2016 IL App (1st) 133360-U

SIXTH DIVISION
May 20, 2016

No. 1-13-3360

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE *ex rel*. SCHAD, DIAMOND and SHEDDEN, P.C.,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
	)	No. 2011 L 9258
v.	)	
	)	
PERSONALIZATIONMALL.COM, INC.,	)	
	)	Honorable
Defendant-Appellant.	)	Thomas Mulroy,
	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court's denial of the defendant's petition for an award of attorney fees, expenses and costs was affirmed. The defendant failed to establish that the plaintiff's

complaint violated Illinois Supreme Court Rule 137, and the defendant forfeited its claim that it was the prevailing party in the action, a requirement for an award of attorney fees and expenses pursuant to the Illinois False Claims Act.

¶ 2 The defendant, PersonalizationMall.com, Inc., appeals from an order of the circuit court of Cook County denying its petition for attorney fees, expenses and costs pursuant to Illinois Supreme Court Rule 137 (eff. July 1, 2013), and the Illinois False Claims Act (Act) (740 ILCS 175/1 *et seq*. (West 2010)). On appeal, the defendant contends that the denial of its petition was error. For the reasons explained below, we affirm the circuit court's order.

¶ 3 BACKGROUND

¶ 4 In *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351 (2009), our supreme court held that shipping charges for certain internet purchases were taxable. The decision in *Kean* prompted the filing of complaints pursuant to the Act by this plaintiff on behalf of the State against retailers for falsely claiming the collection and remittance to the State of all required use taxes on shipping and handling charges. See *People ex rel. Schad, Diamond & Shedden, P.C.*, 2015 IL App (1st) 132999, ¶¶ 1, 5.

¶ 5 On September 6, 2011, in accordance with the provisions of the Act, the plaintiff filed a complaint, *in camera* and under seal, against the defendant and served the State with a copy of the complaint. 740 ILCS 175/4(b)(2) (West 2010). The complaint alleged that the defendant failed to collect and remit to the State the taxes due on shipping charges. The complaint further alleged that the defendant knowingly made false statements and created false records to conceal its obligation to pay tax on the shipping charges. The plaintiff requested an order that the defendant cease and desist from violating the Act, and its share of any proceeds recovered for the State, reasonable attorney fees and costs as provided for in the Act.

¶ 6 Pursuant to section 4(b)(4)(B) of the Act, the State declined to intervene in the plaintiff's action. 740 ILCS 175/4(b)(4)(B) (West 2010). The complaint was unsealed and served on the defendant.

¶ 7 On May 2, 2012, pursuant to section 2-619.1 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619.1 (West 2010)), the defendant moved to dismiss the complaint under both section 2-619 and section 2-615 of the Code (735 ILCS 5/2-619, 2-615 (West 2010)). Following the filing of the plaintiff's response and the defendant's reply to the motion to dismiss, on August 30, 2012, the circuit court heard argument on the defendant's motion to dismiss and denied it. The defendant was ordered to answer or otherwise plead to the complaint.

¶ 8 On October 1, 2012, the defendant filed a motion to dismiss the complaint under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2010)). The motion alleged that the complaint should be dismissed pursuant to section 4(e)(3) of the Act (740 ILCS 175/4(e)(3) (West 2010)) because the allegations of the complaint were the subject of an administrative civil money penalty proceeding to which the State was already a party. The motion further alleged that the State did not oppose the defendant's motion to dismiss the complaint, and therefore, dismissal should be granted pursuant to section 4(c)(2)(A) of the Act (740 ILCS 4(c)(2)(A) (West 2010) (permitting the State to dismiss the complaint even over the objections of the plaintiff)).

¶ 9 On October 2, 2012, the circuit court ordered the State to file an *amicus curiae* brief addressing the defendant's section 2-619(a)(9) motion to dismiss the complaint. In accordance with the court's order, on November 29, 2012, the State filed its *amicus* brief. The State maintained that the complaint should be dismissed with prejudice because the

audits addressed the shipping charges and therefore constituted an administrative civil money penalty proceeding, and the audits constituted public disclosure. The State acknowledged that the plaintiff had no information concerning what information was disclosed to the State during the audit and that due to confidentiality requirements, such information could never be obtained from the State, only from the defendant. However, the State pointed out that the Act did not require that such information be made available to the plaintiff.

¶ 10 In response to the defendant's section 2-619(a)(9) motion to dismiss and the State's *amicus* brief, the plaintiff maintained that its claim against the defendant was not the subject of the audits and that the non-public audits did not constitute public disclosure. The plaintiff pointed out that the State's brief did not constitute a motion to dismiss, and that the State did not join in the defendant's motion to dismiss.

