

Nos. 1-12-3408 and 1-13-0581 (cons.)

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 DISTRICT

MARSHA AZAR,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellant,)	
)	
v.)	Nos. 09 CH 41562 and
)	12 CH 32548
ARIES REAL ESTATE FUND, LLC,)	
)	Honorable Thomas R. Allen,
Defendant-Appellee/Cross-Appellant.)	Judge Presiding

PRESIDING JUSTICE SIMON delivered the judgment of the court.
Justices Pierce and Liu concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err when it refused to order defendant to a second arbitration. The trial court did not err when it dismissed the second lawsuit filed by plaintiff. The trial court did not err when it denied defendant's motion for sanctions.

¶ 2 After initially referring the dispute to arbitration, the trial court reconsidered its ruling and rejected plaintiff's contention that she was entitled to arbitrate certain matters that were set forth in her arbitration demand. The trial court also dismissed a second suit filed by plaintiff pursuant to the section of the Code of Civil Procedure that permits dismissal of a case when there is

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another action pending between the same parties for the same cause. Plaintiff contends that both of those judgments were erroneous. In response to the second suit filed by plaintiff, defendant moved for sanctions. The trial court denied that motion. Defendant cross-appeals arguing that it is entitled to sanctions. We affirm.

¶ 3

BACKGROUND

¶ 4 The dispute in this case stems from a \$3.45 million dollar loan made by Freeman Realty Advisors to Plaintiff Marsha Azar in 2004. Freeman Realty assigned its interest in the loan to Defendant Aries Real Estate Fund. To secure the loan, Azar pledged, among other things, three parcels of property in Chicago: 2228 N. Sawyer, 2244 W. Wilson, and 5553 N. Magnolia. By May 2008, Azar had purportedly defaulted under the terms of the loan agreements as a result of non-payment. Aries served notice on Azar that it intended to enforce its security interests and exercise its rights under the Illinois Commercial Code to effectuate strict foreclosure of the collateral. Azar objected and Aries did not go forward with the foreclosure at that time. In October 2009, Aries claimed additional defaults and began the foreclosure process.

¶ 5 On October 26, 2009, Azar filed suit in the Circuit Court of Cook County (*Azar Holdings LLC v. Aries Real Estate Fund, LLC*, 2009 CH 41562 (October 27, 2009)) seeking to enjoin Aries from alienating the real estate and to maintain the status quo. The case proceeded for a number of months and was dismissed with prejudice after the parties entered into a settlement agreement. The settlement agreement provided a mechanism by which Azar could obtain a release of Aries' interests in the Sawyer, Wilson, and Magnolia properties. The way for Azar to obtain free and clear title to the properties was to pay Aries, by April 1, 2012, either \$2.5 million for all of the properties, or the fair market value of any individual property. The parties agreed that fair market

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value would be determined by a neutral appraiser and that the order in which the individual properties could be repurchased would be drawn from a hat. The agreement also provided that any dispute that arose would be subject to binding arbitration.

¶ 6 The Sawyer property was selected as the first property that Azar could repurchase. The parties attempted to proceed with the transaction, but then disputed the validity of the appraisal, could not mediate the dispute and, at that point, the case came unhinged. Procedural disarray followed.

¶ 7 Pursuant to the terms of the settlement agreement, the parties went to arbitration. On March 14, 2012, the arbitrator issued an award in favor of Azar, but did not, as Azar requested, extend the April 1, 2012 repurchasing deadline that the parties had agreed upon in the settlement agreement. Five days later, on March 19, 2012, Aries filed a motion to vacate the arbitrator's award in the circuit court case that was terminated by the parties' settlement. Being that there was only a little more than a week left before the April 1st purchasing deadline, Azar requested emergency relief in the circuit court for an extension. The circuit court extended the deadline from April 1st to August 1st and continued the case for resolution of Aries' motion to vacate the arbitration award. On June 27, 2012, the circuit court confirmed the arbitration award. In its order, the circuit court indicated that any "any issue as to the means or methods of performance under the award are referred back to the arbitrator."

