2014 IL App (2d) 130508-U
No. 2-13-0508
Order filed March 12, 2014



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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| HOLLYWOOD BOULEVARD CINEMA, LLC, NAPERVILLE THEATER, LLC, and TED E.C. BULTHAUP III, | ) | Appeal from the Circuit Court of Du Page County. |
| Plaintiffs-Appellants and Cross-Appellees, | ) | |
| v. | ) | No. 12-MR-1062 |
| PAUL NORDINI, | ) | |
| Defendant-Appellee and Cross-Appellant. | ) | Honorable Bonnie M. Wheaton, Judge, Presiding. |

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JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Burke and Justice Schostok concurred in the judgment.

**ORDER**

¶ 1 *Held*: (1) The trial court properly dismissed plaintiffs' defamation complaint, as the alleged statements were capable of an innocent construction (for defamation *per se*) or were not reasonably capable of the meaning that plaintiffs alleged (*per quod*); (2) defendant forfeited his request for Rule 137 sanctions by failing to present a developed argument and by raising his specific basis for the first time on appeal; in any event, the trial court did not abuse its discretion in denying sanctions, as plaintiffs' complaint was not frivolous and defendant did not establish an improper purpose.

¶ 2 Plaintiffs, Hollywood Boulevard Cinema, LLC, Naperville Theater, LLC, and Ted E.C. Bulthaup, III appeal from the dismissal with prejudice of their two-count, amended complaint alleging defamation *per se* and defamation *per quod*. Defendant, Paul Nordini, cross-appeals from the denial of his motion for sanctions under Illinois Supreme Court Rule 137 (eff. Jan. 4, 2013). Because the amended complaint did not set forth a cause of action under either theory of defamation, and because the trial court did not abuse its discretion in denying the motion for sanctions, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiffs, filed a two-count, amended complaint against defendant, alleging in count I a claim for defamation *per se* and in count II a claim for defamation *per quod*. The amended complaint, which incorporated several news articles, documents, and written communications, alleged that plaintiffs operate several theaters throughout Du Page County. Bulthaup is the owner, operator, chief executive officer, and managing member of the theaters.

¶ 5 As part of their marketing plan, plaintiffs contract with film actors to make personal appearances at showings of the actors' movies. Plaintiffs spend hundreds of thousands of dollars promoting, and derive significant income from, those personal appearances. The ability to schedule celebrity appearances depends upon plaintiffs' good reputation in the entertainment industry and the relationship between Bulthaup and the celebrities and their agents.

¶ 6 In 2011, plaintiffs contracted with Jenna Marie Massoli (a/k/a Jenna Jameson)[1] to appear at a promotional screening of her film. Jameson did not appear, however, claiming that she was too ill to do so. Plaintiffs later learned that she instead had attended a birthday party for celebrity blogger Perez Hilton.

[1] We will refer to Massoli by her professional name, Jameson, as the parties generally do.

¶ 7 On May 17, 2011, plaintiffs filed a breach-of-contract suit (contract action) against Jameson.[2] Jameson retained defendant, a local attorney, to represent her. Defendant filed an appearance on behalf of Jameson in the contract action.

¶ 8 The amended complaint in this case incorporated several news articles. One of those was a July 14, 2011, article published by The Daily Herald. The article focused on the contract action. The article identified Bulthaup as the owner of the theaters and quoted him as saying that he had "no choice" but to sue Jameson after she had backed out of the agreement because of her alleged medical emergency. Bulthaup said that he was forced to turn away hundreds of fans and lost potentially high revenue.

¶ 9 The July 14 article also included comments from defendant. It quoted defendant as saying that "[plaintiffs'] whole case is premised on this fictitious belief that [Jameson] was fine and simply decided to engage in a different venue that night." Defendant added that "[w]e'll present that [plaintiffs] actually breached the agreement long before the suit because they tried to extort and blackmail [Jameson] for money."

¶ 10 The July 14 article contained several additional references to the nature of the lawsuit, including an allegation that Bulthaup had received a vague doctor's note stating that Jameson was too ill to work or travel. According to the article, defendant stated that there was video evidence from the birthday party that showed that Jameson was in fact ill.

