2019 IL App (1st) 171906-U

SIXTH DIVISION
MARCH 29, 2019

No. 1-17-1906

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BRIAN CONNOLLY, Plaintiff-Appellant, v. ANTHONY MILAZZO, MIKE FISH, SERAP BRUSH, and GLENN GREENE, Defendants-Appellees, (Ann Marie Del Monico, Cheryl Jansen, and Asia Gajderowicz, Defendants).	)	Appeal from the Circuit Court of Cook County. No. 13 CH 24252 Honorable Kathleen M. Pantle, Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justice Harris concurred in the judgment.
Presiding Justice Delort specially conurred.

ORDER

¶ 1 *Held*: We reverse the trial court's dismissal of plaintiff third amended complaint, as it sufficiently pleaded a violation of section 18.4(h) of the Condominium Property Act (765 ILCS 605/18.4(h) (West 2014)). We otherwise affirm the dismissal of the remainder of the third amended complaint. We also reverse the trial court's orders granting defendants-appellees' motion for Rule 137 sanctions and awarding them $111,941.03 for attorney fees and costs.

¶ 2 Plaintiff-appellant Brian Connolly appeals from separate orders of the circuit court of Cook County that (1) dismissed his third amended complaint with prejudice; (2) granted the motion of defendants-appellees Anthony Milazzo, Mike Fish, Serap Brush, and Glenn Greene to impose Rule 137 sanctions, and (3) awarded defendants-appellees attorney fees in the amount of $111,941.03. For the following reasons, we reverse the dismissal in part, as we find that count I of the third amended complaint sufficiently pleaded a cause of action. We also reverse the circuit court's order granting the Rule 137 motion, and the order assessing sanctions in the amount of $111,941.03 against plaintiff-appellant.

¶ 3 BACKGROUND

¶ 4 Plaintiff is the owner of a condominium unit at 111 E. Chestnut Street in Chicago; the unit owners at the building comprise the 111 East Chestnut Condominium Association (the association). Each of the defendants has served as a member of the association's board of directors (board). At relevant times, defendant-appellee Milazzo served as president of the association.

¶ 5 Plaintiff has been an outspoken critic of the board, and Milazzo in particular, whom plaintiff claims has worked to "eliminate" any "dissent." Plaintiff has accused the board members of "self dealing" and conflicts of interest. Plaintiff alleges that he engaged in his own "investigation" of self-dealing incidents and claims that he has sought relief from "various government agencies." Plaintiff's filings in this lawsuit accuse defendants of retaliation for his criticism of the board's alleged misconduct.

¶ 6 Among these retaliatory acts, plaintiff alleges that he was removed from the board, after which the board amended the association's bylaws, to prevent a removed member from ever

again serving on the board (the bylaws amendment)[1]. Plaintiff claims that the bylaws amendment was intended to target him exclusively, and he alleges that the board relied on that bylaws amendment to deny his attempt to become a candidate for the board in March 2013.

¶ 7 According to plaintiff, in August 2013, he sent the board written requests to inspect association records pursuant to section 13-72-080 of the Chicago Municipal Code.[2] The board denied these requests.

¶ 8 Plaintiff claims that the board retaliated against him by sending him a "Violations Notice" dated August 29, 2013 (violations notice), which alleged four incidents of "erratic and intimidating behavior" by plaintiff. In the first alleged incident, plaintiff allegedly told a young boy that he was violating building rules by bringing a bicycle into the main elevator, and plaintiff demanded to know the boy's name and unit number. In the second incident, plaintiff allegedly confronted a resident who was walking her dog through the front door of the building and repeatedly asked her, in an "angry tone," why she was doing so. In the third incident, unnamed association residents allegedly complained that "while at the pool [plaintiff] requested they turn down their music and proceeded to disconnect the I-Pod without their consent" and then "tossed the I-Pod on the ground." Finally, the notice described an incident in which plaintiff approached other residents "and informed them no food was allowed in the pool area"; those residents suspected that plaintiff may have also photographed them without consent.

¶ 9 According to the violations notice, these incidents violated the provision of the association's declaration that states: "No obnoxious or offensive activity shall be carried on in

[1]The bylaws amendment provides that "any person who has been removed from the Board pursuant to *** these By-Laws shall thereafter be disqualified from being elected or appointed to the Board."

[2]That provision of the municipal code is entitled "[e]xamination of records by unit owners" and enumerates several categories of association documents that shall be provided to a unit owner for inspection within 10 business days of a unit owner's written request. Chicago Municipal Code § 13-72-080.

any Unit or in the Common Elements *** which may be or become an annoyance or nuisance to the other Unit Owners or occupants or which disrupts any other Unit Owner's reasonable use and enjoyment of the Property." The violations notice stated that the board was considering imposing fines upon plaintiff, but stated: "prior to making its final determination, the Board invites you to attend a hearing *** at which time you may present any documents, witnesses or other material that supports your innocence."

¶ 10 On October 4, 2013, the board conducted a hearing. According to plaintiff, he was denied the opportunity to present evidence. Plaintiff was subsequently informed that the board had imposed a penalty of $250 for each of the four incidents, resulting in a total fine of $1000.

¶ 11 On October 28, 2013, plaintiff initiated this action by filing a *pro se* complaint, which named the board as the only defendant. The complaint sought, *inter alia*, a declaration that the hearing was "unconstitutional" and that the $1000 fine was unlawful. On the same date, separately, plaintiff filed a motion for a temporary restraining order and preliminary injunction. After a hearing on October 31, 2013, plaintiff agreed to withdraw his motion for a temporary restraining order. At that time, plaintiff was granted leave to file an amended complaint.