¶ 8 On July 2, 2012, the arbitrator issued an amended award. The amended award did not extend the deadline for performance. On July 6, 2012, Azar filed a motion with the arbitrator requesting an extension of the deadline. By email dated July 9, 2012, the arbitrator indicated that, in light of the fact that the circuit court had already confirmed the award, she would "not reconsider

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any dates that were determined in the original award." The arbitrator further indicated that "[t]he amended award is final." Accordingly, the August 1, 2012 date set by the circuit court remained effective. By email dated July 23, 2012, the parties set the closing for the Sawyer property for the following day. However, despite the email exchange that seemed to indicate both parties' willingness to perform, when the following day arrived, Azar filed an emergency motion in the circuit court seeking an extension of the August 1st deadline due to Aries' alleged non-performance. The circuit court granted Azar's motion and extended the deadline for purchasing the Sawyer property to August 9, 2012 and to August 27, 2012 for purchasing the remaining properties. That order also indicated that no further extensions would be granted.

¶ 9 In early August, control of the Sawyer property was delivered to Azar. On August 27, 2012, the deadline for closing on the remaining properties, Azar filed a new case in the circuit court (*Azar v. Aries Real Estate Fund, LLC*, 2012 CH 32538 (August 27, 2012)). The case was assigned to the same judge. On August 30, 2012, Aries filed a motion to dismiss the newly filed case, 2012 CH 32538, and moved for sanctions. On September 6, 2012, while the motion to dismiss was pending in 2012 CH 32538, Azar served Aries with a demand for arbitration in the 2009 CH 41562 case under a claim of authority from the settlement agreement. In the arbitration demand, Azar asserted, among other things, that she was entitled to arbitrate whether Aries was equitably estopped from enforcing the deadlines due to "nonperformance and vexatious delay" by Aries. Aries refused to arbitrate. On October 9, 2012, after briefing, the circuit court granted Aries' motion to dismiss the 2012 CH 32538 case with prejudice. The circuit court's order indicates that it was dismissing the case under the section of the Code of Civil Procedure that authorizes dismissal when a case has the same parties and is for the same cause as another pending

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case. The circuit court denied Aries' motion for sanctions. Both parties timely appealed the disposition of that case.

¶ 10 On the day following the dismissal of 2012 CH 32538, Aries filed a motion in the original case (2009 CH 41562) seeking a declaration that would effectively bar Azar from further interfering with its right to the properties and fully terminate the dispute. That motion was set to be presented on October 15, 2012. On the day of presentment, Azar filed a motion to compel arbitration based on its September 6, 2012 arbitration demand. The circuit court granted Azar's motion, referred the matter to arbitration, and issued a finding pursuant to Illinois Supreme Court Rule 304(a) that there was no just reason for delaying enforcement or appeal. Aries filed a motion to reconsider the order compelling arbitration. After a hearing, the trial court vacated its order compelling arbitration and indicated that its ruling was a final, appealable order thereby terminating the litigation.

¶ 11 The appeals in the two cases were consolidated. Before us now, Azar argues: (1) that the circuit court erred by failing to require Aries to arbitrate under the September 6, 2012 demand; and (2) that the arbitration demand in the initial action and the complaint in the second action stated a claim for equitable tolling. Aries cross-appealed and argues that the circuit court erred by denying its motion for sanctions.

¶ 12 ANALYSIS

¶ 13 *September 6th Arbitration Demand*

¶ 14 As is generally the case, the first issue we must address is what standard of review to apply. Azar gives us no guidance. The Illinois Supreme Court Rules indicate that an appellant must include a concise statement of the applicable standard of review for each issue, with citation to

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authority, either in the discussion of the issue in the argument or under a separate heading placed before the discussion in the argument. Ill. Sup. Ct. R. 341(h)(3). Under some circumstances, we review a trial court's decision of whether to compel arbitration *de novo*, *LRN Holding, Inc. v. Windlake Capital Advisors, LLC*, 409 Ill.App.3d 1025, 1027 (2011), and under others we review it for an abuse of discretion, *Brooks v. Cigna Property & Casualty Companies*, 299 Ill.App.3d 68, 72 (1998). Consistent with our precedent, we will apply an abuse of discretion standard to the issues that require us to review factual issues and we will engage in *de novo* review of the issues that require us to review questions of law. *Bovay v. Sears, Roebuck and Co.*, 2013 IL App (1st) 120789, ¶ 26.

¶ 15 Azar argues that the trial court erred when it reconsidered its ruling and held that Aries was not required to arbitrate under her September 6, 2012 arbitration demand. In particular, Azar argues that she was entitled to arbitrate whether Aries should be equitably estopped from enforcing the deadline to close on the Magnolia and Wilson properties. Azar contends that the arbitrator could not and did not consider issues related to the time for closing on the Magnolia and Wilson properties because those issues were beyond the scope of the first arbitration.

