2013 IL App (1st) 111682-U

FOURTH DIVISION
February 21, 2013

No. 1-11-1682

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

BERNARD A. WOLFE, Plaintiff-Appellee/Cross-Appellant, v. MEYER & BLUMENSHINE f/k/a MEYER, BLUMENSHINE & WOLFE, COREY E. MEYER, LTD., SCOTT BLUMENSHINE, LTD., COREY E. MEYER and SCOTT BLUMENSHINE, Defendants-Appellants/Cross-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 10 M1 162792 The Honorable Martin P. Moltz, Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

HELD: Defendants' action of filing motion to dismiss did not constitute waiver of their right to arbitrate and, therefore, the trial court properly dismissed plaintiff's complaint for breach of contract based on agreement that contained a clear and unambiguous clause mandating arbitration of disputes. However, the trial court abused its discretion in failing to grant defendants' petition for sanctions under the circumstances and, accordingly, remand is required for a hearing on this.

¶ 1 Plaintiff-appellee and cross-appellant Bernard A. Wolfe (plaintiff) filed a complaint at law against defendants-appellants and cross-appellees Meyer & Blumenshine f/k/a Meyer, Blumenshine & Wolfe, Corey E. Meyer, Ltd., Scott Blumenshine, Ltd., Corey E. Meyer and Scott Blumenshine (defendants or as named), sounding in breach of contract. Defendants, meanwhile, filed a petition for sanctions against plaintiff and plaintiff's counsel, alleging that they violated Illinois Supreme Court Rules by filing a frivolous lawsuit. The trial court dismissed plaintiff's suit on the basis that it did not have subject matter jurisdiction and it denied defendants' petition for sanctions.

¶ 2 The parties have now sought review. On appeal, plaintiff contends that the trial court erred in dismissing his complaint because it did have subject matter jurisdiction and, regardless, his suit should have been stayed. He asks that we reverse the trial court's order dismissing his cause, remand for further proceedings and grant any other relief that is warranted. Meanwhile, regarding their appeal, defendants contend that the trial court erred in denying their petition for sanctions because plaintiff knew or should have known that a clause in the contract prohibited his suit, and because plaintiff filed his complaint for improper purposes. Defendants ask that we overturn the trial court's denial, grant their petition for sanctions and remand with instructions to hold an evidentiary hearing to determine the amount of reasonable expenses incurred, as well as any additional and appropriate sanctions to be imposed.

¶ 3 For the following reasons, we affirm the trial court's dismissal of plaintiff's complaint, and we reverse its denial of defendants' petition for sanctions and remand for hearing on this

issue.[1]

¶ 4 BACKGROUND

¶ 5 The facts of this cause are not in dispute.

¶ 6 The parties entered into an Agreement to Retire Partnership Interest (Agreement), whereby plaintiff agreed to retire as general partner of the law firm of Meyer, Blumenshine & Wolfe. In exchange, plaintiff was to receive, under the Agreement, a sum certain from defendants to be paid pursuant to consecutive monthly installments. Defendants were to remain as continuing partners in the law firm, now to be known as Meyer & Blumenshine. Section 7(b) of the Agreement stated:

> "Arbitration. Any dispute or difference arising out of this Agreement, its application or interpretation, which cannot be settled amicably between the Partners within thirty (30) days shall be finally settled under the rules of arbitration of the American Arbitration Association by one or more arbitrators appointed in accordance with such rules. The arbitration shall take place in Chicago, Illinois. Any award or final decision pursuant to such arbitration may be

[1]There is some confusion regarding the party designations in this cause. Instead of filing responses and cross-appellate briefs at the same time, the parties chose to file completely separate sets of briefs regarding the direct appeal and the cross-appeal. It appears that defendants filed their notice of appeal first, which would make the issue of sanctions the "direct appeal" here, while plaintiff's claims regarding the dismissal of his lawsuit would be the "cross-appeal." However, as can be seen from the chronology of this cause, it would be difficult to address defendants' issues regarding sanctions before we discuss the propriety of the dismissal of plaintiff's complaint. Accordingly, we will not use the labels "direct" and "cross" appeal, we will not disturb the party designations as listed, and we will, in our analysis, discuss plaintiff's assertions for review first.

entered for enforcement, and enforcement obtained, in any court of competent jurisdiction."