¶ 11 The July 14 article added that defendant said that Jameson had attempted to reschedule her appearance under the contract but was rebuffed by "[plaintiffs], who only 'wanted to extort and blackmail [Jameson] for $50,000' under the threat of a lawsuit." Defendant stated that

[2] We recognize that Bulthaup was not a plaintiff in the contract action. Nonetheless, for simplicity, we will use the term "plaintiffs" as to both cases.

plaintiffs' attorneys in the contract action should be disqualified "because [they] participated in the alleged extortion attempt" and thus could be called as witnesses if that case went to trial.

¶ 12 The July 14 article reported that Bulthaup denied any extortion attempt. It quoted him as saying that " '[w]e have emails galore that are completely contradictory to extortion.' "

¶ 13 A second article, dated July 27, 2011, was from the Naperville Sun. That article referred to an e-mail that "warned Jameson she would be sued unless she paid [plaintiffs] $50,000 by May 4." The article quoted defendant as saying that the e-mail " 'was an attempt to extort and blackmail' [Jameson]." Defendant was quoted as saying that a letter from plaintiffs' attorney was "inconsistent with settlement talks," but that defendant was optimistic that "an out of court settlement might be reached in a civil lawsuit involving [Jameson]." Defendant added that he hoped "the quarrel could be settled out of court." According to the article, Bulthaup stated that plaintiffs were confident that when the matter was heard by a judge their position would be sustained.

¶ 14 Another article was published July 29, 2011, in the Naperville Patch and was entitled "Jameson Attorney Claims Lawsuit Followed 'Blackmail Attempt.' " The article referred to defendant's motion to disqualify plaintiffs' counsel, stating that "[defendant] cites an April 25 e-mail from a Bulthaup attorney that " 'constitutes blackmail and [sic] or extortion.' " The article added that "[i]n an effort to recoup some of the losses, the email requests a lump sum $50,000 payment" and that a lawsuit had been filed on May 17, 2011.

¶ 15 The amended complaint also included a copy of the motion to disqualify plaintiffs' attorneys. The motion to disqualify asserted, in pertinent part, that plaintiffs decided unilaterally to ignore a provision in the contract that allowed for a make-up appearance and to "attempt to extort and blackmail [Jameson] for $50,000." The motion to disqualify further asserted that

plaintiffs and/or their attorneys labeled an e-mail to Jameson as a settlement document in an attempt to mask its actually being a "blackmail or extortion attempt." It asserted that only after Jameson refused to "succumb to the blackmail and or extortion attempt" did plaintiffs file their lawsuit "in the attempt to hide the criminal activity and make the prior communication look like settlement talks." It also asserted that plaintiffs' attorneys authored the e-mail. Therefore, the motion sought to disqualify the attorneys because of their status as potential witnesses in the contract action.

¶ 16 Also, included as part of the amended complaint was the e-mail referred to in the motion to disqualify. The e-mail, which was apparently authored by one of plaintiffs' attorneys in the contract action, was addressed to a representative of Jameson and was captioned "for settlement purposes only." The e-mail stated, in relevant part, that, although plaintiffs were initially willing to reschedule Jameson's appearance, they were no longer comfortable doing so "in light of her conduct over the past several weeks." The e-mail stated that plaintiffs had sent Jameson proposed terms for a rescheduled appearance and that Jameson had rejected them. The e-mail stated that, because of the failed negotiations related to the contract, "any voluntary settlement must come in the form of a monetary payment by [Jameson] to [plaintiffs] to help at least partially recoup its losses." The e-mail added that if plaintiffs were "forced to file a lawsuit, [they would] seek to recover [their] damages in full." After specifying the purported damages, the e-mail stated that the "total damages [were] well into the six figures." The e-mail asserted that "[i]n an effort to avoid litigation, [plaintiffs were] willing to release [their] claims against [Jameson] in exchange for a lump sum payment of $50,000." The e-mail concluded by asking that Jameson respond to the settlement offer by a certain date.