¶ 16 Azar's argument fails, however, because her arbitration demand was not issued until after the court-imposed deadline to close on the Magnolia and Wilson properties lapsed. The final deadline was August 27th and the arbitration demand was not served until September 6th. At the time the trial court set those deadlines, it indicated that no further extensions would be granted. Between the time that the trial court set that final deadline and the time that deadline passed, Azar did not seek relief from that order. Azar did not take any action with regard to the 2009 case. Instead, Azar let the deadline pass and then served an untimely arbitration demand on Aries. At

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that point, Aries was entitled to refuse to arbitrate and the trial court was entitled to exercise its discretion and decline to compel arbitration.

¶ 17 Issues of arbitrability, particularly whether a successive arbitration is appropriate, may be decided by trial court. *Horwitz, Schakner & Associates, Inc. v. Schakner*, 252 Ill.App.3d 879, 883-84 (1993). Here, it is evident that, at the time Azar issued her arbitration demand, the deadline controlling her rights under the settlement agreement as extended by the trial court had expired and she no longer had any contractual basis on which to seek arbitration. When the final deadline passed without Azar obtaining an extension or demanding arbitration, the trial court was entitled to refuse Azar's request to compel Aries to arbitrate.

¶ 18 It is also clear from the record that the issue of equitable extensions for repurchasing the Magnolia and Wilson properties was considered by the arbitrator in the initial arbitration and beyond. When parties agree to submit a dispute to arbitration, it is presumed that they intended that all matters in dispute be decided. *Richter v. Western States Ins. Co.*, 264 Ill.App.3d 230, 232 (1994). It is also presumed that arbitrators have fully determined all of the issues before them. *Horwitz*, 252 Ill.App.3d at 885. The objective of arbitration is to achieve a final and binding disposition of differences between parties, both present and prospective, with the force of an adjudication precluding the parties from relitigating the same subject. *Bankers Leasing Ass'n, Inc. v. Pranno*, 288 Ill.App.3d 255, 262 (1997). If the award is binding on the parties, any inquiry into the matters originally controverted is forever closed. *Id.*

¶ 19 In her proposed arbitration award, Azar asked that the deadline to purchase the Magnolia and Wilson properties be equitably extended until April 12, 2013. The arbitrator did not adopt this proposal despite finding in Azar's favor on other matters. In the July 6th motion she filed

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with the arbitrator seeking an extension on the Sawyer closing, Azar also asked for relief related to the deadline for the Magnolia and Wilson properties. Namely, Azar claimed that certain tax issues related to the transfers could not occur within the period set out in the award and asked for a 45-day period after the Sawyer closing to address those issues. The arbitrator rejected that extension request. When responding to Azar's request for more time, the arbitrator indicated that she would "not reconsider any dates that were determined in the original award" and that "[t]he amended award is final." So Azar's contentions that the arbitrator never considered issues related to the Magnolia and Wilson closing dates are contradicted by the record.

¶ 20 One other reason why Azar has failed to demonstrate that the trial court erred when it refused to order arbitration is that she failed to plead any facts concerning events that occurred between the time the trial court issued the final deadline and the time that the final deadline passed that would support equitable estoppel. From the time the trial court issued the final extension and the time it passed, nothing changed. Especially important is that there is nothing alleged against Aries during this period that prevented any of the closings. In fact, there are emails and other evidence that demonstrate that, towards the end of July and into early August, Aries was ready and willing to perform by the deadline. All of Aries' allegedly dilatory conduct was presented to the trial court by Azar and the court issued a final extension. Nothing occurred after that extension was issued that would justify equitable relief. In her arbitration demand, Azar only made conclusory, unsupported claims of nonperformance on the part of Aries that the trial judge was entitled to reject. As we will address in more detail below, the allegations in the complaint filed in 2012 only confirm that equitable relief was not warranted. The trial court did not err by declining to order the parties to arbitration based on Azar's September 6th demand.