¶ 7 On July 3, 2010, plaintiff, via his attorney, filed a complaint at law. His complaint contained five counts, each count alleging breach of contract against each of the five named defendants herein. Essentially, he claimed that defendants had failed to pay several of the monthly installments owed him pursuant to the Agreement and that defendants had failed to indemnify him regarding a certain legal action which, in turn, required him to expend money in legal fees. He sought relief in the amount of $36,547.40 in actual damages, plus attorney fees and costs.

¶ 8 On November 30, 2010, defendants filed a "2-619 Motion to Dismiss and Petition for Sanctions." Regarding their motion to dismiss, defendants asserted that the trial court lacked subject matter jurisdiction over the cause due to section 7(b) of the Agreement which mandates arbitration. As an additional ground, defendants claimed that plaintiff's cause should be dismissed as to defendants Corey Meyer and Scott Blumenshine because each is shielded from personal liability. Regarding their motion for sanctions, defendants sought attorney fees and costs from plaintiff and/or his attorney, asserting that they violated Illinois Supreme Court Rule (Rule) 137 (eff. Feb. 1, 1994), by filing the complaint when they knew or should have known of the arbitration clause and by filing the complaint with an improper purpose.

¶ 9 Following briefing and argument, the trial court granted the motion to dismiss as to all defendants, with prejudice. The court stated that its decision was "based on the arbitration clause" contained within the Agreement "and that plaintiff filed this matter [without] first

proceeding to arbitration." The trial court then denied the petition for sanctions.

¶ 10 ANALYSIS

¶ 11 On appeal, as noted, plaintiff seeks review from the trial court's dismissal of his cause and defendants seek review from the trial court's denial of their petition for sanctions. We address each separately.

¶ 12 Dismissal of Plaintiff's Cause

¶ 13 Plaintiff contends that the trial court erred in dismissing his complaint based on the arbitration clause because the court did, indeed, have subject matter jurisdiction over the cause. He insists that the court obtained this jurisdiction when defendants waived the arbitration clause by seeking, as part of their motion to dismiss, the dismissal of Corey Meyer and Scott Blumenshine on the basis that they did not have personal liability under the Agreement. He claims that by doing so, defendants submitted an arbitrable issue to the trial court, namely, whether Meyer and Blumenshine had personal liability, "thereby waiving the arbitration clause in the Agreement." He concludes that, accordingly, the trial court should have denied defendants' motion to dismiss. We disagree.

¶ 14 As with any contractual right, a party to a contract may waive its right to arbitrate. See *TSP-Hope Inc. v. Home Innovators of Illinois, LLC*, 382 Ill. App. 3d 1171, 1174 (2008) (citing *Kostakos v. KSN Joint Venture No. 1*, 142 Ill. App. 3d 533, 536 (1986)). However, our courts have made clear that arbitration, when opted for in a contract, is preferred; they favor arbitration to resolve disputes and disfavor finding a waiver of arbitration rights. See *All American Roofing, Inc. v. Zurich American Insurance Co.*, 404 Ill. App. 3d 438, 441 (2010); accord *TSP-Hope*, 382

Ill. App. 3d at 1174 ("Illinois courts are reluctant to find a party waived its contractual right to arbitration"). This is because arbitration is an easier, more expeditious and less expensive method of resolving disputes than litigation. See *All American Roofing*, 404 Ill. App. 3d at 441. Accordingly, waiver of arbitration rights is not something to be lightly inferred. See *All American Roofing*, 404 Ill. App. 3d at 441 (citing *Glazer's Distributors of Illinois, Inc. v. NWS-Illinois, LLC*, 376 Ill. App. 3d 411, 425 (2007).