¶ 12 In November 2013, plaintiff filed a *pro se* first amended complaint, which no longer named the board as a defendant but instead named seven individual defendants: Milazzo, Ann Marie Del Monico, Cheryl Jansen, Michael Fish, Serap Brush, Asia Gadjerowicz, and Glenn Greene. The first amended complaint included counts for (1) "Breach of the governing documents"; (2) breach of fiduciary duty, (3) "malicious prosecution"; (4) "shareholder oppression" and (5) "civil conspiracy." On January 15, 2014, the trial court granted plaintiff leave to file a second amended complaint.

¶ 13 On February 6, 2014, plaintiff filed a second amended complaint against the same defendants, which contained counts entitled "Breach of the Governing Documents" (count I); "Breach of Fiduciary Duty" (count II), "Malicious Prosecution" (count III), and "Civil Conspiracy" (count IV).

¶ 14 Defendants moved to dismiss the second amended complaint. Defendants argued, *inter alia*, that all counts should be dismissed because plaintiff failed to plead facts to overcome the "business judgment rule." The motion independently argued for dismissal due to the exculpatory provision in the association's declaration, which states that individual directors "shall not be liable to the Unit Owners for any mistake in judgment or for any other acts or omissions of any nature whatsoever *** except for any acts or omission found by a court to constitute gross negligence, willful misconduct, or fraud ***." Defendants' motion independently sought dismissal under section 2-619(a)(3) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(3) (West 2012)), on the basis that certain of plaintiff's allegations were already the subject of a separate lawsuit between plaintiff and Milazzo.

¶ 15 On July 24, 2014, the trial court granted defendants' motion to dismiss the second amended complaint, noting that plaintiff improperly pleaded "evidentiary facts," as well as "hyperbole and conclusory statements." The court dismissed the malicious prosecution count (count III) with prejudice. The court dismissed the remaining counts without prejudice, noting that many of the pleading deficiencies were "easily curable."

¶ 16 In August 2014, plaintiff (still acting *pro se*) filed his third amended complaint, the dismissal of which is at issue in this appeal. Count I was entitled "Violation of Plaintiff's Statutory and Constitutional Rights," and alleged several discrete violations. Among these, plaintiff alleged that defendants violated section 13-72-080 of the Chicago Municipal Code, by

denying his requests to inspect the association's books and records. Count I alleged "on information and belief" that his requests were denied in order "to conceal the Board's negligence in enforcing the Rules & Regulations of the Association, and to coverup [sic] the Board President's misdeeds with regard to non-compliance with Chicago Building Permits and the Association Rules for his unit."

¶ 17 Count I also alleged that defendants' rejection of his candidacy for the board violated section 18(a)(17) of the Condominium Property Act (Act) (765 ILCS 605/18(a)(17) (West 2014))[3]. Count I also claimed that the defendants' amendment of the bylaws precluded him "exclusively from being a member of the board" and "reduced the Plaintiff exclusively to a subordinate 2nd-class status" in violation of section 18(b)(2) of the Act, which states that the association "shall have one class of membership." 765 ILCS 605/18(b)(2) (West 2014).

¶ 18 Count I also claimed that plaintiff's First Amendment rights were violated by the issuance of the violations notice and resulting $1000 fine, which were allegedly intended "to punish, chill and stifle the Plaintiff from speaking with government agencies." Similarly, count I alleged that the notice and fine constituted a violated of section 18.4(h) of the Act (765 ILCS 605/18.4 (West 2014)), as it was an intentional misapplication of the provision of the association's declaration barring "obnoxious or offensive activity." Plaintiff also alleged "on information and belief" that issuance of the violations notice "was in retaliation to Plaintiff having reported the Board President's non-compliance with Building Permits." Count I additionally alleged that defendants' conduct of the hearing violated his due process rights under

[3]This subsection of the Act provides that the board of a condominium association "may disseminate to unit owners biographical and background information about candidates for election to the board if (i) reasonable efforts to identify all candidates are made and all candidates are given an opportunity to include biographical and background information in the information to be disseminated; and (ii) the board does not express a preference in favor of any candidate." 765 ILCS 605/18(a)(17) (West 2014).

the Fourteenth Amendment, as he was denied any pre-hearing "discovery," and the board failed to present any evidence against him.

¶ 19 Count II was entitled "Breach of the Governing Documents and Breach of Fiduciary Duty" and alleged several ways in which the board had failed to comply with the association's governing documents. Plaintiff alleged violation of an association rule specifying that, in the event of disputes between residents, the parties should "attempt to resolve these matters directly in a friendly manner" before the matter is referred to the board. Plaintiff also alleged that the defendants violated a separate association rule requiring "notice and an opportunity for hearing" after an alleged rule violation. Count II otherwise alleged that the board breached their duties through "intentional complete neglect and then arbitrary enforcement of the condominium rules." Count II further complained that defendants violated other rules by, *inter alia*, "fining him excessively, arbitrarily and with malicious purpose" and by precluding his participation in association governance.

¶ 20 Count III, "Tortious Interference with Contractual Relations," pleaded that the association's "Governing Documents" were an enforceable contract between plaintiff and the association, and that defendants "induced the Association to breach its contract with the plaintiff." Count IV, entitled "Civil Conspiracy," alleged that the defendants "worked together, deliberated and knowingly came to agreement" to commit "the intentional torts and harms" described in the first three counts.

¶ 21 On September 10, 2014, defendants moved to dismiss the third amended complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2014)), containing arguments for dismissal under either section 2-615 or section 2-619 of the Code (735 ILCS 5/2-615, 2-619 (West 2014)). The motion first argued that the counts were

subject to dismissal under section 2-615 for failure to state a claim. Defendants made several additional arguments, including the claim that Milazzo was the only named defendant who was actually on the board at the time of the bylaws amendment. Defendants further argued that a separate lawsuit by plaintiff had already included a claim against Milazzo relating to the same amendment, warranting dismissal of such allegations in this lawsuit pursuant to section 2-619(a)(3) of the Code. 735 ILCS 5/2-619(a)(3) (West 2014).

