2017 IL App (1st) 161141-U

SIXTH DIVISION
March 10, 2017

No. 1-16-1141

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PETERSON ROOFING, INC.,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 09 M3 320
DAVID H. DOCTOR,	)	
Defendant-Appellant.	)	Honorable Martin S. Agran, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Rochford concurred in the judgment.

ORDER

¶ 1 ***Held:*** This appeal concerns an award of attorney fees in favor of a company which defended against a customer's Illinois Consumer Fraud and Deceptive Business Practices Act counterclaim. Most of the customer's arguments against the fee award were waived, and the remaining ones are without merit. We affirm the award of fees but modify it by deducting fees incurred before customer filed his counterclaim.

¶ 2 In this appeal, we consider whether the circuit court properly awarded attorney fees to plaintiff/counter-defendant Peterson Roofing, Inc. after Peterson prevailed on a consumer fraud counterclaim brought by defendant/counter-plaintiff David Doctor. We find that the circuit court acted well within its discretion in deciding to award fees. However, because some of the work

for which the court awarded fees did not relate to Doctor's consumer fraud counterclaim, we affirm the award of fees but modify it.

¶ 3 BACKGROUND

¶ 4 This case began as a simple collection lawsuit but eventually grew into a contentious multi-faceted case which spanned seven years and produced a 13-volume record of court orders and pleadings. In January 2009, Peterson Roofing, Inc. (Peterson) filed a one-count complaint against David Doctor for breach of contract. The gist of the complaint was that the parties entered into a written contract in October 2004 pursuant to which Peterson was to make repairs to the roof of Doctor's building in River Grove, Illinois. According to the complaint, Peterson performed the work but Doctor did not pay Peterson. Peterson requested $14,435 in damages.

¶ 5 Doctor responded by filing a three-count counterclaim sounding in breach of contract, fraud/misrepresentation, and consumer fraud under the Illinois Consumer Fraud and Deceptive Business Practices Act (Act). See 815 ILCS 505/1, *et seq.* (West 2008). The counterclaim alleged that the building was sold to a third party in 2007. Count 1 alleged that Peterson did not fulfill its obligations under the contract because, among many other things, Peterson did not apply a primer coat to the gutter bottom, did not properly flush certain elements of the roof, and did not apply coating and sealing in certain locations.

¶ 6 Count 2, which purported to state a claim for fraud/misrepresentation, alleged that Peterson made certain "statements of material fact." The "statements" tracked the contractual breaches alleged in count 1, except that count 2 was cast in the conditional mood (*i.e.*, "[a] primer coat *would be* applied to the gutter bottom[])."

¶ 7 Count 3 was a claim for relief under the Act. It incorporated by reference the first 25 paragraphs of the breach of contract claim—including the allegation that a contract existed, and

then alleged that Peterson made certain statements "as to representations of material fact." The "representations," like the "statements" in count two, were identical with the alleged contractual breaches that Doctor alleged in count 1, except that (again, as with count 2), they were cast in the conditional mood.

¶ 8 Doctor's answer to Peterson's breach of contract complaint included two affirmative defenses: breach of contract and fraud. These were essentially duplicative of counts one and two of his counterclaim.

¶ 9 Peterson filed a motion to dismiss the counterclaim. With respect to count 3, Peterson argued that Doctor's consumer fraud claim was duplicative of his breach of contract claim and that, under *Zankle v. Queen Anne Landscaping*, 311 Ill. App. 3d 308 (2000), count 3 should be dismissed because it did not contain any allegations that were separate and distinct from the breach of contract claim. In August 2009, the court dismissed Doctor's counterclaim in its entirety without prejudice.