¶ 17 Based on these allegations, the amended complaint claimed in count I that defendant made false statements regarding plaintiffs, including that plaintiffs had "committed a felony by attempting to extort [Jameson]." Count I further alleged that defendant's false statements constituted defamation *per se*, because they stated that plaintiffs had committed a criminal offense. Count II alleged, based on the same allegations pertaining to attempted extortion, defamation *per quod*.

¶ 18 Defendant filed a motion to dismiss the amended complaint. In doing so, he contended that plaintiffs had no "standing" to maintain the suit, because the alleged defamatory statements were directed at plaintiffs' attorneys and not plaintiffs. Alternatively, the motion to dismiss asserted that, under the "innocent construction rule," it was not reasonable to construe defendant's alleged statements as accusing plaintiffs of a criminal act. The motion to dismiss further argued that the lawsuit was barred by an absolute privilege, because defendant's comments about extortion and blackmail were related to the motion to disqualify that he had filed in the contract action. Lastly, the motion to dismiss sought sanctions under Rule 137.

¶ 19 After hearing argument, the trial court ruled on the motion to dismiss. In doing so, it referred to its prior ruling on the motion to dismiss the original complaint, where it took judicial notice of the contract action and the fact that Bulthaup was not a party to that action. Therefore, the court ruled that Bulthaup did not have "standing," because no reasonable person in Bulthaup's position could have concluded that defendant's comments referred to him. Thus, the court dismissed with prejudice the amended complaint as to Bulthaup.

¶ 20 The trial court also decided, applying the innocent-construction rule, that a reasonable person would have concluded that defendant's alleged defamatory statements referred to

plaintiffs' attorneys and not plaintiffs. Therefore, the court dismissed with prejudice both defamation claims of the amended complaint.

¶ 21 In considering the motion for Rule 137 sanctions, the trial court found that the case was "made with a good faith argument" and that "there [was] nothing that indicate[d] that it was done for an improper purpose." Thus, the court denied the motion for sanctions.

¶ 22 Plaintiffs filed a timely appeal. They contend that defendant's comments pertained to them and not their attorneys and that Bulthaup was a proper plaintiff because the alleged statements were also directed at him individually.

¶ 23 Defendant, in turn, filed a cross-appeal in which he asks this court to reverse the trial court's denial of his request for sanctions and either remand the cause or "enter an award of sanctions *** to be enforced by the lower court." Plaintiffs have not filed a reply brief.

¶ 24 II. ANALYSIS

¶ 25 We first decide whether the trial court properly dismissed plaintiffs' amended complaint. In doing so, we address the issue of whether plaintiffs stated a cause of action for either defamation *per se* or defamation *per quod*.

¶ 26 A motion to dismiss brought pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)) attacks the legal sufficiency of the complaint by asserting defects on the face of the complaint.[3] *Vitro v. Mikelcic*, 209 Ill. 2d 76, 81 (2004). When ruling on a motion under section 2-615, the relevant question is whether, taking all of the well-pleaded facts as true, the allegations in the complaint, construed in a light most favorable to the plaintiff,

[3] Although defendant here did not designate in his motion whether he was bringing it under section 2-615, it is apparent that the trial court treated it as such and that it was based on the pleadings alone. Thus, we analyze the motion under section 2-615.

are sufficient to state a cause of action upon which relief may be granted. *Canel v. Topinka*, 212 Ill. 2d 311, 317 (2004). A motion to dismiss should not be granted with prejudice unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief. *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155, 161 (2009). We review *de novo* an order granting a section 2-615 motion to dismiss. *Beacham v. Walker*, 231 Ill. 2d 51, 57 (2008). In doing so, we are not bound by the trial court's reasoning and may affirm on any basis supported by the record. *Rabin v. Karlin & Fleisher, LLC*, 409 Ill. App. 3d 182, 186 (2011).

¶ 27 Generally, a statement is considered defamatory if it tends to cause such harm to the reputation of another that it lowers that person in the eyes of the community or deters third persons from associating with the person. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 87 (1996). A statement or publication can be defamatory on its face. *Bryson*, 174 Ill. 2d at 87. Even if a statement is not facially defamatory, it can support a cause of action for defamation if the plaintiff has pled extrinsic facts that demonstrate that the statement has a defamatory meaning. *Bryson*, 174 Ill. 2d at 87.