¶ 15 To determine whether a party has waived its right to arbitrate, a court is to consider whether the party has acted inconsistently with this right. See *TSP-Hope*, 382 Ill. App. 3d at 1174 (citing *Glazer's*, 376 Ill. App. 3d at 425, and *Schroeder Murchie Laya Associates, Ltd. v. 1000 West Lofts, LLC*, 319 Ill. App. 3d 1089, 1098 (2001)). A party acts inconsistently with the right to arbitrate when it submits an arbitrable issue to a trial court for decision, asking the court to decide such an issue on its merits. See *TSP-Hope*, 382 Ill. App. 3d at 1174. Examples of actions that have been found to be inconsistent with the right to arbitrate include filing a motion for summary judgment; filing a counterclaim; answering a complaint, participating in discovery and waiting to assert the right to arbitrate; answering a complaint with claims of setoffs, participating in discovery and waiting to assert the right to arbitrate; filing an answer claiming additional credits, filing a bill of particulars and waiting to assert the right to arbitrate; engaging in discovery, opposing an earlier attempt to compel arbitration and failing to file for arbitration when given the opportunity; and filing a complaint seeking complete relief without mentioning arbitration and requesting arbitration only after an unfavorable outcome or in light of an opposing party's filing of a motion to dismiss. See *TSP-Hope*, 382 Ill. App. 3d at 1174-75 (citing several

cases therein finding waiver of right to arbitrate based on actions of parties).

¶ 16 However, none of these necessarily result in the automatic waiver of the right to arbitrate. See *TSP-Hope*, 382 Ill. App. 3d at 1175; see also *D.E. Wright Electric, Inc. v. Henry Ross Construction Co.*, 183 Ill. App. 3d 46, 53 (1989) (waiver may occur, but it is not automatic). Rather, the ultimate, and most crucial, inquiry is whether the party's actions reflect the desire to seek some determination on the merits, thereby demonstrating an intent inconsistent with the right to arbitrate; if so, then the party has effectively waived its right. See *All American Roofing*, 404 Ill. App. 3d at 442; *TSP-Hope*, 382 Ill. App. 3d at 1175. But, if the party's actions are merely responsive to the opposing party's claims, thereby demonstrating the retention of an intent consistent with the right to arbitrate, then waiver has not occurred. See *All American Roofing*, 404 Ill. App. 3d at 442; *TSP-Hope*, 382 Ill. App. 3d at 1175; see also *Atlas v. 7101 Partnership*, 109 Ill. App. 3d 236, 241 (1982) (actions which constitute "limited legal maneuverings" do not waive right to arbitrate).

¶ 17 The dichotomy is clear. For example, in *Woods v. Patterson Law Firm, P.C.*, 381 Ill. App. 3d 989 (2008), the court found that the defendants waived their right to arbitrate under a contract when they filed two motions to dismiss with respect to the pleadings, demanded a bill of particulars, and participated in discovery by serving document requests, written interrogatories, notices of deposition and subpoenas. See *Woods*, 381 Ill. App. 3d at 995-96. The defendants did all this seeking some determination on the merits and before ever seeking to compel arbitration pursuant to the right to arbitrate under the contract. See *Woods*, 381 Ill. App. 3d at 995-96. The *Woods* court concluded that the defendants' actions were not limited in nature but, rather, that

they had actively participated in the substantive issues of the cause and in the furtherance of the legal issues in a judicial forum. See *Woods*, 381 Ill. App. 3d at 996-97. Therefore, the defendants' actions were inconsistent with those of a party intent on retaining the right to arbitrate and, accordingly, they had waived this right. See *Woods*, 381 Ill. App. 3d at 997.

