2013 IL App (1st) 121778-U

SECOND DIVISION
September 24, 2013

No. 1-12-1778

ADVANTAGE EQUIPMENT RESOURCES, LLC, a corporation, Plaintiff-Appellee, v. THE MIDDLEBY CORPORATION, a corporation, BLODGETT COMPANY, a corporation, PITCO FRIALATOR, INC., a corporation, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County No. 10 L 000081 Honorable Brigid Mary McGrath, Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.

Justice Harris and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion when it granted plaintiff's motion for voluntary dismissal where it was filed after defendants discussed filing a summary judgment motion and the court set a briefing schedule but before the summary judgment motion was filed. The trial court also did not err in denying defendants' request for sanctions against plaintiff.

¶ 2 Defendants appeal the trial court's order granting plaintiff's motion for a voluntary dismissal pursuant to section 2-1009(a) of the Civil Code of Procedure (Code) (735 ILCS 5/2-

1009 (West 2010)) and the denial of defendants' request for sanctions. We find the circuit court did not err and accordingly we affirm.

¶ 3 BACKGROUND

¶ 4 Plaintiff filed this action for the payment of earned commissions. Plaintiff alleged claims for breach of contract, violation of the Ohio Sales Representative Act, violation of the Illinois Sales Representative Act (in the alternative), declaration (pled in the alternative), and unjust enrichment (pled in the alternative). Plaintiff alleged it procured sales of equipment to national food chains for defendant, The Middleby Corporation, and its food service equipment divisions, including defendants Blodgett Company and Pitco Frialator, Inc. Plaintiff served as a sales representative for defendants pursuant to a written agreement that allowed the parties to terminate the agreement on 30 days written notice. Over a number of years plaintiff claimed to have procured millions of dollars in sales before defendants terminated the representation effective January 14, 2009.

¶ 5 Plaintiff sought damages for commissions due and unpaid, for the sale of: (1) equipment shipped through January 14, 2009; (2) equipment that would have been shipped from January 1, 2009 through January 14, 2009, but for defendants' bad faith delay in shipping (delayed orders); and, (3) equipment shipped after the effective date of termination, on sales that were procured by plaintiff prior to termination.

¶ 6 Defendants filed a motion to dismiss pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)) arguing that the procuring cause doctrine did not apply to plaintiff's claim for continued commissions after the January 2009 termination. The circuit court found that

plaintiff adequately stated a cause of action and denied the motion to dismiss. Defendants answered the complaint on March 8, 2010. Plaintiff and defendants thereafter engaged in contentious discovery over a two year period.

¶ 7 Plaintiff filed a motion to compel defendants to answer written discovery arguing that its theory for recovery is based in part on the Illinois procuring cause doctrine. Defendants in turn filed a motion for a protective order arguing the procuring cause doctrine did not apply, therefore, plaintiff was not entitled to the requested information. Further, defendant claimed plaintiff could not identify any pre-termination commissions due and had not answered discovery on this aspect of its claim. Plaintiff's motion was granted in part and the court requested further information on the issue of the procuring cause doctrine.

¶ 8 On November 16, 2011, a hearing on plaintiff's second motion to compel discovery involving the procuring cause claims was held. Defendants advised the court it would produce documents relating to the delayed orders claim and to post termination orders, consisting of over 70,000 documents, that arguably would pertain to the procuring cause theory of recovery. On January 11, 2012, defendants again complained that plaintiff refused to produce its principal for oral deposition and that plaintiff refused to meaningfully respond to Interrogatory No. 7 that requested specifics relating to sales that formed the basis for commissions claimed after the 30 day termination period. Defendants informed the court that although it had already produced approximately 70,000 documents, plaintiff had not provided specifics in support of its various claims. After the parties were allowed a more than generous amount of time to argue their respective positions, the court granted plaintiff an additional 35 day period to respond to

defendants' interrogatories and ordered the parties to return "to address briefing on the threshold legal issue identified by the Court."

