counsel that attested to the accuracy of the supporting documents in both of plaintiffs' briefs, explained the various work conducted on behalf of plaintiffs, provided the schedule of billing, and affirmed the total amount of fees and costs sought in the petition.

¶ 61 The court's June 2015 order granted plaintiffs' petition in full and awarded them the requested sum of $15,269.46. The written order explained the legal standard used to calculate and assess attorney fees, analyzed the "detailed records" provided by plaintiffs' counsel, explained how it reached the determination that counsel's work was beneficial to plaintiffs and that the effort expended by counsel was reasonable with respect to the importance of the matter, and concluded that the fees sought were not excessive and all related to defendants' conduct. Further, the order explained that the granting of attorney fees was not merely punitive but was aimed at accomplishing the objectives of discovery. The order stated that if defendants did not pay the amount in full within 21 days of the entry of the order, the order would be "converted to a Judgment in favor of Plaintiffs on this issue."

¶ 62 Defendants contend that the fee award is excessive because some expenses were not specifically related to the dilatory conduct the court had found on defendants' part. Defendants argue that the circuit court should have disregarded all entries after October 27, 2014 because, by that time, defendants had fully complied with the court's discovery orders and the time spent responding to the motion to reconsider was not related to the defendants' alleged dilatory conduct.

¶ 63 A review of the fee petition and reply for the period after October 27, 2014 reflects that plaintiffs were seeking payment for time spent reviewing documents that had been produced, preparing for the hearing on the motion for sanctions, responding to defendants' motion to reconsider the sanctions order, and preparing and filing the fee petition and reply. The court did not abuse its discretion in finding that those fees were "sought in connection with" sanctionable conduct by the defendants.

¶ 64 Defendants next argue that plaintiffs' petition for attorney fees and costs was not adequately supported due to the omission of an attorney affidavit from the original petition. After defendants identified this omission in their response brief, plaintiffs included the affidavit in their reply brief and explained that the failure to include the affidavit with their electronic filing was inadvertent and the result of a "clerical error." Defendants were given leave to file a sur-reply in opposition to plaintiffs' petition, and they did so on March 27, 2015. We see no reason why the circuit court should not be permitted to find that the affidavit, inadvertently omitted from the petition but provided to the court in the reply brief, satisfied any requirement that the court be presented with sufficient evidence to determine the reasonableness of the fees.

¶ 65 Defendants also argue the circuit court improperly relied on the dissenting opinion in *Gray v. National Restoration Systems, Inc.*, 354 Ill. App. 3d 345 (2004), to find that the omission

of plaintiffs' counsel's affidavit from the fee petition was a clerical error. However, there is no indication that the court relied on that dissent in approving the fees award, as the case is not mentioned in its order. Even if the court had considered that dissent, for the reasons stated above, our finding that the court did not abuse its discretion in approving the award is unaffected.

¶ 66 C. The Order of July 21, 2015

¶ 67 On July 21, 2015, the circuit court granted plaintiffs' motion for entry of judgment. The court found that defendants failed to comply with the June 3, 2015 order and entered judgment in favor of plaintiffs and "against defendants John Panaligan, Jenneth Panaligan, Vital Wellness Home Health Care, Inc., and JNJ Management Group, Ltd., in the amount of $15,269.46." The order also stated that "[t]here is no just reason for delaying either enforcement or appeal or both, pursuant to [Illinois] Supreme Court Rule 304(a)."

¶ 68 Defendants contend that the circuit court abused its discretion in entering this order because it includes Rule 304(a) language when that was not specifically requested by the parties and because the order fails to correctly name two of the corporate defendants. Neither of these arguments have merit.

¶ 69 Pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 10, 2010), a finding that "there is no just reason for delaying either enforcement or appeal or both *** may be made *** *on the court's own motion* or on motion of any party." (Emphasis added.) The court is not limited to making such a ruling only when a party has requested it.

¶ 70 Defendants argue that because the judgment refers to "Vital Wellness Home Health Care, Inc." when "Care" is not part of the corporate name and refers to "JNJ Management Group, Ltd." when the last part of the correct name is "Limited," no judgment can be enforced as to anyone other than John and Jenneth. Although the circuit court cannot make any *substantive* additions or

corrections to final orders and judgments after the expiration of 30 days, the court is not similarly restricted in its ability to correct clerical errors to reflect the actual order or judgment rendered by the court. *Jayjo v. Fraczek*, 2012 IL App (1st) 103665, ¶ 29. As of the time of this appeal, plaintiffs have not moved the circuit court to enter a corrective order, nor has the court entered any such order for us to review. Nonetheless, we find that what appears to be, at most, a clerical error is not a basis for reversal or finding that the order is unenforceable against any particular defendant.

¶ 71 Finally, defendants further argue that the circuit court "abused its discretion by executing the two Memorandum of Judgment documents prepared by Plaintiffs" on July 27, 2015. However, this appeal was filed on July 24, 2015 and challenges the court's action of entering the judgment order of July 21, 2015. Subsequent actions taken by the court are beyond the scope of this appeal and warrant no further discussion.

¶ 72 CONCLUSION

¶ 73 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 74 Affirmed.