¶ 28 In our case, plaintiffs alleged in count I that defendant's statements were defamatory *per se*. A statement is deemed defamatory *per se* if its harm is obvious and apparent on its face. *Pompa v. Swanson*, 2013 IL App (2d) 120911, ¶ 17. Only certain limited types of defamatory statements are deemed actionable *per se*. *Bryson*, 174 Ill. 2d at 87.

¶ 29 There are five categories of *per se* defamatory statements. *Green v. Rogers*, 234 Ill. 2d 478, 491 (2009). Those categories are: (1) words that impute the commission of a criminal offense; (2) words that impute infection with a loathsome, communicable disease; (3) words that impute that a person is unable to perform, or lacks integrity in performing, his employment duties; (4) words that impute that a person lacks ability, or otherwise prejudices that person, in

his profession; and (5) words that impute that a person has engaged in adultery or fornication. *Green*, 234 Ill. 2d at 491-92.

¶ 30 In a case of alleged defamation *per se*, a court is to apply the innocent-construction rule in deciding whether the statement is defamatory. *Tuite v. Corbitt*, 224 Ill. 2d 490, 511 (2006). In applying that rule, a court must interpret the allegedly defamatory words as they appear to have been used and according to the idea that they were intended to convey to a reasonable person. *Tuite*, 224 Ill. 2d at 511-12. The rule requires a court to consider the statement in context and to give the words, and any implications arising therefrom, their natural and obvious meaning. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 580 (2006). If, as so construed, the statement can reasonably be innocently interpreted, it is not actionable *per se*. *Solaia Technology, LLC*, 221 Ill. 2d at 580. A statement capable of a nondefamatory interpretation, given its verbal or literary context, should be so interpreted. *Solaia Technology, LLC*, 221 Ill. 2d at 580. However, when the defendant clearly intended, and understandably conveyed, a defamatory meaning, a court should not strain to put an inoffensive gloss on the statement. *Solaia Technology, LLC*, 221 Ill. 2d at 580.

¶ 31 In this case, the statements by defendant, regarding extortion and blackmail, are alleged to be defamatory *per se* because they imputed criminal conduct. However, when read in the overall context in which they were made, they can reasonably be interpreted as a critical commentary on plaintiffs' efforts to resolve the contract dispute with Jameson. The various articles, as well as the e-mail, clearly reflected that defendant made the statements in relation to the contract action and the related settlement efforts. For example, the focus of the July 14 article was a discussion of the pending lawsuit, including defendant's comments about the merits of the suit. The e-mail, referred to in both the July 27 and July 29 articles, was captioned as

being for settlement purposes only and entirely involved settlement matters. The July 27 article expressly referred to the lawsuit, as well as the efforts at settlement via the e-mail. The July 29 article included defendant's comments about an "out of court settlement" and his hopes that "the quarrel could be settled out of court." It further stated that defendant believed that a letter from plaintiffs' attorney was "inconsistent with settlement talks." When viewed in the totality of the context in which they were made, a series of articles pertaining to the lawsuit and related settlement efforts, the challenged statements can reasonably be interpreted as harsh criticisms of plaintiffs' tactics in seeking a resolution of the contract dispute with Jameson, as opposed to criminal accusations. See *Garber-Pierre Food Products, Inc. v. Crooks*, 78 Ill. App. 3d 356, 359-60 (1979) (the words blackmail and extortion used by the defendant to criticize the plaintiff's business-related decisions were not defamatory *per se*). Thus, we conclude that, under the innocent-construction rule, the statements were not defamatory *per se*, and, on that basis, we affirm the trial court's dismissal of count I.

¶ 32 Plaintiffs, however, alleged in count II that the statements were defamatory *per quod*. A claim for defamation *per quod* may be brought in two circumstances. *Bryson*, 174 Ill. 2d at 103. First, such claim is appropriate where the defamatory character of the statement is not apparent on its face and resort to extrinsic circumstances is necessary to show its injurious meaning. *Bryson*, 174 Ill. 2d at 103. To maintain a *per quod* action in such circumstances, a plaintiff must plead and prove extrinsic facts to explain the defamatory meaning. *Bryson*, 174 Ill. 2d at 103.