¶ 9 On February 21, 2012, the court was advised that plaintiff's answer to Interrogatory No. 7 stated it expected, through discovery, to learn of persons with knowledge and documents relating to each relevant sale. Complaining that plaintiff filed the lawsuit in order to learn whether it had a viable cause of action, defendants requested leave to file a motion for summary judgment. The court entered a briefing schedule requiring the motion to be filed by March 27, 2012. The court observed that its ruling on the scope of the procuring cause doctrine would not bar plaintiff's relief but it might assist in tailoring discovery requests.

¶ 10 Prior to defendants filing of their summary judgment motion, on March 2, 2012, plaintiff filed a motion for voluntary dismissal pursuant to section 2-1009(a) of the Code. The motion was presented to the trial court on March 13, 2012. Defendants objected. In response to an inquiry from the court, plaintiff stated it would not stipulate to the case being re-assigned to Judge McGrath upon re-filing. The court requested briefing on the question of whether plaintiff could voluntarily dismiss the lawsuit after the defendant indicated it would file a summary judgment motion and after a briefing schedule had been ordered. The court directed defendants to not file its summary judgment motion until this issue was resolved. Defendants written response in opposition to the voluntary dismissal motion argued that the court should decide the motion for summary judgment before considering the voluntary dismissal motion and, in the alternative, the court should require plaintiff to pay defendants' costs pursuant to Supreme Court Rule 219(e) and Rule 137. Ill. S. Ct. R. 219(e) (eff. July 1, 2002); Ill. S. Ct. R. 137 (eff. Feb. 1, 1994).

¶ 11 On June 13, 2012, after hearing, the circuit court granted plaintiff's motion for a voluntary dismissal and denied defendants' request for attorney's fees and costs pursuant to Rules 219(e) and 137. Although "sympathetic to defendant's [sic] position, because they have gone through enormous amounts of time and expense in complying with plaintiff's discovery requests," the circuit court observed that her understanding at the February 21 hearing was that the proposed summary judgment motion related to the "discrete issue of the scope of the procuring cause doctrine" which "would have an impact on damages sought. I can't say with any certainty beyond that that it would bar the whole case," or that it "would have been potentially dispositive." In denying the defendants' request for sanctions, the trial court stated, that "there were various discovery disputes. I entered discovery orders on the disputes and the motions to compel. But at no time did I enter sanctions against plaintiff, and at no time did I find their conduct rose to the level of being contumacious or an unwarranted disregard of the court's orders. And I can't [*sic*] say that at this point, as well."

¶ 12 This appeal followed.

¶ 13 ANALYSIS

¶ 14 On appeal, defendants contend (1) the trial court erred in granting plaintiff's motion for a voluntary dismissal because it was filed in the face of an unfiled summary judgment motion that was discussed in open court which could have resulted in a final disposition of the case, and (2) the trial court erred in refusing to impose sanctions under Supreme Court Rules 137 and 219 (e).

¶ 15 In support of this position, defendants rely primarily on *Gibellina v. Handley*, 127 Ill. 2d 122 (1989), *Fumarolo v. Chicago Board of Education*, 142 Ill. 2d 54 (1990) and Section 2-

1009(b) of the code. A brief overview of these opinions and the relevant statutory provision follows.

¶ 16 Section 2-1009 of the code provides, in part:

> (a) The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party's attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause.
>
> (b) The court may hear and decide a motion that has been filed prior to a motion filed under subsection (a) of this Section when that prior filed motion, if favorably ruled on by the court, could result in a final disposition of the cause.
>
> 735 ILCS 5/2-1009(a)(b) (West 2010).

A plaintiff's right to voluntarily dismiss prior to trial or hearing has been recognized as absolute. *Johnson v. United National Industries, Inc.*, 126 Ill. App. 3d 181, 184 (1984) ("it is well established that plaintiff has an absolute right to voluntarily dismiss * * * prior to trial, and the court has no discretion to deny this motion for dismissal"). Under section 2-1009 a plaintiff has a fairly unfettered right to voluntarily dismiss at any time prior to trial. *Patsis v. Zion-Benton Township High School*, 234 Ill. App. 3d 232, 237 (1992). There are three requirements under section 2-1009 of the Code that must be satisfied for a plaintiff to qualify for a voluntary dismissal: "(1) no trial or hearing shall have begun; (2) costs must be paid; and, (3) notice must be given." *Vaughn v. Northwestern Memorial Hospital*, 210 Ill. App. 3d 253, 257 (1991). As long as these requirements are satisfied the trial court must grant a plaintiff's motion for