¶ 22 The motion to dismiss the third amended complaint was not decided for several months, due to unsuccessful attempts at settlement. On October 20, 2014, the court entered an order reflecting that certain defendants expressed their wish to mediate, but others did not.[4] In January 2015, the court directed the parties to mediation. On May 11, 2015, the parties (including all defendants) participated in an unsuccessful mediation.

¶ 23 In the months after the mediation, the court conducted a number of status hearings regarding settlement. On August 25, 2015, the trial court ordered plaintiff to reply to a settlement proposal; the order specified that if plaintiff did not reply, the court would set a briefing schedule on the still-pending motion to dismiss the third amended complaint.

¶ 24 On September 18, 2015, the trial court denied plaintiff's motion for leave to file a fourth amended complaint, and entered a briefing schedule on the pending motion to dismiss. In October 2015, separate memoranda in support of dismissal were filed by the two law firms representing defendants.

¶ 25 Plaintiff sought legal counsel before responding to the motion to dismiss. Plaintiff's first attorney, Denise Debell, filed an appearance on November 24, 2015. Less than a month later, on

[4]The record and appellees' brief reflect that the defendants developed conflicting opinions regarding mediation. As a result, in January 2015, the court granted leave for a second law firm, Tressler LLP, to serve as counsel for three of the seven defendants: Gajderowicz, Del Monico, and Jansen. The remaining four defendants (the appellees herein) continued to be represented by Kovitz Shifrin Nesbit.

December 22, 2015, that attorney moved to withdraw. Over plaintiff's objection, Debell's motion to withdraw was granted.

¶ 26 Plaintiff subsequently retained attorney Norman Lerum, who filed his appearance on January 22, 2016. On March 2, 2016, Lerum filed plaintiff's response to the motion to dismiss. In that response, plaintiff offered to voluntarily withdraw count III, but he opposed the dismissal of the remaining counts.

¶ 27 The defendants filed reply briefs in March 2016. On April 6, 2016, the court heard oral argument on the motion to dismiss, at which Lerum argued on plaintiff's behalf.

¶ 28 On July 22, 2016, the trial court entered an order dismissing the third amended complaint, with prejudice. Before addressing the merits of each counts, the court first observed that the third amended complaint was "a confusing mix of allegations and causes of action." The court remarked that the complaint "does not set out ultimate facts as is required for proper pleading," but that the "allegations largely consist of conclusions, many of which were pleaded on information and belief."

¶ 29 With respect to count I, the trial court noted that, to the extent it claimed violations of the First and Fourteenth Amendment, "these allegations fail for the simple reason that Defendants are not state actors." The court proceeded to find that plaintiff's allegations based upon the violations notice and hearing did not state a claim for violation of section 18.4(h) of the Act (765 ILCS 605/18.4(h) (West 2014)). The court noted: "It appears that Connolly is alleging that the board essentially made up its mind that he violated the By-Laws before the hearing, but Connolly alleges no facts in support of that position." The court further reasoned that the content of violations notice "shows that the Board was not trying to control his speech" but was "citing

Connolly for his conduct." The court found that the violations notice cited plaintiff for his "behavior" but not "protected speech."

¶ 30 The court also rejected plaintiff's claim that the bylaws amendment violated the Act's provision that an association "shall have one class of membership." 765 ILCS 605/18(b)(2) (West 2014). The court reasoned that the language of the bylaws amendment did not apply to plaintiff exclusively, but applied to "any unit owner who has been removed from the Board."

¶ 31 The court also found that count I did not state a violation of section 13-72-080 of the Chicago Municipal Code, in that that plaintiff "failed to attach a copy of his request to examine the books and records," he did not plead the nature of the records he sought to inspect, and failed to plead that he included a proper purpose in his request. The court also found that count I failed to plead a violation of section 18(a)(17) of the Act, reasoning that defendants "were not obligated to disseminate [plaintiff's] biographic and background information for the simple reason he was not a candidate for the board."

¶ 32 Turning to count II (breach of fiduciary duty), the trial court determined that this count failed for multiple, independent reasons. First, the court found that the allegations were "conclusory" and too vague to meet the "fact-pleading standard." Second, the court noted that plaintiff failed to bring the claim derivatively, although it alleged injuries to other condominium unit owners. The court independently found that dismissal was warranted because "the acts complained of clearly fall within the exercise of business judgment by Defendants." As a final independent reason to dismiss count II, the court found that the exculpatory provision of the by-laws shielded the defendants from liability.

¶ 33 The court proceeded to find that count III (tortious interference with contractual relations) failed as matter of law, because defendants, as members of the association, could not have

"tortiously interfered with their own contract." The court also dismissed count IV because plaintiff had "failed to state an independent cause of action" to support a claim for conspiracy. The court specified that plaintiff would not be allowed further leave to amend, and thus dismissed the third amended complaint with prejudice.

¶ 34 In August 2016, the defendants-appellees herein filed a motion for Rule 137 sanctions against plaintiff as well as his attorney, Lerum. The Rule 137 motion asserted that none of plaintiff's pleadings or motions had been "well-grounded in fact or law." The motion additionally argued that plaintiff's pleadings had an improper purpose, claiming plaintiff had engaged in a "campaign of retaliation" and "relentless harassment." The Rule 137 motion suggested that plaintiff's motivation could be inferred from the fact that he had filed separate lawsuits against the association and Milazzo, and by the fact that plaintiff "maintained a website devoted to demeaning Association management."[5] The Rule 137 motion also claimed that plaintiff had requested mediation when he had "no good-faith intention of negotiating." The Rule 137 motion recognized that Lerum did not appear on plaintiff's behalf until January 2016, but sought sanctions against him because he "proceeded with this litigation and the frivolous arguments contained therein without any regard for the law."

