

No. 1-18-0591

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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LM INSURANCE CORPORATION	)	Appeal from the Circuit Court of
	)	Cook County, Law Division.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 2016 - M1 - 170295
	)	
GO TO LOGISTICS, INC.	)	Honorable
	)	Margaret A. Brennan
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE GRIFFIN delivered the judgment of the court.  
Presiding Justice Mikva and Justice Walker concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court erred when it entered a default judgment on plaintiff’s motion for sanctions.

¶ 2 On February 21, 2018, the trial court entered a default judgment against defendant Go To Logistics, Inc. as a discovery sanction and awarded plaintiff LM Insurance Corporation \$2,966,625.37 in damages on its breach of contract claim. Defendant appeals the trial court’s judgment and argues that it was entitled to an evidentiary hearing on the merits of plaintiff’s motion for sanctions. Alternatively, defendant argues that the sanction imposed was unduly harsh

and inappropriate. We vacate the trial court's judgment and remand this case to the circuit court for proceedings consistent with this order.

¶ 3

### BACKGROUND

¶ 4 In February of 2013, defendant Go To Logistics, Inc., an Illinois trucking company, applied for coverage through the Illinois Workers' Compensation Insurance Assigned Risk Plan ("the Plan"). The Plan provides employers with access to workers' compensation insurance coverage when they cannot obtain it in the private market. In its application, defendant made the following representations: it was not related to another entity; had no subcontractors; and its employees did not work for other businesses or subsidiaries. The application was accepted. The Plan's administrator bound coverage and assigned plaintiff LM Insurance Corporation as defendant's insurance carrier.

¶ 5 Plaintiff issued a statutory workers' compensation insurance policy to defendant effective March 1, 2013. The policy was twice renewed and cancelled on August 20, 2015. In 2015, plaintiff exercised its contractual right to audit defendant's payroll when the policy ended. The purpose of the audit was to determine the difference between the premium paid and the final premium owed, if any.

¶ 6 The audit produced the following findings. More than 60 tractor trailers were located at defendant's address, the truck drivers who entered and exited the trucks wore "Go 2 Logistics" t-shirts and the trucks were branded with "Go 2 Logistics" or "GT Expedited" on the cabs. Defendant initially paid its truck drivers directly, but at some point during the policy period shifted payments to another trucking company, GT Expedited, Inc. ("GT Expedited"). GT Expedited and defendant share the same owner: Tomasz Rzedzian ("Rzedzian").

¶ 7 Based on these findings, plaintiff's auditor concluded that the truck drivers were employees of defendant, not GT Expedited, and constituted a premium payroll exposure. In other

words, the final premium exceeded the premium paid and defendant was contractually obligated to pay the difference. Plaintiff sued defendant to recover the difference on February 17, 2016.

¶ 8 In its complaint filed in the circuit court of Cook County, plaintiff pleaded a cause of action for breach of contract and sought \$2,893,420.37 in unpaid insurance premiums and statutory interest. Defendant filed a motion to dismiss the complaint pursuant to section 2-619(a)(9) of the Illinois Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2016)), which allows a defendant to dismiss a claim upon a showing that an affirmative matter bars or defeats it.

¶ 9 Defendant's affirmative matter was an agreement allegedly executed by and between defendant and GT Expedited on November 1, 2013 ("November Agreement"). The November Agreement purportedly (1) evidenced GT Expedited's performance of transportation services (use of its truck drivers and equipment to transport goods) for defendant on an independent contractor basis and (2) showed, by way of its provision requiring GT Expedited to maintain workers' compensation insurance, that plaintiff was seeking a premium for truck drivers who were already covered by another workers' compensation policy.

¶ 10 Based on the November Agreement, defendant argued that plaintiff was in breach of its own policy because the terms specifically prohibited additional premiums where defendant could demonstrate that GT Expedited met its own workers' compensation obligations. Defendant claimed that GT Expedited was an independent contractor and maintained workers' compensation insurance during the relevant policy periods. According to defendant, the November Agreement defeated plaintiff's breach of contract claim.