voluntary dismissal and does not have discretion to deny the motion. *Lewis v. Collinsville Unit 10 School District,* 311 Ill. App. 3d 1021, 1024 (2000); *Pines v. Pines*, 262 Ill. App. 3d 923, 930 (1994). An order granting a plaintiff's motion for a voluntary dismissal is reversible only if the trial court abused its discretion. *Mizell v. Passo*, 147 Ill. 2d 420, 425-26 (1992). "An abuse of discretion occurs where the court's decision is against the manifest weight of the evidence such that no reasonable person could take the view adopted by the trial court." *Id*.

¶ 17 In *Gibellina v. Handley*, 127 Ill. 2d 122 (1989), the supreme court modified this "absolute" right after a review of three cases that were "representative of the myriad of ways in which plaintiffs have utilized the voluntary dismissal statute, ranging from the potentially abusive to the innocuous". *Id*. at 130. The "gist" of defendants argument in *Gibellina* was that once a motion for summary judgment has been filed that motion should be heard before a plaintiff's motion for voluntary dismissal. Exercising its inherent authority to manage the courts, the supreme court refused to completely displace the plain meaning of section 2-1009 but did declare "the trial court may hear and decide a motion which has been filed prior to a section 2-1009 motion when that motion, if favorably ruled on by the court, could result in a final disposition of the case." *Id*. at 137.

¶ 18 In *Fumarolo v. Chicago Board of Education*, 142 Ill. 2d 54 (1990), the defendants served plaintiffs with notice of their intent to file a motion seeking leave to file a motion for summary judgment. *Id*. at 65-66. Two days later, defendants answered the complaint and were granted leave to file the summary judgment motion and a briefing schedule was set. *Id*. at 65-66. One month later, before the defendants filed the summary judgment motion, plaintiffs filed a section

2-1009 motion for voluntary dismissal indicating their intent to file a complaint in federal court. *Id*. at 65-66. The summary judgment motions were filed thereafter. *Id*. at 65-66. The trial court denied plaintiffs' motion for voluntary dismissal and ruled in favor of the defendants' motion for summary judgment. *Id*. at 65-66. Arguing *Gibellina* required the dispositive motion must be filed before the voluntary dismissal motion in order to overcome the absolute right to voluntarily dismiss, plaintiff's sought reversal. The supreme court found plaintiff's advanced a "too formalistic and rigid an interpretation of *Gibellina*. The decisive factor in *Gibellina* was not that the defendant had actually filed a potentially dispositive motion, but was instead that the defendant had put a potentially dispositive motion before the court prior to the filing of the section 2-1009 motion." *Id*. at 65-66. Finding the trial court had entertained oral motions for summary judgment, which were "widely discussed" in the trial court, "a dispositive motion was, in fact, for all intents and purposes, on file" and the motion to voluntarily dismiss "was plainly made 'in the face of' a potentially dispositive motion," the supreme court held the trial court properly exercised its discretion in ruling on the summary judgment motion before ruling on the motion to voluntary dismiss. *Id*. at 68-69.

¶ 19 The *Gibellina* modification was codified in a 1993 amendment to section 2-1009 of the Code, effective January 1, 1994. See Pub. Act. 88-157 (eff. Jan. 1, 1994); *In re Air Crash Disaster at Sioux City, Iowa, on July 19, 1989,* 259 Ill. App. 3d 231, 242 (1994) . The amendment provides "the court may hear and decide a motion that has been filed prior to a motion filed under subsection (a) of this Section when that prior filed motion, if favorably ruled on by the court, could result in a final disposition of the cause." 735 ILCS 5/2-1009(b) (West

2010).