¶ 10 Thereafter, between August 2009 and February 2011, Doctor filed five amended counterclaims, all sounding in breach of contract, fraud, and consumer fraud under the Act. Peterson responded to each of these counterclaims (except the second amended counterclaim, for reasons irrelevant to this appeal) with a motion to dismiss. With respect to Doctor's claim under the Act, Peterson argued consistently throughout the case that Doctor's consumer fraud claim was duplicative of his breach of contract claim and thus barred under *Zankle*. The court granted each of Peterson's motions to dismiss without prejudice.

¶ 11 Doctor filed a sixth amended counterclaim in June 2011. Peterson answered it, and the parties proceeded with discovery. Peterson propounded interrogatories and requests to produce upon Doctor, and deposed him.

¶ 12 One of Peterson's interrogatories asked Doctor to identify the specific ways in which he had been harmed by Peterson's alleged fraud and breach of contract. In response, Doctor stated that he: (1) had to reduce the sale price of the building by $50,000, from $500,000 to $450,000 due to leaks in the roof, (2) suffered $10,000 in damages because he did not receive a labor guarantee and manufacturer's warranty, and (3) suffered $10,000 in damages because the alleged roof leaks allowed water to enter the building and damage a piece of machinery. In response to another interrogatory, Doctor admitted that he never had the roof professionally inspected

¶ 13 One of Peterson's requests asked Doctor to produce all documents that referred, related to, or reflected leaks in the roof. In response, Doctor produced miscellaneous correspondence and financial documents, but no photographs or other evidence actually documenting that the roof ever leaked. Among the documents Doctor produced was a June 8, 2007 letter to an attorney for an individual who was negotiating with Doctor to purchase the building. In the letter, Doctor noted various deficiencies with the property, such as the need for electrical upgrades, but he did not mention any problems with the roof. The letter concluded by stating the offered price of the building was $450,000 "as is," or $500,000 if Doctor made certain repairs required by the Village of River Grove.

¶ 14 Doctor testified at his deposition that he noticed that the roof had been leaking sometime in 2005 or 2006 after he returned from a vacation. Doctor then personally inspected the roof but did not notice any damage. He admitted that he did not have the roof professionally inspected.

¶ 15 In March 2013, Peterson filed a motion for partial summary judgment on Doctor's counterclaim with respect to damages. In June, the court granted the motion in its entirety. However, on reconsideration, the court reinstated Doctor's claim that he had to reduce the sale price due to the leaks.

¶ 16 The case proceeded, and as the trial date approached, Peterson filed nearly 40 motions *in limine*, of which three are relevant: motions *in limine*, 9, 10, and 11. Motion *in limine* 9 requested that Doctor be barred from presenting testimony regarding any repairs made to the roof after Peterson's work because Doctor had not produced any evidence "regarding subsequent roof repairs to fix any work performed by [Peterson], specifically no evidence of repairs to fix any roof leaks." In the motion, Peterson noted that Doctor himself had admitted that no repairs were made to the roof after 2004 and that he did not have the roof inspected at any time after Peterson finished its work.

¶ 17 In motion *in limine* 10, Peterson argued that Doctor had failed to produce any evidence that the building suffered permanent damage as a result of Peterson's work. Accordingly, Peterson asked the court to bar Doctor from presenting testimony to the jury or otherwise arguing that any leaks in the roof constituted "permanent damage to the property." Motion *in limine 11* drew directly from 10. It claimed that Doctor had failed to produce any evidence showing that the building was permanently damaged by Peterson, and therefore asked the court to bar Doctor from seeking damages as a result of a diminution in value of the building.

¶ 18 The court considered these motions at three pre-trial hearings in April 2015. With respect to motion *in limine* 9, Peterson's attorney argued, "[t]here's an admission that there wasn't any roof repairs done." A discussion ensued between the court, Peterson's counsel, and Doctor's attorney, after which Peterson's counsel stated, "Mr. Doctor has no evidence that he had the roof repaired at any point in time between 2004 and when he sold it in 2007. There's no dispute regarding that. He's admitted he did not have any done to either one of those roofs." In response, the court asked Doctor if he had "any evidence there was roof repairs between those dates?" Doctor admitted he did not and the court immediately granted motion *in limine* 9.