¶ 11 Defendant supported its motion to dismiss with an affidavit of its owner, Tomasz Rzedzian. In the affidavit, Rzedzian attested to serving as president of both Defendant and GT Expedited, and having executed the November Agreement on behalf of both parties on

November 1, 2013. He further attested that GT Expedited agreed to use its vehicles and truck drivers to perform transportation services for defendant on an independent contractor basis and that GT Expedited had workers' compensation insurance coverage under policies issued by another insurance company from November 1, 2013 to November 2015.

¶ 12 The trial court held a hearing on defendant's motion to dismiss and denied it. Defendant answered plaintiff's complaint on October 28, 2016 and denied owing any premiums beyond those already paid. The primary basis for this denial (and for denying other material allegations) was the November Agreement. The answer was verified by Rzedzian.

¶ 13 Defendant later filed three affirmative defenses. The second and third affirmative defenses claimed the truck drivers who worked for GT Expedited and performed transportation services for defendant pursuant to the November Agreement were independent contractors and opted out of workers' compensation coverage. On that basis, defendant claimed no additional premium was due and owing.

¶ 14 Plaintiff commenced the discovery process by serving GT Expedited with a third party subpoena for documents. On January 18, 2017, plaintiff asked the trial court to enter an order compelling GT Expedited to comply with the subpoena.

¶ 15 Plaintiff's "motion to compel" alleged GT Expedited failed to produce corporate tax returns, its financial records with defendant, documents related to its payment of workers' compensation premiums, relevant emails with its insurance broker and certain W-2 wage and tax statements for its employees. Before the trial court ruled, plaintiff filed another motion to compel on March 10, 2017.

¶ 16 The second motion claimed, generally, that plaintiff was unable to get straightforward answers from defendant about its trucking business. Specifically, plaintiff argued that defendant failed to produce its corporate tax return for 2015 and took issue with defendant's interrogatory

response that it was “not in possession of any w-2s for 2013.” The trial court held a hearing on both motions to compel on March 15, 2017.

¶ 17 The trial court granted in part and denied in part both motions to compel. In a written order, it required defendant to identify all ownership of the relevant trucks, supplement and produce complete copies of returns, and produce all employee earning reports for 2013, 2014, and 2015. A deadline was set for April 7, 2017.

¶ 18 Before the deadline, plaintiff filed another motion to compel. But this time, the motion was accompanied by a motion for sanctions pursuant to Illinois Supreme Court Rule 219 (Ill. S. Ct. R. 219) (eff. July 1, 2002), which empowers a trial court to sanction a party’s failure to comply with discovery and related court orders.

¶ 19 In its motion, plaintiff argued that a separate subpoena revealed defendant had improperly withheld the following material documents and information regarding its truck drivers: (1) the names of the entities providing truck drivers to defendant; (2) the names of the employees working for those entities; and (3) the names of many of defendant’s “payroll employee” drivers. Plaintiff further claimed that defendant’s sworn affidavits and interrogatory verifications, indicating that all information had been provided, were false.

¶ 20 The trial court held a hearing and granted plaintiff’s motions “in their entirety.” The trial court ordered defendant to comply with discovery by May 25, 2017 and ordered defendant to pay plaintiff \$500 in costs as a discovery sanction.

¶ 21 On October 16, 2017, plaintiff filed yet another motion to compel alleging that defendant failed to produce the names of the truck drivers it planned to call as witnesses at trial. Plaintiff argued that such withholding was in violation of Illinois Supreme Court Rule 213(f) (Ill. S. Ct. R. 213(f) (eff. Jan. 1, 2018)), which mandates the disclosure of witnesses to be called at trial.

Defendant disclosed the names of the truck drivers it intended to call at trial and plaintiff withdrew its motion.

¶ 22 On November 15, 2017, plaintiff filed a final motion for sanctions and asked the trial court to sanction defendant under subsection (c)(v) of Rule 219, which empowers a trial court to enter a default judgment against a party for deliberately disregarding its authority. In its motion, plaintiff argued that certain email records it received through a third party subpoena revealed that the November Contract was a “forgery” and its submission was a “fraud upon the court.”