¶ 20 Defendants argue that under *Fumarolo*, the circuit court erred in failing to exercise its discretion by failing to consider an intended, but not yet filed, summary judgment motion, prior to granting the voluntary dismissal. Conversely, plaintiff argues that *Fumarolo* is no longer good law because it was decided prior to the 1993 amendment and applies only where a hearing has begun or where a dispositive motion has been earlier filed. Here, plaintiff argues, defendants' motion had not yet been filed or briefed and, in any event, the unfiled summary judgment motion would not have disposed of the entire case and, therefore, the trial court lacked the discretion to deny the motion for a voluntary dismissal.

¶ 21 Clearly, under *Gibellina*, its progeny and section 2-1009 (b), a trial court has the discretion to hear, but is not required to decide, a previously filed dispositive motion before ruling on a later filed motion for voluntary dismissal. *Bochantin v. Petroff*, 145 Ill. 3d 1, 6 (1991); *Smith v. Central Illinois Regional Airport*, 207 Ill. 2d 578, 583-84 (2003). A plaintiff's unfettered right to voluntarily dismiss pursuant to section 2-1009(a) is subject to two qualifications: (1) where a defendant's previously filed motion could result in final disposition of the cause of action if ruled upon favorably by the court; or, (2) where the circumstances require that such dismissal under 2-1009 would directly conflict with a supreme court rule. *Morrison v. Wagner*, 191 Ill. 2d 162, 165 (2000). "Absent such a circumstance, the trial judge generally has no discretion to deny the motion to voluntarily dismiss." *In re Nancy A.*, 344 Ill. App. 3d 540, 551 (2003).

¶ 22 Here, contrary to defendants' argument, a potentially dispositive motion, similar to the

circumstances in *Fumarolo*, was not before the court. Although defendants' counsel stated he intended on filing a summary judgment motion, no such motion had been filed. At the November 16, 2011, hearing on plaintiff's motion to compel discovery, the parties argued over what documents were related to plaintiff's procuring cause theory. The trial court indicated that the issue remained unclear and that the parties and court needed to "discuss how to get this legal issue resolved as to the exact scope of the Procuring Cause Doctrine as it relates to specific orders or specific problems." The trial court observed:

> "I mean, the Defendants are reading it one way, the particular sale, and Plaintiff is reading it another way. I think that we've got to get this – Because there's, whatever, 70-some thousand documents you're going to be getting and that they're just providing. And now you're telling me– And you've probably put this in your motion papers. But I was thinking the 70,000 covered all this – But that you want even more information regarding any communications regarding all these sales up to the time of the trial and things of that nature. That until we get the specific issue resolved and the Court ensures that its understanding of the procuring cause factor is correct, until we get those lines drawn, I can't order them then because that would be tens of thousands of more documents."

¶ 23 At the February 21, 2012 hearing, the trial court made clear that the indicated summary judgment motion would not be dispositive of the plaintiff's action. Rather, the motion would address a desire to limit discovery and only involve certain of plaintiff's claims. The court noted,

> "[i]f they [defendants] persuade me that the procuring cause [doctrine] relates only to specific orders on which everything has been accomplished except delivery then

> discovery is going to be tailored accordingly. If that's not the case and if its open to all future sales of a particular product, that's going to have an effect on discovery.
>
> * * *
>
> I'm not going to be cutting the plaintiff's relief off. That's going to be dependent on any facts."

Finally, on June 13, 2012, the court observed that a review of her notes indicated that "in February of 2012, I stated that the motion as going to deal with the discrete issue of the scope of the procuring cause doctrine. And the motion which was to be filed, I thought would have an impact on damages sought. I can't say with any certainty beyond that that it would bar the whole case."

¶ 24 In the circuit court, defendants conceded that certain claims were not impacted by the indicated summary judgment motion and, if defendants prevailed, those claims would survive. Therefore, we cannot say that the trial court had discretion to first rule on the summary judgment motion before ruling on the section 2-1009(a) motion for voluntary dismissal. Rather, given the posture of the case, the trial court properly held that plaintiff had an unfettered right to seek the voluntary dismissal pursuant to section 2-1009(a).