¶ 35 On October 19, 2016, plaintiff and Lerum filed a response to the sanctions motion in which they argued that the Rule 137 motion failed to identify any statements in plaintiff's pleadings that were false or not made after a reasonable inquiry. Plaintiff also insisted that he made "good faith efforts" regarding settlement. The response also argued that Lerum could not be sanctioned for arguments made in the response to the motion to dismiss the third amended

[5]As noted by plaintiff, Milazzo initiated a separate defamation lawsuit against plaintiff premised upon the content of that website. Our court affirmed the dismissal of that lawsuit. *Milazzo v. Connolly*, 2017 IL App (1st) 162418-U (June 6, 2017).

complaint, because that filing was signed by another attorney at his law firm.[6] The response also requested an evidentiary hearing, if the trial court did not deny the Rule 137 motion outright.

¶ 36 On January 6, 2017, the trial court entered an order finding that Rule 137 sanctions were appropriate. The court found that plaintiff's filings were frivolous, as "none of the complaints were well-grounded in fact or law." The court emphasized that plaintiff repeatedly sought leave to amend but failed to correct his pleading defects. In addition to the pleadings, the court also found that the response to the motion to dismiss the third amended complaint "was riddled with arguments that were not grounded in fact or law." The court specifically found that attorney Lerum could be sanctioned, based upon the frivolous arguments contained in that response.[7]

¶ 37 The court's order concluded: "Because the Court has found that sanctions are appropriate for the filing of frivolous papers, it need not reach the issue of whether Connolly had an 'improper purpose' in filing and pursuing this lawsuit. Thus, there is no need for an evidentiary hearing." The court thus granted the motion for Rule 137 sanctions and directed the defendants-appellees to file a petition for attorney fees.

¶ 38 On February 14, 2017, the moving defendants submitted a petition seeking a total of $112,704.08 in attorney fees and costs, representing fees incurred by their counsel from the inception of this lawsuit through December 31, 2016. The petition attached invoices from counsel including time entries describing the nature of the work performed, the hourly billing rate for each attorney, paralegal, and law clerk, and the amount charged for each entry.[8]

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[6]That filing was signed by an "associate attorney," Catherine E. Lerum.

[7]The court noted that although Lerum had not personally signed the response, that filing identified him as plaintiff's attorney, and that, at oral argument, he had "repeated the frivolous arguments" contained in the response.

[8]The movants subsequently sought additional attorney fees in the amount of $9,939.05 for the time period January 1 through April 23, 2017.

¶ 39 Plaintiff and Lerum filed a response, arguing that the requested amount was excessive because, *inter alia*, the court's January 2017 order had not specified that the *entire lawsuit* was in violation of Rule 137, and because the movants did not show that all of the requested fees were directly related to the Rule 137 violations. The response also requested an evidentiary hearing on the reasonableness of the requested fees.

¶ 40 On July 27, 2017, the court entered an order awarding fees. At the outset of its analysis, the court explained that it did not believe an evidentiary hearing was required:

> "No evidentiary hearing is needed *** because this is not a case involving multiple complex issues. This court has been presiding over this case since its inception and is very familiar with the proceedings. Procedurally, this case never made it past the motion to dismiss stage. Moreover, Connolly and Lerum do not raise issues of fact that cannot be resolved with [sic] further evidence. *** Connolly and Lerum had ample opportunity to identify [time] entries which they contend would require an evidentiary hearing due to disputed issues of fact, but they have failed to do so."

The court proceeded to find that fee petition's time entries contained adequate information, that the hourly rates were reasonable.

¶ 41 Notably, in explaining why it found a "reasonable connection between the fees sought and the amount involved in the litigation," the court commented on plaintiff's intent:

> "In short, Connolly did not come to the courthouse to achieve a peaceful resolution for the disputes he had with the Association, but instead filed frivolous pleadings to harass Defendants. If

> Connolly was truly interested in rectifying a derailed situation he would have sued the Association ***. In other words Connolly did not bring this litigation genuinely trying to achieve a favorable outcome. Instead, he sued the Board members individually and sought costly remedies, including seeking punitive damages ***. Thus, he raised the stakes, forcing Defendants to vigorously defend, which drastically drove up the cost of litigation. For example, at one point, Defendants sought, and received, a protective order from the harassing onslaught of Connolly's frequent demand for records during the pendency of the lawsuit. *** At another point, the Court had to order Connolly to give Defendants the courtesy of a response to their settlement proposal ***, an Order that would have been completely unnecessary had Connolly been litigating in good faith. *** Though Defendants were ultimately able to succeed—due to the fact that Connolly's claims were meritless—it was expensive. The harassing nature of Connolly's lawsuit is apparent. Therefore, he cannot now complain about the costliness of this litigation."

¶ 42 The court proceeded to award a total of $111,941.03 in attorney fees and costs, noting that it did not award fees for certain time entries not clearly related to this lawsuit, or for time entries that related solely to defendants other than the four Rule 137 movants. The court also elected to reduce, by 25%, the amount of fees sought in connection with the Rule 137 motion,

because that motion had "raised a number of issues that the Court did not rely upon in determining whether to impose Rule 137 sanctions."

¶ 43 On July 28, 2017, plaintiff filed a timely notice of appeal. Accordingly, this court has jurisdiction. Ill. S. Ct. R. 303 (eff. July 1, 2017).

¶ 44 ANALYSIS

¶ 45 On appeal, plaintiff challenges the dismissal of the third amended complaint, arguing that counts I and II sufficiently stated causes of action.[9] Plaintiff (and Lerum) separately raise several arguments challenging the orders granting the Rule 137 motion and imposing sanctions in the amount of $111,941.03.