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¶ 21

Dismissal Of The 2012 Case

¶ 22 Azar contends that the trial court erred when it dismissed the case she filed in 2012 (2012 CH 32538) because the complaint filed in that case stated a claim for equitable tolling. In its order disposing of that case, the trial court indicated that it was dismissing the case pursuant to section 2-619(a)(3) which provides that duplicative actions should be dismissed. See 735 ILCS 5/2-619(a)(3). The 2012 case was filed on August 27th, the date of the final deadline for Azar to repurchase the properties. It is clear from the record that Azar filed that case in search of another extension. In fact, that is exactly the relief that is sought in the complaint. However, the allegations of the delay relate to Azar's inability to close, not any conduct on the part of Aries. Like in the 2009 case, Azar requested an extension beyond August 27, 2012 in the 2012 case because she claimed she would not have time after the Sawyer closing to complete the Magnolia and Wilson closings. The trial court declined to grant any further extension and made August 27th the final deadline. In the complaint in the 2012 case, there is no allegation that Aries did anything, from the time the court extended the deadline to the time the deadline arrived, to delay or prevent the closings. In fact, Azar admitted that the reason she could not close by the deadline was that she "was unable, within the time frame, to complete lender paperwork in order to complete the transaction." That is insufficient. The trial court was entitled to dismiss that case.

¶ 23

Perhaps dismissing the 2012 case on the grounds that there was another pending case between the same parties for the same cause was not the most technically sound basis for dismissal, but it does not amount to reversible error. It is true that the parties were still actively litigating in the 2009 case and were operating under a deadline issued in that case at the time Azar filed the 2012 case. It is also true that both cases related to the same subject matter. But the more

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compelling basis for dismissal is that the complaint failed to state a claim for equitable relief.

However, any procedural error that was committed was harmless. We may affirm for any reason that is supported by the record. *Akemann v. Quinn*, 2014 IL App (4th) 130867, ¶ 21. Ultimately, we are reviewing the trial court's ruling to ensure that the court arrived at the correct result. *Id.* It did here.

¶ 24 This dispute began over a loan that was made in 2004 and in default as early as 2008 because Aries did not make the required payments. Multiple extensions were granted for the parties to comply with the dates that they agreed upon. Yet, more than three years after the settlement agreement was executed and more than a year after the deadline that the parties set for all of the properties to close, the parties remained in court arguing about extensions. As the trial court observed, the case became a procedural train wreck because the parties were using a two-track system of dispute resolution where they were concurrently engaging the court and the arbitrator on the same issues. The purpose of arbitration is to resolve disputes in a timely, cost effective manner and to achieve finality. It achieved none of those objectives in this case. Nonetheless, Azar was entitled to no further equitable relief so the trial court did not err when it dismissed the 2012 case or when it finally put an end to this misadventure.

¶ 25 *Sanctions*

¶ 26 Aries filed a motion for sanctions in response to the 2012 case. Aries argues that the 2012 case was brought for an improper purpose, namely that the case was filed in an attempt to evade the trial court's ruling that no further extensions would be granted. Azar contends that sanctions are not warranted because the 2012 case was not frivolous and was not filed for an improper purpose.

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¶ 27 The Illinois Supreme Court Rules provide that every pleading filed with the court should be well-grounded in fact, warranted by existing law, and not brought for an improper purpose. See Ill. Sup Ct. R. 137(a). An order denying Rule 137 sanctions will not be disturbed on review absent an abuse of discretion. *Oviedo v. 1270 S. Blue Island Condominium Ass'n*, 2014 IL App (1st) 133460, ¶ 46. A trial court abuses its discretion where no reasonable person would take the view adopted by the trial court. *Village of Vernon Hills v. Heelan*, 2014 IL App (2d) 130823, ¶ 36. Sanctions are not warranted because a party makes an incorrect argument or merely because their claims are unsuccessful. *Nelson v. Chicago Park Dist.*, 408 Ill.App.3d 53, 68 (2011). Instead, the purpose of the Rule is to penalize attorneys and parties who abuse the judicial process by filing frivolous or false matters without a basis in law or fact or for purposes of harassment. *Id.*

¶ 28 Here, while Azar's 2012 case did not state a cause of action, it appears to have been a good faith attempt to preserve her rights under the settlement agreement. The trial judge was intimately familiar with the parties and the dispute as a whole and determined that sanctions were not warranted. Based on the record before us, we find no abuse of discretion in the trial judge's decision to deny Aries' request for sanctions.

¶ 29 CONCLUSION

¶ 30 Accordingly, we affirm the judgment of the Circuit Court of Cook County.

¶ 31 Affirmed.