¶ 18 In contrast lie the cases of *TSP-Hope* and *All American Roofing*. In *TSP-Hope*, the plaintiff and the defendant entered into a building contract containing an arbitration clause. Later, however, the plaintiff filed a complaint alleging breach of contract and a demand that the defendant file suit within 30 days to enforce liens on the property. The defendant filed an answer and a counterclaim in response, as well as an amended complaint after the trial court granted the plaintiff's motion to dismiss the defendant's affirmative defense. The defendant also waited to assert its right to arbitrate under the contract for almost 11 months, which it finally did when it filed a motion to dismiss the cause and a request to remove it to arbitration. See *TSP-Hope*, 382 Ill. App. 3d at 1173-74.

¶ 19 The issue on appeal was whether the defendant had acted inconsistently with its right to arbitrate. See *TSP-Hope*, 382 Ill. App. 3d at 1174. The *TSP-Hope* court found that it had not. See *TSP-Hope*, 382 Ill. App. 3d at 1175. It noted that, while the defendant had arguably submitted arbitrable issues to the court for decision when it filed its counterclaim, all of the defendant's pleadings were, in light of the circumstances, nothing more than responsive to the plaintiff's claims. See *TSP-Hope*, 382 Ill. App. 3d at 1175. Again, the *TSP-Hope* court made clear that, while submitting arbitrable issues may result in waiver of the right to arbitrate, this is not a hard-and-fast rule. See *TSP-Hope*, 382 Ill. App. 3d at 1175. Instead, the court looked to

the particular facts of the case: the defendant had not conducted any discovery, and its filing of the counterclaim was merely in direct response to the plaintiff's complaint and demand regarding the liens which the defendant would have forfeited if it had failed to commence a timely action once the plaintiff had filed the demand. See *TSP-Hope*, 382 Ill. App. 3d at 1175-76. Accordingly, the *TSP-Hope* court found that the defendant had not acted inconsistently with the right to arbitrate and affirmed the dismissal of the cause. See *TSP-Hope*, 382 Ill. App. 3d at 1176; see also *D.E. Wright Electric*, 183 Ill. App. 3d at 53-54 (finding that, in light of the circumstances, the defendant did not abandon right to arbitrate when it filed counterclaim); *Edward Electric Co. v. Automation, Inc.*, 164 Ill. App. 3d 547, 555 (1987) (the defendant did not waive right to arbitrate where it did not conduct discovery and its counterclaims were filed in response to the plaintiff's complaint and in order to protect the defendant's rights from litigation).

¶ 20 Similarly, in *All American Roofing*, following a dispute regarding unpaid deductibles and retrospective premiums, the defendant insurer summoned the plaintiff company to arbitration, pursuant to their insurance policy. The plaintiff, however, filed a declaratory judgment action and second amended complaint asserting, among other claims, fraud, breach of contract, and violation of public policy. After the trial court granted the defendant's motion to dismiss and removed the case to arbitration, the plaintiff contended on appeal that the defendant had waived its right to arbitrate because it had asked the trial court to declare a New York choice-of-law clause enforceable, thereby submitting an arbitrable issue to the trial court. The *All American Roofing* court disagreed. Turning to the facts of the case, it noted that the party alleged to have waived the right to arbitrate, *i.e.*, the defendant, was, in fact, the party that instituted arbitration in

the first place. See *All American Roofing*, 404 Ill. App. 3d at 442. In addition, the defendant had refused to allow the plaintiff's attempt to move the cause to the court system when it filed a motion to dismiss in order to protect its right to arbitrate. See *All American Roofing*, 404 Ill. App. 3d at 442. The *All American Roofing* court found that the defendant's actions were "merely responsive to" the plaintiff's pleading and, because the defendant "has consistently argued the parties' dispute does not belong in the courts," it concluded that the defendant's actions did not result in the waiver of its right to arbitrate. *All American Roofing*, 404 Ill. App. 3d at 442-43.