¶ 11 On February 20, 2013, the State filed a motion to dismiss the complaint pursuant to section 4(c)(2)(A) of the Act, which incorporated the arguments in its *amicus* brief. The motion alleged further that the audits were conducted and completed prior to the filing of the complaint and that the supplemental affidavit of James S. Calgano, chief financial officer of the defendant, provided a factual basis as to what information was disclosed during the audits. The State maintained that information disclosed by the audits established that the plaintiff did not qualify as an original source under the Act. See 740 ILCS 175/4(e)(A)(B) (West 2010).

¶ 12 On March 12, 2013, the circuit court granted the State's motion and dismissed the complaint with prejudice. The court's order specifically provided that the court did not reach the defendant's section 2-619(a)(9) motion to dismiss. On March 26, 2013, the court granted the plaintiff's motion to modify the judgment order. *Inter alia*, the modified order provided

that the court retained jurisdiction to allow the plaintiff to file a petition for attorney fees and expenses and for its share of the State's recovery as provided under the Act. 740 ILCS 175/4(d)(2) (West 2010).

¶ 13 On April 11, 2013, the plaintiff filed its petition for attorney fees, expenses, costs and its statutory share, which was opposed by both the State and the defendant. On August 21, 2013, the circuit court issued its written opinion and order denying the plaintiff's petition for attorney fees, expenses and its statutory share on the grounds that there were no proceeds, and the case did not result in a judgment or settlement.

¶ 14 On September 20, 2013, the defendant filed a petition for attorney fees, expenses and costs, pursuant to Rule 137 and section 4(d)(4) of the Act (740 ILCS 175/4(d)(4) (West 2010)). With respect to Rule 137, the defendant asserted that the plaintiff filed its complaint without a factual basis and knowing that it had no validity under the Act. The defendant further asserted that despite the State's request that the complaint be dismissed with prejudice in its *amicus* brief, the plaintiff continued to litigate and then prolonged the litigation further with its request for a statutory share and attorney fees and costs after the complaint was dismissed with prejudice. With regard to section 4(d)(4) of the Act, the defendant maintained it was entitled to attorney fees and expenses since it was the prevailing party in the suit, and the suit was clearly frivolous.

¶ 15 On September 30, 2013, the circuit court held a hearing on the defendant's petition for attorney fees and expenses and denied the petition. The defendant filed a notice of appeal from the September 30, 2013, order denying its petition for attorney fees, expenses and costs.

¶ 16 ANALYSIS

¶ 17 I. Rule 137

¶ 18 The defendant contends that it was entitled to sanctions in the form of an award of attorney fees and costs pursuant to Rule 137.

¶ 19 A. Standard of Review

¶ 20 The court reviews an order granting or denying sanctions under the abuse of discretion standard. *Peterson v. Randhava*, 313 Ill. App. 3d 1, 9 (2000). An abuse of discretion will only be found where the court's finding is against the manifest weight of the evidence or if no reasonable person would take the view adopted by the court. *Baker v. Daniel A. Berger, Ltd.*, 323 Ill. App. 3d 956, 963 (2001).

¶ 21 B. Discussion

¶ 22 Under Rule 137, sanctions may be imposed upon a party or his attorney or both for the filing of a pleading, motion or other document that is not well grounded in fact, is not warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law, or where it was interposed for an improper purpose, such as to harass, caused unnecessary delay or needless increase in litigation. Ill. S. Ct. Rule 137 (eff. July 1, 2013). The purpose of the rule is to deter the filing of frivolous and false lawsuits and is not intended to penalize litigants and their attorneys merely because they were zealous but unsuccessful. *Peterson*, 313 Ill. App. 3d at 7. Rule 137 is penal in nature and must be strictly construed. *Peterson*, 313 Ill. App. 3d at 7. We apply an objective standard in determining what was reasonable under the circumstances as they existed at the time of the filing. *Sanchez v. City of Chicago*, 352 Ill. App. 3d 1015, 1020 (2004).

¶ 23 The record supports the circuit court's denial of Rule 137 sanctions. The plaintiff complied with the Act in submitting the complaint to the State for review. At the time it reviewed the complaint, the State had already completed its two audits. Yet, after reviewing

the complaint, the State did not instruct the plaintiff not to proceed with the case and declined to intervene to dismiss the suit as it could have under section 4(c)(2)(A) of the Act. In its *amicus* brief, the State acknowledged that the audit information was confidential and would not have been available to the plaintiff. Therefore, the fact that the audits were completed before the filing of the complaint did not indicate the lack of a factual basis for the complaint or that it was interposed for any improper purpose. See Ill. S. Ct. R. 137 (eff. July 1, 2013). Moreover, the State did not participate in the suit until the court ordered it to file an *amicus* brief with regard to the defendant's section 2-619(a)(9) motion to dismiss.