¶ 23 According to plaintiff, the emails showed that a form contract, identical in content to the November Contract, was (1) exchanged in “mid-2015” between employees of defendant (Dariuz Pawlowski and Irene Sierzega) and defendant’s insurance Broker (Larry Nedder of Cottingham & Butler) (“Nedder”), (2) reformatted and (3) backdated to reflect an execution date of November 1, 2013.

¶ 24 Plaintiff argued that defendant was unable to produce proof of the November Agreement’s existence prior to 2015 and pointed to defendant’s pattern of discovery noncompliance as reason to believe that defendant would continue to thwart the discovery process. Plaintiff concluded that an order of default was appropriate because the November Contract formed the basis defendant’s defense and permeated all aspects of the case.

¶ 25 Defendant filed a response denying these allegations. It maintained that the November Agreement was a true and accurate copy of the agreement reached with GT Expedited on November 1, 2013. Defendant argued that the email exchanges were ordinary run of the mill communications between individuals who had a working business relationship dating back to 2008 and claimed that Nedder sent the form contract before November of 2013 (as early as 2008).

¶ 26 Attached to defendant's response was an affidavit of Rzedzian, who attested to having signed the November Agreement on November 1, 2013 on behalf of both contracting parties. He denied the November Contract was a forgery and stated that the email exchange took place because defendant was updating its contracts.

¶ 27 On January 10, 2018, the trial court held a hearing on plaintiff's motion for sanctions. An evidentiary hearing was not held. On February 5, 2018, the trial court granted plaintiff's motion for sanctions in a written order.

¶ 28 The trial court's written order focused on the legitimacy of the November Agreement and made the following findings: Plaintiff submitted "credible evidence that the November Agreement was created in 2015 and backdated to represent that it was signed in 2013. [Plaintiff] submits credible evidence that the document relied on by [defendant] as the basis for its defense is illegitimate." It further found that there was "no evidence" presented to corroborate Rzedzian's claims that the November Agreement was valid and that his affidavit was not credible.

¶ 29 The trial court determined that Nedder's deposition testimony regarding the email exchange did "nothing to shift the evidence as to whether the November Agreement was actually signed in 2013." It concluded that defendant "has shown through its conduct that no sanction would encourage it to satisfy its obligations and respect the Court's authority" and a default was warranted and entered.

¶ 30 The trial court held a prove-up hearing on February 21, 2018 and entered an order and memorandum of judgment against defendant in the amount of \$2,966,625.37. Defendant filed its notice of appeal on March 16, 2018.

¶ 31 Defendant argues that it was entitled to an evidentiary hearing and, in the alternative, that the sanction imposed was inappropriate.

¶ 32

ANALYSIS

¶ 33 The issue on appeal is whether the trial court erred when it failed to hold an evidentiary hearing on the merits of plaintiff’s motion for sanctions. Generally, a discovery sanction will not be reversed absent an abuse of discretion. *Locasto v. City of Chicago*, 2014 IL App (1st) 113576, ¶ 26.

¶ 34 At the outset, we note that defendant failed to ask the trial court to hold an evidentiary hearing. Generally, arguments raised for the first time on appeal are forfeited. *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 15. However, plaintiff replied to defendant’s argument in its reply brief and we find it necessary in the interests of justice to consider the argument because the imposition of such a severe sanction must be supported by sound procedure. *527 S. Clinton, LLC v. Westloop Equities, LLC*, 403 Ill. App. 3d 42, 50 (2010) (forfeiture is a limitation on the parties and not the court); *Arient v. Shaik*, 2015 IL App (1st) 133969, ¶ 37 (reviewing court may consider a forfeiture under the plain error doctrine in civil cases); *Hartnett v. Stack*, 241 Ill. App. 3d 157, 175 (1993) (a sanction causing a default judgment is the most severe Rule 219(c) sanction a court can impose on a defendant). Accordingly, we turn to address defendant’s argument.