¶ 21 Based upon our review of the particular circumstances of the instant cause, we find that what occurred clearly falls more in line with situations akin to *TSP-Hope* and *All American Roofing* than with those akin to *Woods*. It is true that defendants here presented a motion to dismiss which contained an arguably arbitrable issue, *i.e.*, whether Meyer and Blumenshine were subject to personal liability under the Agreement. However, we do not consider this action to automatically result in the waiver of their right to arbitrate. Instead, turning to the facts here, we note that several facets of this cause show the exact opposite–that defendants had no intention to waive this right. First, they conducted no discovery in this cause–no interrogatories, depositions or subpoenas concerning Meyer and Blumenshine's personal liability. In addition, defendants asserted their right to arbitrate at the very start of the litigation process. When plaintiff filed his complaint at law, thereby seeking to move this dispute to a judicial forum, defendants immediately resisted by filing a motion to dismiss. The first, and primary, contention in their motion sought to protect their right to arbitrate the matter; they argued that no trial court could have subject matter jurisdiction over the cause precisely due to section 7(b) of the Agreement

which mandates arbitration. Thus, defendants were protecting their right to arbitrate. It was only as a secondary, and alternative, matter that defendants asked for dismissal with respect to Meyer and Blumenshine, individually. Specifically, defendants referred in their motion to dismiss directly, and only, to counts four and five of plaintiff's complaint in this respect, wherein plaintiff sought relief from Meyer and Blumenshine personally. Clearly, this portion of defendants' motion to dismiss was merely responsive to plaintiff's pleading. Moreover, the defendants were further protecting their interests by preserving the issue for review. That is, had defendants not raised the affirmative defense of lack of personal liability, had the trial court denied their motion to dismiss, and had the cause proceeded to a judicial forum, it could easily have been concluded that any defense regarding Meyer and Blumenshine's potential personal liability would have been waived because defendants had not raised it in their motion to dismiss. See, *e.g.*, *Hanson v. De Kalb County State's Attorney's Office*, 391 Ill. App. 3d 902 (2009) (failure to raise defenses in motion to dismiss results in waiver of them).

¶ 22 We note that, in his brief on appeal, the only two cases plaintiff cites for support on this matter, *Glazer's* and *Kennedy v. Commercial Carriers, Inc.*, 258 Ill. App. 3d 939 (1994), actually coincide with our decision here and, indeed, refute his claims. That is, in *Glazer's*, the party that eventually tried to rely on an arbitration clause was the same party that initiated litigation, seeking complete relief from the trial court without ever mentioning arbitration in the first place. When that party was denied a temporary restraining order, lost an interlocutory appeal and faced a motion to dismiss, it finally sought arbitration. The *Glazer's* court found that it was now too late, as all the party's prior actions clearly signified an intent to abandon the right to arbitrate.

See *Glazer's*, 376 Ill. App. 3d at 426. And, in *Kennedy*, the plaintiffs sued the defendant for breach of contract. In response, the defendant filed two motions: one to remove the cause to federal court on the ground that it was preempted by federal labor law, and one to dismiss in state court for lack of subject matter jurisdiction due to an arbitration clause. The *Kennedy* court held that the defendant's actions in no way constituted conduct demonstrating an intent to abandon its right to arbitrate. See *Kennedy*, 258 Ill. App. 3d at 943.

¶ 23 We find no reason to depart from these holdings or the line of legal reasoning expressed in *TSP-Hope* and *All American Roofing*. Therefore, in the instant cause, we find that defendants' addition of Meyer and Blumenshine's lack of personal liability as a ground for the motion to dismiss does not establish that they acted inconsistently with their right to arbitrate. Accordingly, defendants did not waive this right here and the trial court properly dismissed plaintiff's complaint for lack of subject matter jurisdiction in light of section 7(b) of the Agreement.