¶ 46 We first address plaintiff's arguments regarding the dismissal of the third amended complaint. We note that defendants filed a motion to dismiss under section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2014)), containing arguments for dismissal under either section 2-615 or section 2-619 (735 ILCS 5/2-615, 2-619 (West 2014)). A motion to dismiss pursuant to section 2-615 attacks the legal sufficiency of the complaint and alleges only defects on its face. *Sandholm v. Kuecker,* 2012 IL 111443, ¶ 54. "In ruling on a section 2-615 motion to dismiss, a reviewing court must examine the allegations of the complaint in the light most favorable to the plaintiff and accept as true all the well-pleaded facts and reasonable inferences therefrom. [Citation.] If the facts are insufficient to state a cause of action upon which relief may be granted then dismissal pursuant to section 2-615 is appropriate. [Citation.]" *Gatreaux v. DKW Enterprises, LLC,* 2011 IL App (1st) 103482, ¶ 10. Unlike a section 2-615 motion, "a section 2-619 motion admits the legal sufficiency of the complaint but asserts an affirmative defense or other matter that avoids or defeats that claim. [Citation.]" *Id.* "Our review of a combined section

[9] As discussed below, plaintiff's opening brief makes no attempt to challenge the dismissal of the remaining counts, counts III and IV.

2-619.1 motion to dismiss pursuant to either section 2-615 or section 2-619 of the Code [citation] is *de novo*." *Id.*

¶ 47 We turn to review the dismissal of count I, which was entitled "Violation of Plaintiff's Statutory and Constitutional Rights." At the outset, we note that the argument in plaintiff's opening appellate brief with respect to Count I is relatively narrow. That is, although the allegations in that count referred to several discrete statutory and constitutional violations, plaintiff now focuses his argument on his claim that defendants violated section 18.4(h) of the Act. Specifically, he argues that he stated a violation of section 18.4(h) by alleging that defendants "misapplied and misinterpreted association rules" when they issued the violations notice that eventually resulted in the $1000 fine.

¶ 48 We thus consider whether the allegations in count I, construed in the light most favorable to plaintiff, stated a claim for violation of section 18.4(h) of the Act. That statutory provision specifies that, although a condominium association's board is empowered to "adopt and amend rules and regulations covering the details of the operation and use of the property," "no rule or regulation may impair any rights guaranteed by the First Amendment to the Constitution of the United States or Section 4 of Article I of the Illinois Constitution including, but not limited to, the free exercise of religion ***." 765 ILCS 605/18.4(h) (West 2014).

¶ 49 Notably, a recent opinion of our court—decided after the submission of the parties' opening briefs in this case—discussed the nature of a viable claim under section 18.4(h). *Boucher v. 111 East Chestnut Condominium Ass'n, Inc.*, 2018 IL App (1st) 162233. In his reply brief, plaintiff urges that we should be guided by *Boucher* because it is factually analogous. We thus review that decision in detail.

¶ 50 Coincidentally, the plaintiff in *Boucher* was a member of the same condominium association as the plaintiff in this case. As in this case, the *Boucher* plaintiff received two notices from the association describing alleged incidents in which his behavior violated the provision of the association's declaration prohibiting " 'obnoxious or offensive activity.' " *Id.* ¶ 4. One notice described an instance when Boucher allegedly " 'yelled profanities' " at an association employee; a second notice alleged a separate instance where Boucher was " 'rude and disrespectful' " to another employee. *Id.* At a subsequent hearing, Boucher gave his account of the incidents, but the board denied his attorney's request to review evidence related to the allegations. *Id.* ¶ 5. The board also denied a subsequent request by Boucher's attorney for a copy of the recording of the hearing. *Id.* The board assessed Boucher fines of $250 for each alleged incident. *Id.* ¶ 6.

¶ 51 Boucher filed a complaint against the association and all seven members of the board. *Id.* In count I, Boucher alleged that he had previously " 'expressed criticism of certain management practices' " and employees, and that the board "penalized [him] in retaliation for expressing his opinions *** about management practices," in violation of section 18.4(h) of the Act. *Id.* He also pleaded separate counts based on the denial of his request for a recording of his hearing (count II), and a claim for breach of fiduciary duty based on the board's failure to disclose the evidence used against him (count III). *Id.*

¶ 52 Defendants moved to dismiss for failure to state a cause of action under section 2-615 of the Code; the trial court granted that motion in part and dismissed count I. *Id.* ¶ 7. After the parties engaged in discovery, the trial court granted the defendants summary judgment on counts II and III. *Id.* ¶¶ 9-10.

¶ 53 On appeal, our court reversed the dismissal of count I, finding that Boucher had stated a claim for violation of section 18.4(h). *Id.* ¶¶ 14-21. Our court reviewed the legislative history, which indicated that the intent of the statute was to prevent the institution of rules infringing upon condominium owners' First Amendment rights, for example, rules prohibiting owners from displaying religious objects on their doors, or prohibiting owners from knocking on neighbors' doors for political campaigning. *Id.* ¶¶ 15-16. We determined that section 18.4(h) "forbids a board from impairing any rights guaranteed by the First Amendment," and that "[u]nder section 18.4(h), condominium boards must not adopt or enforce any rules that prohibit the free exercise of religion, abridge the freedom of speech, or abridge the right to peaceably assemble. [Citation.]" (Internal quotation marks omitted.) *Id.* ¶ 18.

¶ 54 Our court specifically rejected the defendants' argument that Boucher could not state a claim under 18.4(h) "because the association cited part of the condominium declaration, and not a document titled 'rules,' as the basis for its sanctions against Boucher." *Id.* ¶ 19. Our court reasoned:

> "Looking again to the legislative history, we conclude that a plaintiff can state a statutory cause of action against a condominium association by alleging that he put up an unobtrusive religious symbol on his door *** and the association told him to take it down. The association may have violated the plaintiff's rights, even if it never adopted any pertinent rule, regulation, or declaration. Similarly, a plaintiff states a cause of action against an association for violation of his right to free speech by alleging that

> the association precluded him from expressing his political opinion or that the association penalized him for expressing his opinions.
>
> Boucher alleged that the association and its directors fined him because he expressed his opinion criticizing the board's management of the condominium. We hold that he has adequately stated a cause of action for violation of section 18.4(h) of the Act. Accordingly, we reverse the dismissal of count I." *Id.* ¶¶ 20-21.