¶ 33 Second, a *per quod* action is appropriate where a statement is defamatory on its face but does not fall within one of the limited categories that are actionable *per se*. *Bryson*, 174 Ill. 2d at 103. In that type of *per quod* action, a plaintiff need not plead extrinsic facts, because the

defamatory character of the statement is facially evident and resort to additional facts to ascertain its defamatory meaning is unnecessary. *Bryson,* 174 Ill. 2d at 103.

¶ 34 In this case, plaintiffs premised their *per quod* allegations on defendant's statements that they had engaged in blackmail and extortion. Even absent any "innocent construction," which does not defeat a *per quod* claim (see *Tuite,* 224 Ill. 2d at 511), those statements still were not actionable, as they were " 'not reasonably or fairly capable of the meaning assigned to them.' " *Mittleman v. Witous*, 135 Ill. 2d 220, 233 (1989) (quoting *American International Hospital v. Chicago Tribune Co.*, 136 Ill. App. 3d 1019, 1026 (1985)). That is so because, when viewed in the overall context in which they were made, they could reasonably be viewed only as criticisms by defendant concerning the contract action pending against his client, including plaintiffs' settlement tactics. A reasonable person would view those comments, when made as part of a discussion or report about the lawsuit, as public posturing by an attorney about the merits of the case. Although such terms as blackmail and extortion, standing alone, could conjure up an impression of illegal activity, when made under the circumstances as alleged they could not be reasonably interpreted as assertions that plaintiffs had in fact engaged in such criminal conduct.

¶ 35 Nor did they otherwise disparage plaintiffs' business reputation to a degree that would have affected the community's perception of plaintiffs. A reasonable person would expect a business to take strong measures to resolve what it perceived to be a breach of contract by Jameson. In the rough and tumble business world, one would not be shocked to read or hear that a business engaged in a strong, aggressive bargaining position in an effort to resolve a business dispute. *Cf. Becker v. Zellner*, 292 Ill. App. 3d 116, 129-30 (1997) (setting forth a hard bargaining position, threatening a civil suit, or declaring one intends to use the courts to enforce its legal rights is not actionable). Nor would a reasonable person be surprised to hear an equally

strong response by a defendant's attorney. The worst that might be said of defendant's allegedly defamatory comments here is that they were hyperbolic characterizations of plaintiffs' approach to resolving the contact dispute with his client. Although they might have been overzealous, they were not defamatory. Thus, on that basis, we agree with the trial court's dismissal of the defamation *per quod* claim in count II.[4]

¶ 36 We next address defendant's cross-appeal from the denial of his request for sanctions under Rule 137. We begin by noting that plaintiffs did not file a reply brief and thus have not responded to defendant's cross-appeal. See Ill. S. Ct. R. 343(b)(1) (eff. July 1, 2008). However, because the issue is relatively straightforward, we may consider it despite the absence of any response. See *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 129 (2010) (citing *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976)).

¶ 37 In doing so, we initially point out that defendant's entire argument regarding sanctions under Rule 137 consists of one sentence in the "conclusion" section of his appellate brief and contains no citation of authority.[5] In that single sentence, defendant asserts that, although the trial court did not find any basis for sanctions, this court "should now consider [defendant's] assertion that sanctions are in fact warranted due to ongoing litigation being designed to keep [defendant] from representing Jameson in the [breach-of-contract] suit." He adds at the end of that same sentence a vague reference to the top of page 22 of the common-law record.

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[4] We have affirmed the trial court's dismissal of both claims on a basis different from that relied on by the court, but one clearly supported by the record. See *Rabin*, 409 Ill. App. 3d at 186.

[5] That is consistent with his brief overall, which consists of less than four full pages of argument and includes only one citation of legal authority.