¶ 24 Regarding one last matter, plaintiff in his brief makes an additional, and extremely condensed, attempt in support of his position by arguing that, even if the trial court was correct in its finding, it still erred in dismissing his cause. He claims that the court should have, instead, stayed his case pending the arbitrator's award, at which time the court could have confirmed it. However, plaintiff provides no legal support for this assertion. Nor have we found any case in our research where, when it was held that a party did not waive its right to arbitrate, the cause was subsequently stayed in a trial court rather than dismissed so arbitration could, in fact, commence. Moreover, plaintiff's argument presumes that he would have prevailed in an arbitration and/or that defendants would not have paid whatever arbitration award was rendered,

if any, thereby requiring an action before a trial court to confirm it. Whatever the instance, under these circumstances, plaintiff's last-ditch argument is without merit and we find, again, that the trial court properly dismissed his complaint.

¶ 25 Denial of Defendants' Petition for Sanctions

¶ 26 Regarding the matters they raise on appeal, defendants contend that the trial court erred in denying their petition for sanctions. Defendants argue that plaintiff violated Rule 137 by filing his complaint when he knew or should have known that the Agreement between the parties contained an arbitration clause. They further argue that plaintiff violated the rule when he filed the complaint for improper purposes. Based upon our review of this cause, we agree with defendants.

¶ 27 Rule 137 mandates that a party "make reasonable investigation into the facts prior to filing" his pleading. *Walsh v. Capital Engineering & Manufacturing Co.*, 312 Ill. App. 3d 910, 914 (2000). His signature, and that of his attorney, on the pleading certifies that he has read it and that, "to the best of his knowledge, information, and belief formed after a reasonable inquiry it is well grounded in fact and is warranted by existing law *** and that it is not interposed for any improper purpose." Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994); see *Baker v. Daniel S. Berger, Ltd.*, 323 Ill. App. 3d 956, 963 (2001) (this rule is meant to penalize those parties who plead false or frivolous matters or seek to impose vexatious litigation, without sufficient legal or factual basis). If a party violates this rule, a court may impose an appropriate sanction, such as the payment of the other party's attorney fees and costs. See *Walsh*, 312 Ill. App. 3d at 914; Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994).

¶ 28 The burden of proof lies with the party seeking to recover under Rule 137 and requires a showing that the opposing party pled statements which he knew or should have known were not true. See *Miner v. Fashion Enterprises, Inc.*, 342 Ill. App. 3d 405, 422 (2003). Again, the inquiry is based on reasonableness, which is measured against an objective standard looking at the circumstances existing at the time the pleading was filed. See *Walsh*, 312 Ill. App. 3d at 915 (citing *Toland v. Davis*, 295 Ill. App. 3d 652, 656 (1998) ("imposition of sanctions is not to be based on a subjective after-the-fact analysis or hindsight")); accord *Baker*, 323 Ill. App. 3d at 963, 966. Accordingly, that the party who filed the pleading honestly believed his cause to be well grounded in fact or law is insufficient to defend against an alleged violation of Rule 137. See *Walsh*, 312 Ill. App. 3d at 915; *Baker*, 323 Ill. App. 3d at 963, 966. Ultimately, while our review of a trial court's decision regarding the imposition of Rule 137 sanctions follows an abuse of discretion standard and, thus, merits deference, "[t]his general rule does not preclude this court from independently reviewing the record and finding an abuse of discretion where the facts so warrant." *Walsh*, 312 Ill. App. 3d at 914; accord *Baker*, 323 Ill. App. 3d at 963.

¶ 29 We find that the facts of the instant cause do, in fact, warrant a finding that the trial court abused its discretion in denying defendants' petition for sanctions against plaintiff, for several reasons.