¶ 19 With respect to motions *in limine* 10 and 11, Peterson, citing *Myers v. Arnold*, 83 Ill. App. 3d 1 (1980), maintained that Doctor was required to show that the building suffered permanent damage due to the alleged leaks in order to recover damages for diminution of value to the property. Peterson argued that Doctor had not presented any evidence whatsoever establishing that "whatever was causing this roof leak was a permanent damage." In express reliance on *Myers*, the court granted motions *in limine* 10 and 11, stating: "[t]he case said what it said, and I Shepardized it, and there's nothing else out there that says anything different, so 10 and 11 are granted."

¶ 20 After the court granted motions *in limine* 10 and 11, Doctor's attorney asked, "does that *** get rid of *** our $50,000 in damages?" The court answered, "I think it does. I think you have to show, you know, whatever your damages are."

¶ 21 On April 28, 2015, Peterson filed a motion to dismiss the sixth amended counterclaim and affirmative defenses. The motion, brought pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2014)), argued that the court's orders granting motions *in limine* 9, 10, and 11 "create affirmative matter that completely negate Doctor's claims that he suffered damages."

¶ 22 The court granted this motion to dismiss, relying heavily on *McWilliams v. Dettore*, 387 Ill. App. 3d 833 (2009) and *Ceres Terminals v. Chicago City Bank and Trust Company*, 259 Ill. App. 3d 836 (1994). The court explained:

> "In our case here, the motions in limine provide the basis for a 2-619(a)(9) motion to dismiss the counterclaim. There is no evidence of diminution in value. The evidence is that repairs could have been made. If real property is partially injured and the injury

> may be repaired in a practical manner, then the proper measure of damages is the cost of restoring the property to its condition prior to the injury.
>
> However, as repairs were never made to the injuries complained of prior to the sale of the real property in question, any damages recovered could not be put towards making the necessary repairs. There being no provable damages, the counterclaim must fail."

¶ 23 Thereafter, Peterson filed a petition for attorney fees pursuant to section 10a(c) of the Act. In his written response to Peterson's fee petition, Doctor maintained that the court did not intend to dismiss the sixth amended counterclaim with prejudice and accused Peterson of surreptitiously adding the phrase "with prejudice" to the order after Doctor's attorney finished preparing it. On the merits, Doctor attacked Peterson's petition in four ways. First, he argued that Peterson was not a "prevailing party" under the Act because the case was still ongoing, and was thus not entitled to an award of attorney fees. Second, Doctor argued that Peterson failed to plead or allege Doctor brought his consumer fraud claim in bad faith. Third, he contended—in reliance on a United States district court memorandum opinion from 1936—that Peterson could not show that he brought his consumer fraud claim in bad faith. Fourth, he claimed that the amount of fees Peterson requested was unreasonable because, among other things, (1) multiple attorneys worked on the case, (2) the attorneys charged the same rate even though one attorney had four years' experience and the other 25 years' experience, (3) although the hourly rates might have been reasonable for downtown Chicago, they were not reasonable for "the fringes of Cook County" such as Rolling Meadows, the location of the courthouse at which the case was

heard, (4) the fees requested were for an amount "over four times the amount in controversy[,]" (5) the issues in the case were neither "difficult" nor "novel," (6) Peterson's attorneys did not forego other employment, and (7) Peterson was requesting fees unrelated to the counterclaim, such as fees relating to the initiation of Peterson's complaint against Doctor.

¶ 24 At the hearing on Peterson's petition for attorney fees, the court stated that its notes did not reflect that the dismissal of Doctor's sixth amended counterclaim was with prejudice. At the conclusion of the hearing, however, the court stated that the dismissal was "with prejudice at this point in time."