¶ 24 Finally, the circuit court denied the defendant's first motion to dismiss, and in the order dismissing the case with prejudice, the court noted specifically that it had not ruled on the defendant's section 2-619(a)(9) motion to dismiss. At the plaintiff's request, the court modified its dismissal order to allow the plaintiff to file a petition for its share and attorney fees and costs under the Act.

¶ 25 Based on the record, the circuit court's denial of Rule 137 sanctions was not against the manifest weight of the evidence and therefore, the denial of sanctions was not an abuse of discretion.

¶ 26 II. Attorney Fees Award Under the Act

¶ 27 The defendant contends that it was entitled to an award of attorney fees, expenses and costs under section 4(d)(4) of the Act. The Act provides in pertinent part as follows:

> "If the State does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the

claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." 740 ILCS 175/4(d)(4) (West 2010).

¶ 28 A. Standard of Review

¶ 29 Where a statute provides that a court may award attorney fees and costs, the use of the term "may" connotes discretion. Therefore, an award of attorney fees under the Act is left to the discretion of the circuit court. *Krautsack v. Anderson*, 223 Ill. 2d 541, 554 (2006). An abuse of discretion will only be found where the court's finding is against the manifest weight of the evidence or if no reasonable person would take the view adopted by the court. *Baker*, 323 Ill. App. 3d at 963. The determination that a party was the "prevailing" party is also reviewed for an abuse of discretion. *Peleton, Inc. v. McGivern's, Inc.*, 375 Ill. App. 3d 222, 226 (2007). However, where the facts are undisputed, whether a party was the prevailing party under the relevant statute is a matter of statutory construction which the court reviews *de novo*. *City of Elgin v. All Nations Worship Center*, 373 Ill. App. 3d 167, 169 (2007).

¶ 30 B. Discussion

¶ 31 In order to be entitled to an award of attorney fees and expenses under the Act, a defendant must establish, first, that it prevailed in the action. " 'A party may be considered a "prevailing party" for purposes of awarding fees when he is successful on any significant issue in the action and achieves some benefit in bringing suit [citation], receives a judgment in his favor [citation] or by obtaining an affirmative recovery. [Citation.]' " *Duemer v. Edward T. Joyce & Associates, P.C.*, 2013 IL App (1st) 120687, ¶ 73 (quoting *Grossinger Motorcorp, Inc. v. American National Bank & Trust Co.*, 240 Ill. App. 3d 737, 753 (1993)).

¶ 32 The defendant maintains that the circuit court's dismissal of the complaint pursuant to the State's motion to dismiss established that it prevailed in the action. The defendant does not

provide any argument and does not cite to any statutory or case law to support its position that it is the prevailing party. All of its argument and case law is directed solely at the issue of whether the plaintiff's claim was frivolous. When confronted by the plaintiff's argument in its appellee's brief that the dismissal of the complaint pursuant to the State's motion to dismiss did not establish that the defendant prevailed in the action, the defendant did not address why dismissal of the complaint rendered it the prevailing party for an award of attorney fees and expenses under section 4(d)(4) of the Act.

¶ 33 This court is entitled to be presented with clearly defined issues, citations to pertinent authority and cohesive argument. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 10. Failure to provide argument and citation to authority violates Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2013) and results in the forfeiture of the argument on appeal. *JPMorgan Chase Bank, N.A. v. East-West Logistics, L.L.C.*, 2014 IL App (1st) 121111, ¶ 58. Moreover, our supreme court has cautioned that with the exception of subject matter jurisdiction, a reviewing court should not normally search the record for unargued and unbriefed reasons to reverse the judgment of the circuit court. *Schrager v. Bailey*, 2012 IL App (1st) 111943, ¶ 34 (citing *People v. Givens*, 237 Ill. 2d 311, 323 (2010)).

¶ 34 Since the defendant failed to establish that it prevailed in the action, we need not address the defendant's argument that the claim was clearly frivolous, clearly vexatious, or brought for harassment purposes. The circuit court's determination that the defendant was not entitled to an award of attorney fees and expenses under section 4(d)(4) of the Act was not against the manifest weight of the evidence, and therefore, the denial of the petition for attorney fees and expenses was not an abuse of discretion.

¶ 35 CONCLUSION

¶ 36 The judgment of the circuit court is affirmed.

¶ 37 Affirmed.