¶ 35 Defendant contends that the trial court erred when it found that the November Agreement was “backdated to represent that it was signed in 2013” and “illegitimate” without holding an evidentiary hearing. Defendant cites *Century Road Builders, Inc. v. City of Palos Heights*, 283 Ill. App. 3d 527, 531 (1996) in support of its argument, which involved a sanction imposed pursuant to Illinois Supreme Court Rule 137 (Ill. S. Ct. R. 137 (eff. Jan. 1, 2018)) (Rule 137). Rule 137 allows a trial court to sanction a party for filing a pleading for an improper purpose.

¶ 36 The trial court in *Century Road Builders* imposed a Rule 137 sanction against a party after finding that its pleading was filed with the “intent to harass” particular defendants. *Id.* at



530. This court vacated the trial court’s judgment and remanded the case because the trial court failed to hold an evidentiary hearing. *Id.* at 531 (“an evidentiary hearing should always be held when a sanction is based upon a pleading for an improper purpose as opposed to one which is unreasonable based on an objective standard”).

¶ 37 *Century Road Builders* is, of course, a Rule 137 case and therefore not directly applicable here. See *Locasto v. City of Chicago*, 2014 IL App (1st) 113576, ¶ 33 (finding that although Rules 137 and 219 have similarities in terms of remedies, they serve different purposes and embrace different dynamics and facets of litigation). But the two cases are not wholly dissimilar. Here, as in *Century Road Builders*, the trial court’s decision to impose a sanction was predicated upon its resolution of an issue of fact (the sanctioned party’s intent) without holding an evidentiary hearing.

¶ 38 We hold that the trial court erred when it failed to hold an evidentiary hearing on the merits of plaintiff’s motion for sanctions. This error was plain and obvious. See *In re Marriage of Saheb & Khazal*, 377 Ill. App. 3d 615, 627 (2007). The trial court’s decision to sanction defendant, albeit under subsection (c)(v) of Rule 219, was premised upon its determination that defendant intentionally misrepresented the execution date of the November Agreement in an attempt to defeat plaintiff’s breach of contract claim (“the November Agreement was created in 2015 and backdated to represent that it was signed in 2013”). The trial court was required to support that determination with findings of fact based upon the evidence taken at an evidentiary hearing. *Edward M. Cohon & Associates, Ltd. v. First National Bank of Highland Park*, 249 Ill. App. 3d 929, 938 (1993) (existence of intent to defraud is a question of fact); *Schecter v. Associates Finance, Inc.*, 148 Ill. App. 3d 375, 380 (1986) (whether an “affidavit” was a forgery presented question of fact).

¶ 39 Furthermore, the trial court’s decision to sanction defendant rested in large part on unsupported credibility determinations. For instance, the trial court found Rzedzian’s affidavit was not “credible” and that Nedder’s deposition testimony regarding the email exchange did “nothing to shift the evidence as to whether the November Agreement was actually signed in 2013.” Such findings required proper evidentiary support and had none. *Larkin v. George*, 2016 IL App (1st) 152209, ¶ 19 (“the question of whom to believe and what weight to give to all the evidence is a decision for the trier of fact”); Illinois Pattern Jury Instructions, Civil No. 1.01(4)-(5) (Supp. 2018) (trier of fact judges the credibility of the witnesses and draws reasonable inferences from the evidence).

¶ 40 Indeed, the material allegations contained in plaintiff’s motion for sanctions were not undisputed. Defendant challenged plaintiff’s inference drawn from the email exchange that the November Agreement was a forgery and filed a supporting affidavit wherein Rzedzian, who signed the November Agreement on behalf of both contracting parties, attested to its validity. Even plaintiff, in its response brief, acknowledged that there were issues of fact in dispute (“the Circuit Court heard the disputed issues of fact” and “weighed the evidence surrounding those disputed issues”). Clearly, matters of record alone could not support the trial court’s determination that defendant engaged in the subject misconduct.

¶ 41 We do not reach the question of whether a default judgment would have been appropriate if the findings contained in the trial court’s written order were proven true.

¶ 42 CONCLUSION

¶ 43 Accordingly, we vacate the trial court’s judgment and remand this cause to the circuit court for further proceedings consistent with this order.

¶ 44 Vacated and Remanded.