¶ 38 Page 22 of the common-law record, referred to by defendant, contains the "[p]reliminary [s]tatement" from his motion to dismiss the original complaint. That portion of the motion to dismiss stated that the present lawsuit created a conflict that caused defendant to withdraw as Jameson's attorney in the contract action. It also stated in the next sentence that plaintiffs' complaint must be dismissed with prejudice because its purpose was not to recover damages, but rather was to "stifle and chill" defendant's representation of Jameson in the contract action. It did not mention Rule 137 or request any sanctions.

¶ 39 Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) requires that an argument contain the contentions of the appellant, the reasons in support, and a citation of authority. A reviewing court is entitled to have the appellant present clearly defined issues, citation of pertinent authority, and cohesive arguments, and the appellant cannot expect the court to make arguments for him. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 10. Arguments unsupported by citation of proper authority are forfeited (*Nelson v. County of Kendall*, 2013 IL App (2d) 120635, ¶ 9), as are those that are not clearly defined and sufficiently presented (*In re Detention of Lieberman*, 379 Ill. App. 3d 585, 610 (2007)).

¶ 40 Defendant's argument here, regarding Rule 137 sanctions, contains no reasoned argument and is not clearly defined. Nor does it have a single citation of authority. It essentially amounts to a contention thrown in at the tail end of his brief. Thus, it is forfeited.

¶ 41 Giving defendant the benefit of the doubt in interpreting his argument under Rule 137, it appears that he is relying on his assertion that plaintiffs brought this action to force him to withdraw from the contract action. That particular argument, however, was not raised in the trial court as a basis for imposing Rule 137 sanctions. Rather, defendant presented it for the limited purpose of seeking dismissal of the original complaint in this case. Consequently, that argument

is forfeited for that reason as well. See *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 85.

¶ 42 Alternatively, even if we were to consider the merits of defendant's Rule 137 argument, it would fail. Rule 137 provides, in pertinent part, that the attorney of record must sign every pleading, certifying that he has read the pleading and that, to the best of his knowledge, the pleading was grounded in fact and warranted by existing law or a good-faith argument for the extension of existing law. Ill. S. Ct. R. 137 (eff. Jan. 4, 2013). Rule 137 is designed to prevent abuse of the judicial process by imposing sanctions on attorneys who file vexatious and harassing actions based on allegations that are unsupported by fact or law. *Burrows v. Pick*, 306 Ill. App. 3d 1048, 1050 (1999). The party seeking sanctions under Rule 137 bears the burden of proving that the opposing party made false allegations, without reasonable cause, for the purpose of harassment or undue delay. *Mina v. The Board of Education for Homewood-Flossmoor*, 348 Ill. App. 3d 264, 279 (2004). Because it is punitive, Rule 137 should be strictly construed. *Sadler v. Creekmur*, 354 Ill. App. 3d 1029, 1045 (2004).

¶ 43 The decision whether to impose Rule 137 sanctions lies within the sound discretion of the trial court, and we will not disturb its decision absent an abuse of discretion. *Mina*, 348 Ill. App. 3d at 279. Therefore, we afford considerable deference to the trial court's decision. *Mina*, 348 Ill. App. 3d at 279.

¶ 44 In this case, defendant has not shown, in either the trial court or here, that plaintiffs' amended complaint lacked a good-faith basis in fact or law. Although it ultimately proved not to state a claim for defamation, it was not frivolous under the facts and existing law. That alone defeats any claim for sanctions.

¶ 45 Additionally, defendant has not shown that plaintiffs brought the action for any vexatious or harassing reasons. The fact that it might have prompted defendant to withdraw as Jameson's attorney in the contract action, an assertion we assume to be true for purposes of this issue, is not alone enough to make it either vexatious or harassing. Considering the law and the statements made by defendant, plaintiffs were reasonably justified in bringing the present suit. Because we cannot say that no reasonable person would have denied defendant's request for sanctions, the trial court did not abuse its discretion in doing so. See *Gonzlalez v. Nissan North America, Inc.*, 369 Ill. App. 3d 460, 463-64 (2006).

¶ 46 III. CONCLUSION

¶ 47 For the foregoing reasons, we affirm the orders of the circuit court of Du Page County dismissing with prejudice the amended complaint in its entirety and denying the motion for sanctions.

¶ 48 Affirmed.