¶ 55 In light of our reasoning in *Boucher*, we conclude that count I of the third amended complaint in the case before us, stated a claim for violation of section 18.4(h). We recognize that the pleading was not particularly artful, which was not surprising given plaintiff's *pro se* status. Nevertheless, keeping in mind that we examine the allegations in the light most favorable to the plaintiff, we conclude that count I set forth the gist of a colorable claim that the violations notice and fine were imposed in retaliation for plaintiff's exercise of free speech. Under the portion of the complaint entitled "Facts Common to all Counts," plaintiff alleged that he "expressed criticism of the governing practices of the Board and management" including "investigation into, and public discussion of, incidents of Board-member self dealing" and that "[s]aid public discussion has included petitions for relief with *** various government agencies." Count I pleaded that the issuance of the violations notice was an "intentional misapplication of *** the Association's Declaration, in violation of the Plaintiff's First Amendment Rights" and "was in retaliation to Plaintiff having reported the Board President's non-compliance with Building Permits for his unit *** to government authorities." Thus, the nature of plaintiff's claim is essentially identical to that alleged in *Boucher*, namely, that the "association penalized him for expressing opinions" critical of defendants' conduct. *Id.* ¶ 21. The gist of plaintiff's claim (as in

Boucher) was that the notice of purported violations of the association's rule against "obnoxious activity," was, in fact, retaliation for exercise of his First Amendment right to express criticism. As in *Boucher*, we conclude that plaintiff sufficiently stated a potentially viable cause of action for violation of section 18.4(h) of the Act.

¶ 56 Further, we note our disagreement with the trial court's conclusion that the violations notice could not form the basis for a claim based on section 18.4(h) of the Act, because that notice "concerned Connolly's actions, not his protected speech." The violations notice described four separate incidents of alleged "obnoxious or offensive activity." Three of the four incidents, as they are described in the violations notice, undoubtedly involved *speech*. First, the notice alleged that plaintiff told a boy that it was against a building rule to bring his bicycle into an elevator, and alleged that plaintiff asked the boy for his name and unit number. This was an exercise of speech, even if it might be considered rude. Similarly, the second incident claimed that plaintiff repeatedly questioned a resident as to why she was walking her dog through the front door. Although the violations notice states that plaintiff used an "angry tone," plaintiff's questions directed to a fellow resident plainly constitute speech. The third incident described in the violations notice—which claims that plaintiff disconnected another person's I-Pod and "tossed [it] on the ground"—is the only one of the four incidents that complains solely of offensive *conduct*, beyond mere speech. Finally, the fourth incident is premised, at least in part, on speech—specifically, that plaintiff told another resident that no food was allowed in the pool area.[10] Clearly, the statements or questions attributed to plaintiff could be deemed rude or socially inappropriate. Nonetheless, it is well settled that First Amendment protection encompasses speech that may be considered socially unacceptable or offensive.

[10]The violations notice also suggests, equivocally, that plaintiff "may have been taking pictures" of other residents without their consent.

¶ 57 In sum, we conclude that count I stated a viable cause of action, to the extent that it alleged a violation of section 18.4(h) of the Act. For that limited reason, dismissal of count I was inappropriate. Thus, we reverse dismissal of count I, but only to the extent that count I was premised on violation of section 18.4(h).

¶ 58 We recognize that, although count I purported to allege several other violations of plaintiff's constitutional and statutory rights, his brief makes no effort to argue that he sufficiently pleaded such other violations. As the appellant, it was plaintiff's obligation to raise any other arguments to dispute the dismissal of count I. However, he opted to limit his argument on that count to the sufficiency of the allegations pertaining to section 18.4(h). Thus, he has forfeited any challenge to the trial court's findings that the other allegations of count I failed to state a cause of action. Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1., 2017); see also *Lake County Grading Co., LLC v. Village of Antioch*, 2014 IL 115805, ¶ 36. To be clear, on remand, plaintiff may proceed with count I, but only to the extent that count I alleged a violation of section 18.4(h) of the Act.

¶ 59 We turn to review the dismissal of count II, for breach of fiduciary duty. Plaintiff argues that he sufficiently pleaded this claim by alleging that defendants "den[ied] him his property and statutory rights to participate in the governance process and to be afforded minimum due process." He argues that this count can be premised on the violations notice and related hearing, insofar as the defendants "unreasonably interpreted" and "misapplied" the declaration provision barring "obnoxious" activities. He also claims that defendants breached fiduciary duties by concealing evidence and conducting a "hostile, kangaroo court type hearing." Further, he argues that he stated a breach of fiduciary duty claim by alleging that defendants amended the bylaws to "specifically target him" and otherwise prevented him from running for a board position. He

claims that such actions violated section 18(a)(17) and section 18(b)(2) of the Act, which in turn, support his claim for breach of fiduciary duty.

¶ 60 Significantly, however, plaintiff's opening brief fails to address independent bases for dismissal relied upon by the trial court. That is, the trial court did not merely find that the allegations were too vague and conclusory to state a claim for breach of fiduciary duty. The trial court's discussion of count II also identified independent bases for dismissal, including application of the business judgment rule and the exculpatory provision of the association's declaration. Yet, plaintiff's opening brief contains no argument disputing the application of the exculpatory clause. Similarly, while the plaintiff's opening brief makes a passing reference to the business judgment rule, [11] it does not attempt to articulate why the business judgment rule did not apply.

¶ 61 It is well-settled that points not raised in an appellant's opening brief are forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017). Plaintiff's opening brief simply made no attempt to dispute two of the trial court's independent grounds for dismissal of count II. Thus, he has forfeited any challenge to those independent grounds for dismissal of count II. As a result, we need not address the merits of his remaining arguments in order to affirm the dismissal of count II.