¶ 30 First and foremost, it is, and has been since the moment litigation was instituted, unmistakable that the instant cause centers entirely on the Agreement entered into by the parties. Undeniably, plaintiff was a signatory to the Agreement and the Agreement formed the basis of his complaint at law. In fact, in examining his complaint, we note that he cited to several

portions of it in support of his arguments before the trial court, including, and in particular, several subsections of section 7. Consequently, then, even the most basic level of "reasonable investigation," as mandated by Rule 137, would have required plaintiff to examine the Agreement–the very basis of his pleading–along with its provisions *before* he signed and filed his complaint. As we laid out earlier, and as undisputed by the parties on appeal, section 7(b) of the Agreement requires arbitration if the parties disagree as to a matter the Agreement governs: "[a]ny dispute or difference arising out of this Agreement, its application or interpretation, which cannot be settled amicably *** shall be finally settled under the rules of arbitration of the American Arbitration Association." This language is some of the most clear, unambiguous and unequivocal we have seen. Thus, had plaintiff abided by his duty and conducted even the most minimal of reasonable inquiries into the circumstances at hand, it would have been immediately, and objectively, clear to him that his complaint was not well grounded in fact or warranted by law in light of section 7(b) of the Agreement.

¶ 31 Furthermore, plaintiff's sole response to defendants' claims is that he properly filed the complaint at law, even in light of section 7(b), because defendants could have, and did, waive their right to arbitrate when they filed their motion to dismiss. Upon consideration, however, this argument is, at best, specious, and at worst, deliberately deceitful.

¶ 32 Initially, we note that, contrary to plaintiff's argument, simply because it was legally possible, in general, for defendants, just like any party, to waive the right to arbitrate, this is not a basis for his filing of a complaint in court in light of the clear language of the governing Agreement that mandated arbitration here. Pursuant to the objective standard used to measure

the circumstances at the time of the pleading's filing, it is irrelevant that plaintiff believed this to be a possibility. In addition, and more dangerous, is plaintiff's argument that defendants had waived their right to arbitrate at the time he filed his complaint. This is a wholly disingenuous assertion. Specifically, at the time plaintiff filed his complaint, defendants had not yet done anything regarding their right to arbitrate; they had taken no action with respect to the Agreement at all. Rather, once the alleged dispute arose under the Agreement, it was plaintiff, and not defendants, who took the first step: he filed a complaint at law. Up to that point, defendants had done absolutely nothing from which anyone–neither plaintiff nor the trial court–could have assumed defendants could have, would have, or did, waive their right to arbitrate. Their only action–the filing of their motion to dismiss, which is the sole action plaintiff cites as causing waiver of their right to arbitrate–came *after*, and in response to, plaintiff's filing of his complaint. Accordingly, and again contrary to plaintiff's response, at the time he filed his complaint, defendants had undeniably done nothing to even merit the consideration that they waived their right to arbitrate. This was not a possibility here, let alone a reasonable one.

¶ 33 The parties discuss at length *Edward Yavitz Eye Center, Ltd. v. Allen*, 241 Ill. App. 3d 562 (1993), with defendants relying on it as analogous to the instant cause and plaintiff asserting that it is distinguishable and irrelevant. In *Yavitz*, the plaintiff filed a complaint at law seeking recovery pursuant to an agreement between the parties. The agreement, however, contained an arbitration clause which, very similar to section 7(b) of the Agreement at issue here, stated that " 'any dispute arising out of this contract *** shall be subject to arbitration.' " *Yavitz*, 241 Ill. App. 3d at 564-65. Citing this clause, the defendant filed a motion to dismiss. The cause

proceeded in court for a time, with amended complaints and answers, when finally the court granted summary judgment to the defendant. After this, the defendant filed a petition for sanctions under Rule 137, contending that the plaintiff had filed the complaint knowing that it was not well grounded in law or fact and did so with an intent to harass when arbitration was clearly required by the agreement. The trial court denied the defendant's petition. See *Yavitz*, 241 Ill. App. 3d at 566-67.