¶ 25 During the hearing, both parties reiterated arguments regarding the fee petition which they had already made in writing. Peterson repeatedly expressed its willingness to participate in an evidentiary hearing to further aid the court in determining whether an award of fees was appropriate. Doctor never requested a hearing. The court took the motion under advisement.

¶ 26 The remaining portion of the case, Peterson's original breach of contract claim, then proceeded to a three-day jury trial. The jury returned a verdict in favor of Peterson for $14,335. After this verdict, the court granted Peterson's petition, stating:

> "Attorney's fees are left to the sound discretion of the Trial Court.
>
> In determining whether a Trial Court abused its discretion, our Appellate Court has identified several factors or criteria a Trial Court may consider when ruling on a fee petition under Section 10a(c).
>
> These factors include, but are not limited to: One, the degree of the opposing party's culpability or bad faith; two, the

ability of the opposing party to satisfy an award of fees; three, whether an award of fees against the opposing party would deter others from acting under similar circumstances; four, whether the party requesting fees sought to benefit all consumers or businesses or to resolve a *** significant legal question regarding the Act; and five, the relative merits of the parties' positions.

***

I considered all these factors. And most importantly, I considered that it was my opinion that there was no merit in the Consumer Fraud Count, and as such, I find it to have been made in bad faith.

As such, the petition for attorney's fees is granted."

¶ 27 The court later held a hearing to set the amount of attorney fees. At first, the court stated that it was awarding $40,320 in fees. The following colloquy ensued:

"MR. DEWALD [Attorney for Peterson]: For the record, Judge, what did we actually ask for?

THE COURT: $40,320 is what I see. Maybe—oh, I'm—

MR. MCCORMICK [Attorney for Peterson]: No, no. There was two—I broke them down because—

THE COURT: You did one—I'm sorry.

MR. MCCORMICK: One is for one firm, one is for the other. The reason for that is because—

THE COURT: Riebandt & DeWald. Okay. I'm sorry.

MR. MCCORMICK: Right. So the DeWald Law Group fees are $40,320, and then the—

THE COURT: For DeWald it's $40,320?

MR. MCCORMICK: Correct. And then for Riebandt & DeWald it's $30,795."

Thereafter, the court awarded Peterson $71,115 in attorney fees. This appeal followed.

¶ 28 ANALYSIS

¶ 29 Doctor's arguments on appeal fall into two broad categories. First, Doctor attacks the circuit court's decision to award any fees at all. Second, Doctor offers a variety of reasons why, in his view, the amount of fees the court awarded was unreasonable. Before proceeding, however, we set forth the general law governing our analysis.

¶ 30 Section 10a(c) of the Act provides in relevant part, "in any action brought by a person under this Section, the Court *** may award *** reasonable attorney's fees and costs to the prevailing party." 815 ILCS 505/10a(c) (West 2014). Our supreme court has explained that "the term 'prevailing party' under the Act encompasses a prevailing defendant, as well as a prevailing plaintiff." *Krautsack v. Anderson*, 223 Ill. 2d 541, 554 (2006).

¶ 31 The *Krautsack* court also clarified the standard applicable when a defendant requests attorney fees under the Act. The court explained that, "where a prevailing defendant petitions the trial court for a reasonable attorney fee under [the Act], only if the trial court makes a threshold finding that the plaintiff acted in bad faith should the trial court consider other circumstances relevant to its exercise of discretion." *Id*. at 559.

¶ 32 Continuing, the court described the relationship between the concept of bad faith under Supreme Court Rule 137 (see Ill. S. Ct. R. 137 (eff. July 1, 2013)) and the Act. The court explained:

> "Because Rule 137 addresses the pleadings, motions and other papers a litigant files, the rule does not provide a sanction against all asserted instances of bad-faith conduct by a litigant or the litigant's attorney during the course of litigation. [Citation.] For example, a party's pleadings may conform to Rule 137, yet the party may be guilty of other rule violations amounting to bad faith. We discern no reason why a prevailing defendant should be limited by Rule 137 in establishing a plaintiff's bad faith. Rule 137, and the body of case law that has developed around it, provide useful guidance to litigants and judges, but a defendant's failure to demonstrate bad faith by the plaintiff under Rule 137 is not fatal to a prevailing defendant's fee petition under the Act." *Id*. at 562.