¶ 62 Similarly, we again note that plaintiff's brief makes no argument challenging the trial court's dismissal of the remaining counts of the third amended complaint, counts III and IV. Thus, he has forfeited any challenge to the dismissal of those counts.

[11]Plaintiff's opening brief's only reference to the business judgment rule is the statement: "The defendants excused their breaches of fiduciary duty by relying on the business judgment rule or claiming they had no further obligation to provide Connolly with the 'evidence' of the accusations contained in their violation notice").

¶ 63 In sum, we reverse the dismissal of count I, but only to the extent that it stated a claim for violation of section 18.4(h) of the Act. We otherwise affirm the dismissal of the remainder of the third amended complaint.

¶ 64 We turn to the trial court's order of January 6, 2017 granting the Rule 137 motion, as well as the order of July 27, 2017 awarding $111,941.03 in attorney fees in connection with the Rule 137 motion.

¶ 65 "Illinois Supreme Court Rule 137 requires that either a party or a party's attorney sign every 'pleading, motion and other paper' to certify that 'it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.' Ill. S. Ct. R. 137 (eff. Feb. 1, 1994). The purpose of Rule 137 is to prevent abuse of the judicial process by penalizing claimants who bring vexatious and harassing actions based upon unsupported allegations of fact or law. [Citation.]" *Williams Montgomery & John Limited v. Broaddus*, 2017 IL App (1st) 161063, ¶ 41.

¶ 66 "Using an objective standard, the trial court must evaluate whether a party made a reasonable inquiry into the facts and law supporting his or her allegations. [Citation.] *** The party seeking sanctions for a violation of the rule bears the burden of proof and must show that the opposing party made untrue and false allegations without reasonable cause. [Citation.]" *Clark v. Gannett*, 2018 IL App (1st) 172041, ¶ 66. "When considering the propriety of Rule 137 sanctions, a reviewing court determines whether (i) a trial court's ruling was based on adequate information, (ii) valid reasons appropriate to the case are identifiable, and (iii) the ruling

logically follows from applying the reasons stated to the particular circumstances. [Citation.]" *Id.* ¶ 67.

¶ 67 The trial court should hold an evidentiary hearing before finding a Rule 137 violation, unless the record makes clear that there was a violation. *Williams Montgomery & John Limited*, 2017 IL App (1st) 161063, ¶ 45 ("Although in general a hearing on both the merits and the amount of fees is required before a court grants an award of sanctions, [citation] no hearing is required where 'the court's determination of the issue can be made on the basis of the pleadings or trial evidence.' [Citations.]"). Thus, an evidentiary hearing is not necessary where there are "ample facts in the record to support the court's finding that [a filing] was neither well-grounded in fact nor warranted by existing law." *Id.* at ¶ 46; see also *McCarthy v. Abraham Lincoln Reynolds III, 2006 Declaration of Living Trust*, 2018 IL App (1st) 162478, ¶ 24 (finding that circuit court's determination that plaintiff's claim was frivolous did not require an evidentiary hearing where there were "ample facts in the record to support the court's finding that plaintiff's *** claim was barred by *res judicata*").

¶ 68 However, an evidentiary hearing is necessary where the Rule 137 violation is based on a finding of *improper purpose:* "A hearing should always be held when a sanction award is based upon a pleading filed for an improper purpose, rather than one which is merely unreasonable based on an objective standard. [Citations.]" *Century Road Builders, Inc. v. City of Palos Heights*, 283 Ill. App. 3d 527, 531 (1996) (reversing where "no evidence was taken either on the issue of whether [plaintiff's] complaints were filed for any improper purpose or on the issue of the reasonableness of the sanctions awarded").

¶ 69 "A trial court's decision to impose sanctions is entitled to 'significant deference,' and therefore we will not disturb its decision absent an abuse of discretion. [Citation.] A court abuses

its discretion where no reasonable person would take the view adopted by it." *Williams Montgomery & John Limited,* 2017 IL App (1st) 161063, ¶ 43.

¶ 70 Upon the record in this case, we conclude that the trial court erred when it imposed Rule 137 sanctions, without an evidentiary hearing. There are multiple reasons for this conclusion.

¶ 71 First, in light of our conclusion that count I should not have been dismissed in its entirety, we cannot agree with the trial court's conclusion that *all* of plaintiff's pleadings were frivolous. We recognize that the trial court, at the time of its Rule 137 ruling, lacked the benefit of our court's decision in *Boucher*. Nonetheless, the trial court erred in finding that *none* of the causes of action were warranted by existing law, or, at least, a plausible argument for extension or modification of the law.

¶ 72 We are also troubled by the court's decision not to hold an evidentiary hearing before deciding that Rule 137 sanctions were appropriate. In this regard, we emphasize the inconsistency between the court's stated reasoning in the January 2017 order granting the sanctions motion, compared with its comments in the July 2017 order assessing the amount of sanctions. The January 2017 order stressed that the *only* basis for Rule 137 sanctions was that plaintiff's filings were objectively frivolous. That order explicitly stated that the court "need not reach the issue of whether Connolly had an 'improper purpose' in filing and pursuing this lawsuit." On that basis, the trial court stated that there was "no need" for an evidentiary hearing.

¶ 73 In contrast, the subsequent July 2017 order awarding $111,941.03 in fees included several remarks finding that plaintiff acted with an improper purpose. The court specifically stated that plaintiff "did not come to the courthouse to achieve a peaceful resolution" but had "filed frivolous pleadings *to harass* Defendants." (Emphasis added.) Moreover, whereas the prior order justified Rule 137 sanctions only because the pleadings were objectively frivolous, the July

2017 order referred to other aspects of plaintiff's conduct as evidence of subjective bad faith and improper intent. Specifically, the July 2017 order noted that defendants had obtained a protective order "from the harassing onslaught" of plaintiff's "frequent demands for records during the pendency of the lawsuit" and criticized plaintiff for failing to make proper discovery requests pursuant to supreme court rules. The July 2017 order criticized plaintiff for failing to respond to a settlement offer in a timely manner, commenting that it would not have had to order him to respond "had [he] been litigating in good faith." In justifying the large award, the court remarked that the "harassing nature of Connolly's lawsuit is apparent."