¶ 34 On appeal, the *Yavitz* court reversed, finding that the trial court had abused its discretion in failing to grant sanctions under Rule 137. See *Yavitz*, 241 Ill. App. 3d at 568. This is because, when the plaintiff filed his original complaint, this pleading alleged a cause of action that "was obviously preempted by the agreement's arbitration clause." *Yavitz*, 241 Ill. App. 3d at 568. The *Yavitz* court noted that even a cursory examination of the agreement, which formed the basis of the plaintiff's request for recovery, would have shown that the agreement's unambiguous language barred a suit based on it. See *Yavitz*, 241 Ill. App. 3d at 569. Because the plaintiff failed to conduct a reasonable inquiry, as required by Rule 137, before filing the complaint, the trial court should have awarded sanctions to the defendant; it abused its discretion when it did not and, thus, the *Yavitz* court ordered the reversal of its decision and remand for a hearing on the amount of sanctions to which the defendant was entitled in light of the plaintiff's actions. See *Yavitz*, 241 Ill. App. 3d at 569, 573.

¶ 35 We find that the instant cause mirrors *Yavitz* and merits the same result. Just as the plaintiff there, plaintiff here filed his complaint with knowledge of the arbitration clause in the Agreement. And, just as the plaintiff in *Yavitz*, plaintiff here sought relief for his alleged

damages by relying directly on the Agreement itself; the Agreement, which contained a clear and unambiguous mandate of arbitration for any dispute arising thereunder, formed the basis of his cause of action.

¶ 36 Plaintiff's assertions that *Yavitz* is distinguishable are meritless, as is his citation to *Pritzker v. Drake Tower Apartment, Inc.*, 283 Ill. App. 3d 587 (1996). The only relation *Pritzker* has to *Yavitz* is that one of the parties in *Pritzker* argued that *Yavitz* was wrongly decided. However, the *Pritzker* court, noting that *Yavitz* had nothing to do with that case, specifically stated that it would "not reconsider the court's holding in *Yavitz*" since "[t]he issue presented in [*Pritzker*] is different." *Pritzker*, 283 Ill. App. 3d at 591 (explaining that *Yavitz* and *Pritzker* are entirely distinguishable because, whereas it was clear the plaintiff in *Yavitz* knew of the arbitration clause in the agreement via the fact that he had negotiated the contract and relied on it in his complaint, there was nothing in the record in *Pritzker* to indicate that the same was true of the party who filed the cause of action, even though an arbitration clause existed).

¶ 37 Consequently, without more from plaintiff here, we find no reason to depart from the holding of *Yavitz*. Accordingly, just as the *Yavitz* court found that the trial court's failure to award sanctions under Rule 137 amounted to an abuse of discretion, we, too, find that the trial court herein abused its discretion in denying defendants' petition for sanctions under Rule 137 in light of plaintiff's conduct.

¶ 38 We wish to make one last note regarding the specific circumstances of the instant cause. What concerns us here, in particular, is that plaintiff was not only represented by counsel during both the creation of the Agreement and the filing of his complaint, but also the fact that plaintiff,

himself, is an attorney. He is not just any attorney, but, as made clear in the record, an experienced one who worked at a high-profile law firm. The standards and mandates of Rule 137 make clear, in even the most basic sense, that, in light of the circumstances presented here, there was no reasonable basis–legal, factual or otherwise–to file a complaint at law at the time he did. Either he did not make a reasonable inquiry into the circumstances at the time he filed his complaint, or he did so and chose to ignore them altogether. In either instance, the violation is inescapable and, more importantly, in this cause, inexcusable.[2]

¶ 39 CONCLUSION

¶ 40 Accordingly, for all the foregoing reasons, we affirm the judgment of the trial court dismissing plaintiff's complaint at law; however, we reverse its judgment denying defendants' petition for sanctions pursuant to Rule 137 and remand for a hearing to determine the amount of sanctions to which defendants are entitled for expenses incurred as the result of plaintiff's actions.

¶ 41 Affirmed in part; reversed in part and remanded.

[2]Under the circumstances herein, one could almost view plaintiff's filing of his complaint as an attempt to lure defendants into waiving their right to arbitrate by doing something in court in response, instead of exercising that right. Were this the case, that attempt has clearly failed.