¶ 33 Under *Krautsack*, once the circuit court makes a threshold finding that the plaintiff's claim was brought in bad faith, the court should "consider other circumstances relevant to its exercise of discretion." *Id*. at 559. On that point, the court identified a "nonexhaustive" list of five factors that the circuit court "may consider when ruling on a fee petition." *Id*. at 554. The factors are: " '(1) the degree of the opposing party's culpability or bad faith; (2) the ability of the opposing party to satisfy an award of fees; (3) whether an award of fees against the opposing party would deter others from acting under similar circumstances; (4) whether the party requesting fees sought to benefit all consumers or businesses or to resolve a significant legal

question regarding the Act; and (5) the relative merits of the parties' positions.' " *Id*. (quoting *Graunke v. Elmhurst Chrysler Plymouth Volvo, Inc.*, 247 Ill. App. 3d 1015, 1020 (1993)).

¶ 34 Ultimately, the decision to award attorney fees is committed to the sound discretion of the circuit court. *Kleidon v. Rizza Chevrolet, Inc.*, 173 Ill. App. 3d 116, 123 (1988). Accordingly, this court will not set aside an order awarding attorney fees unless the decision constitutes an abuse of discretion. *Id*. "An abuse of discretion occurs only where the trial court's decision is 'arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it.' " *People v. Lerma*, 2016 IL 118496, ¶ 23 (quoting *People v. Rivera*, 2013 IL 112467, ¶ 37).

¶ 35 With this guidance in hand, we turn to Doctor's claims on appeal. Doctor first argues that the circuit court committed error when it found Doctor's consumer fraud claim had been brought in bad faith because, in Doctor's words, "the trial judge provided no further explanation of his methods or reasons for reaching a bad faith conclusion." Implicit in that statement is the argument that the law entitled Doctor to a fuller explanation of the court's reasoning. Yet, Doctor has not cited a single case or authority standing for that proposition, and no such requirement is in the Act. As a result, this argument is waived. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016).

¶ 36 Next, Doctor argues that the court erred by "appl[ying] a bad faith standard not supported by case law." This argument is meritless. As defendant concedes in his appellate brief, the Illinois Supreme Court has yet to articulate a test for bad faith under the Act. The only guidance that court has given is that the Rule 137 standard—which asks whether a claim was false or frivolous—is not the sole standard by which bad faith under the Act is to be determined. Therefore, the circuit court could have applied a bad faith standard "not supported by case law"

only by requiring Peterson to show that Doctor's claim was false or frivolous. That plainly did not occur here. Moreover, even if the court had applied the false or frivolous standard, Doctor would have no room to complain because, as the supreme court explained in *Krautsack*, that standard sets an exceedingly difficult bar to clear.

¶ 37 Next, we consider Doctor's argument that his claim was not brought in bad faith. This argument is forfeited because it is not supported with citation to legal authority. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016). But even if we excused Doctor's forfeiture, the argument fails on the merits.

¶ 38 The main thrust of this argument consists of Doctor's suggestion that the court "improperly equated inability to prove damages with bad faith in bringing the claim." But it is not as simple as Doctor suggests. As relevant to this appeal, the problem with Doctor's consumer fraud claim was not, as his argument implies, merely that the court ultimately determined that Doctor could not prove he was damaged. Instead, the trouble for Doctor is that the facts which led the court to grant Peterson's motions *in limine* 9, 10, and 11—which in turn led the court to dismiss Doctor's counterclaim—were all facts which had to have been known to Doctor before he filed his counterclaim.