¶ 74 These remarks make clear that the court did not merely find that plaintiff's claims were *objectively* frivolous; the court also *subjectively* found that plaintiff had an improper "harassing" purpose. Yet, when it initially decided the Rule 137 motion, the court had specifically declined to make any such findings of plaintiff's intent. Clearly, it was inconsistent to first state that Rule 137 sanctions were warranted solely under an *objective* view of the pleadings, but then to justify the extent of the award, in part, on findings of plaintiff's bad faith and intent to harass. Moreover, it was improper for the court to deny plaintiff an evidentiary hearing *before* making these findings. See *Century Road Builders*, 283 Ill. App. 3d at 531. We recognize that plaintiff's behavior throughout the litigation may have been irritating to the court and the defendants. This in turn could lead the court to the subjective conclusion that sanctions were warranted. However, given the large size of the award, this was all the more reason for the court to hold an evidentiary hearing, and its failure to do was an abuse of discretion.

¶ 75 For the foregoing reasons, we reverse both the January 6, 2017 order granting defendants-appellees' motion for Rule 137 sanctions, as well as the July 2017 order awarding attorney's fees. However, we emphasize that we are not deciding whether, *in fact*, plaintiff was

motivated by an improper purpose. Further, we do not foreclose the possibility that, after a proper hearing, the court may still find that Rule 137 sanctions are appropriate. Our ruling is that, as a procedural matter, plaintiff was entitled to an opportunity to present, or respond to, evidence as to whether he litigated this lawsuit in good faith or for an improper purpose.

¶ 76 In conclusion, we reverse the dismissal of the third amended complaint, but only to the extent that plaintiff may proceed on count I's allegations that defendants violated section 18.4(h) of the Act. We otherwise affirm the dismissal of the third amended complaint. We also reverse the January 6, 2017 order granting defendants-appellees' motion for Rule 137 sanctions, as well as the July 2017 order awarding attorney's fees in the amount of $111,941.03. However, our holding does not preclude a subsequent determination, after a proper hearing, that Rule 137 sanctions were appropriate. Thus, we remand for further proceedings consistent with this order.

¶ 77 Reversed in part; affirmed in part.

¶ 78 Cause remanded.

¶ 79 PRESIDING JUSTICE DELORT, specially concurring:

¶ 80 Earl Bush, the press secretary to Chicago Mayor Richard J. Daley, famously told reporters: "Don't print what he said. Print what he meant." Trevor Jensen, *Earl Bush: 1915-2006*, Chicago Tribune, July 21, 2006, https://www.chicagotribune.com/news/ct-xpm-2006-07-21-0607210117-story.html. Sometimes, legislatures enact laws which intend to prohibit particular conduct, but do not quite say so clearly. This case presents a situation where a court must apply what the legislature meant rather than what it said.

¶ 81 Section 18.4(h) of the Condominium Property Act allows condominium boards to adopt regulations governing the use of the property. However, there is an exception to that general rule. That exception provides: "However, no rule or regulation may impair any rights guaranteed by

the First Amendment to the Constitution of the United States or Section 4 of Article I of the Illinois Constitution including, but not limited to, the free exercise of religion * * *." 765 ILCS 605/18.4(h) (West 2016). A first-year constitutional law student can identify the inherent problem with this statute. The First Amendment to the United States Constitution protects individuals against state actors (broadly speaking, the government). It does not protect individuals' rights against private entities such as condominium boards. *People v. DiGuida*, 152 Ill. 2d 104, 121 (1992) (holding that the First Amendment did not prohibit a shopping center from regulating speech on its property). The same is true of Section 4 of Article I of the Illinois constitution. *Id*. at 124. So what, then, can we make of the Condominium Property Act's declaration that a condominium board may not violate an owner's First Amendment rights?

¶ 82 This court struggled with that question in *Boucher v. 111 E. Chestnut Condo. Ass'n, Inc.*, 2018 IL App (1st) 162233. In *Boucher*, the circuit court dismissed the plaintiff's claim because the condominium board was not a state actor. *Id*. ¶ 14. The court believed that section 18.4(h) could only apply if a government entity controlled the property, such as would be the case with public housing. See *id.* The *Boucher* court acknowledged the circuit court's reasoning, but it found that strictly interpreting section 18.4(h) in a manner consistent with First Amendment jurisprudence would render the law meaningless. *Id*. ¶ 18. Following the doctrine of legislative interpretation that courts avoid interpreting statutes into nothingness, the court laboriously set out to tease some coherent meaning from an atrociously drafted law. The *Boucher* court examined the legislative history, and determined that the law was intended to stop condominium boards from, among other things, prohibiting unit owners from displaying religious symbols on their individual doors or knocking on doors to solicit support for political candidates. *Id*. ¶¶ 15-17. The *Boucher* court thus held, as did the court in *Goldberg v. 400 E. Ohio Condo. Ass'n*, 12 F.

Supp. 2d 820, 824 (N.D. Ill. 1998), that "section 18.4(h) forbids a board from 'impair[ing] any rights guaranteed by the First Amendment,' not from violating the Amendment itself." *Id*. ¶ 18 (quoting 765 ILCS 605/18.4(h) (West 1998)).

¶ 83 Based on the interpretation of section 18.4(h) of the *Boucher* and *Goldberg* courts—that the law prohibits condominium boards from abridging unit owners' ability to speak, exercise their religion, or engage in other activities which the First Amendment and the corollary Illinois constitutional provision protect in the context of state action, I concur in the judgment of the majority to reverse the dismissal of count I on Connolly's section 18.4(h) claim. I join the majority opinion with respect to all other issues.