¶ 39 As we explained, the court granted Peterson's motions *in limine* 9, 10, and 11, all three of which were germane to damages element of Doctor's consumer fraud claim. Motion *in limine* 9 barred Doctor from presenting testimony regarding subsequent repairs to the property. The court granted the motion after Doctor admitted during discovery (and again during the hearing on the motion) that he never made any repairs to the roof subsequent to Peterson's work, or even had the roof inspected. Likewise, the court granted motions *in limine* 10 and 11 and barred Doctor from presenting testimony that: (1) the building suffered permanent damage (motion 10) and (2)

that the building value was diminished due to permanent damage (motion 11). Both motions were predicated on, and were granted because of, Doctor's failure to produce any evidence showing that the building was permanently damaged as a result of Peterson's work.

¶ 40 In short, Doctor's consumer fraud claim did not fail because Peterson produced more persuasive evidence. It failed because the court, seven years after Doctor first filed his counterclaim, was able to determine that critical facts (or, rather, their nonexistence) which had previously been known only to Doctor affirmatively defeated his claims. While we may have come to a different conclusion under these facts, we cannot say that no reasonable person would have reached the same conclusion as the circuit court in this case.

¶ 41 Next, we consider Doctor's argument that the court erred by failing to properly consider the five *Krautsack* factors enumerated above. This argument fails for two reasons. First, the record affirmatively defeats this claim. Before announcing its ruling, the court read directly from *Krautsack* and listed the factors which the supreme court advised courts to consider when ruling on a fee petition under the Act. After doing that, the judge stated, "I considered all these factors." Second, the court is not *required* to consider any of factors. When the court set forth the factors, it stated that the circuit courts "*may*" consider them, not that the circuit court has a binding obligation to consider them.

¶ 42 Doctor offers a variety of arguments with respect to four of the *Krautsack* factors, but they all suffer a singular flaw. Doctor first contends that the court erred because it "did not have before it evidence with respect to Doctor's ability to satisfy a fee award." Doctor never made this argument in the court below. Accordingly, this argument is waived. Likewise, Doctor's second, third, and fourth arguments—namely, that: (1) the court did not have evidence that a fee award would serve a deterrent purpose, (2) Peterson did not act to benefit all consumers, and (3)

the relative merits of his and Peterson's claims do not merit fees—were never made in the circuit court and are therefore waived.

¶ 43 Of course, this court may excuse a party's waiver to meet the demands of justice, but no such circumstance exists here. *Welch v. Johnson*, 147 Ill. 2d 40, 48 (1992). Doctor had the opportunity to respond to Peterson's petition and did. He had to the opportunity to argue at the hearing on the petition and did. And, four times during the hearing, Peterson indicated its willingness to hold a full evidentiary hearing, during which time Doctor would have had the opportunity to submit evidence germane to the *Krautsack* factors. Yet despite Peterson's open invitation, Doctor never requested an evidentiary hearing. Moreover, we emphasize that the determination of whether fees are appropriate is a matter committed to the discretion of the circuit court. A party cannot refrain from placing before the circuit court argument and evidence that may aid the court in the exercise of its discretion, and then argue on appeal that the court abused its discretion by failing to consider that nonexistent argument and evidence.

¶ 44 We next address Doctor's second category of arguments, which attack the reasonableness of the court's award. Doctor first argues that the court's award was unreasonable because, according to him, this case "is a basic collection action from the Third Municipal District with $14,355 at issue." In his view, "no sensible client would approve of an attorney racking up more than $71,000 on the road to (potentially) collecting just over $14,000." Simply put, this case ceased to be a "basic collection action" when Doctor filed his multi-count counterclaim which sought, among other relief, $50,000 in compensatory damages as well as an unspecified (but presumably significant) award of punitive damages under the Act. It continued to digress from the "simple collection case" path over the course of seven years as Doctor unsuccessfully attempted to plead a valid cause of action despite filing six successive counter-complaints.

¶ 45 Next, Doctor states that he is "compelled to point out" that, in his view, "the record suggests that the circuit court "made a substantial fee award to Peterson without a careful and thorough consideration of the record before it." This claim, predicated on the fact that the court at first granted only $40,000 in fees due to an oversight, consists of nothing more than speculation and conjecture. We therefore reject it as unsupported by authority or the record.

¶ 46 Next, Doctor argues, relying on *Aliano v. Sears, Roebuck and Co.*, 2015 IL App (1st) 143367, that the amount of fees awarded was unreasonable because Peterson did not support its request for fees with "the original time sheets maintained by the individual attorneys." This argument is waived because Doctor did not raise it in the court below.

¶ 47 Finally, Doctor argues that the court awarded fees that were unrelated to the consumer fraud claim. Our analysis requires that we quote this argument in full:

> "For ease of illustration, rather than demonstrating the insufficiency of Peterson's submission by an extended narrative line-by-line analysis, Doctor has included in the Appendix to his brief a copy of the schedules appended as exhibits to the Fee Affidavit. ***. On that copy, the individual time entries that are plainly not related to the Consumer Fraud Act claim and those that are not sufficient to determine whether they are related to the Consumer Fraud Act claim are highlighted in yellow."

¶ 48 This argument—with one exception which we will discuss momentarily—is waived. First, Peterson argues—and Doctor does not dispute—that the fee schedules with yellow highlighting that Doctor appended to his appellate brief were never submitted to the trial court. It is inappropriate for Doctor to submit this evidence for the first time on appeal. Second, the

argument is woefully underdeveloped. Doctor fails to cite any particular time entry which was not related to the consumer fraud claim. Instead, he declares that if an entry is highlighted in yellow, it did not relate to the consumer fraud claim. But why? The answer, as best we can tell, is because Doctor says so. Supreme Court Rule 341(h)(7) requires more. The time entries are not self-explanatory. Thus, in order to advance this argument, Doctor, as the appellant, had a duty to supply this court with an argument containing actual substance. A document *de hors* the record supplemented with Doctor's mere say-so is not sufficient. These failings result in waiver.

¶ 49 There is one exception to Doctor's waiver of this issue. In his response to Peterson's fee petition, Doctor specifically argued that Peterson had requested fees for time it spent initiating its original suit against him. The time sheets Peterson attached to its fee petition, and which are in the record, confirm that point. They contain eight entries from January 1, 2009 to May 29, 2009—all of which predate the time when Doctor filed his counterclaim on June 8, 2009.

¶ 50 "It is well established that the rule of waiver is a limitation on parties and not on reviewing courts and that this court, in reviewing the judgments of lower courts, may, in furtherance of its responsibility to reach a just result, override considerations of waiver and consider a point which is either not raised or, if raised, not argued by the appellant." *Welch*, 147 Ill. 2d at 48. Here, because Doctor actually argued to the circuit court that Peterson was requesting fees for work that predated his consumer fraud claim, and because the record confirms that Doctor is correct on that point, we find it appropriate to excuse Doctor's waiver of this argument, but only with request to those time entries on Peterson's fee schedule that predate the counterclaim.

¶ 51 The record shows that for the eight entries which predated the counterclaim, Peterson requested (and received) a total of $1,380 in fees. Without those fees, Peterson's award would

have been $69,735. Accordingly, we affirm the circuit court's decision to award fees under the Act but modify the judgment to reflect an award of $69,735 in attorney fees.

¶ 52 CONCLUSION

¶ 53 We affirm the circuit court's order awarding fees but, pursuant to our authority under Supreme Court Rule 366(a)(5) (Ill. S. Ct. R. 366(a)(5) (eff. Feb. 1, 1994), modify the judgment to reflect an award of $69,735 in attorney fees.

¶ 54 Affirmed as modified.