¶ 25 Defendants also argue the circuit court erred in its use of "would" as opposed to "could" in determining the effect of the potential summary judgment motion on plaintiffs' claims. However, "could" and "would" have both been used by our supreme court since Gibellina and the amendment. Our supreme court has ruled that if a dispositive motion would, as opposed to could, dispose of the action the trial court's discretion is triggered. *Best v. Taylor Machine Works*, 179

Ill. 2d 367, 440 (1997). Defendants' argument in effect is a distinction without a difference. The circuit court discussed with the parties the defendants' arguments to be raised in the summary judgment motion, the effect they may have and the purpose for the motion being brought.

¶ 26 The trial court found that the motion for summary judgment would not dispose of the plaintiff's entire action. Part of plaintiff's claims involving the procuring cause doctrine might possibly be reduced in scope by the summary judgment motion. The parties statements before the circuit court establish that they agreed claims not based on the procuring cause doctrine were not and could not be disposed of by the defendants' motion. Defendants have not established that the opposite conclusion can be drawn from the statements of the court and the parties.

¶ 27 *Gibellina* did not indicate what motions were potentially dispositive, but rather left the decision up to the discretion of the circuit court, not to be disturbed unless the trial court abused that discretion. *In re: Air Crash Disaster at Sioux City, Iowa, on July 19, 1989*, 259 Ill. App. 3d 231, 242 (1994); *Mizell v. Passo*, 147 Ill. 2d 420, 425 (1992). We " 'hesitate to impose any restrictions, no matter how warranted by circumstances and policy, absent guidance from the legislature or the supreme court.' " *In re: Air Crash Disaster at Sioux City, Iowa*, on July 19, 1989, at 235 (1994) (quoting *Crawford v. Schaeffer*, 226 Ill. App. 3d, 129, 135-56 (1992). We cannot say that the defendants' unfiled summary judgment motion would have resulted in a final disposition of the litigation where the parties and the trial court agreed that certain of plaintiff's claims would remain even if the motion had been ruled upon favorably. Therefore, the trial court did not have the discretion to consider the unfiled summary judgment motion and did not err in granting plaintiff's section 2-1009(a) motion for voluntary dismissal.

¶ 28 Defendants also argue the trial court erred when it did not permit defendants to file the motion for summary judgment after the section 2-1009 motion was presented to the court. We see no merit in this argument. An important purpose in affording the trial court discretion in these circumstances is to aide in the efficient administration of the lawsuit. Every litigant believes its summary judgment motion is a winner. While some are successful, all consume the time and financial resources of the parties. The experienced trial judge had the superior perspective of where this lawsuit had been and where it was going. To conclude the trial court should have allowed the apparently unfinished summary judgment motion to be filed, generating at a minimum a response and a reply that would have dealt with only a part of the dispute, makes little practical or legal sense. Because the trial court determined that the defendants' motion would not result in a final disposition of the case, we cannot say that the actual filing of the motion would have made a difference in its effect on plaintiff's claims. Also, to rule otherwise would allow defendants an opening to claim, after a section 2-1009 motion is filed, they have a dispositive motion that could be filed thereby negating a plaintiff's near absolute right to a voluntary dismissal.

¶ 29 Defendants also argue that plaintiff misused section 2-1009(a) of the Code as a "crude surrogate" for a motion for substitution of judge. Section 2-1001(a)(2) of the Code allows a litigant to seek a substitution of judge as of right "if it is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case." 735 ILCS 5/2-1001 (West 2010). Clearly, plaintiffs were not entitled to a different judge as a matter

of right. Defendants argue plaintiff was aware the trial judge had continuing concerns regarding plaintiff's claims and plaintiff used its right under section 2-1009 to gain a voluntary dismissal knowing that if the case was later refiled, it would not automatically be before the same trial judge. Defendants basis of this argument is plaintiff's refusal to stipulate that if refiled, the case would be before the same trial judge.

¶ 30 The issue of the stipulation was raised by the trial court during the March 13, 2012 hearing where plaintiff presented its motion for voluntary dismissal. The trial judge asked the parties if there was "any chance you stipulate to refiling on this calendar?" and plaintiff's counsel responded "[y]ou know, we're seeking to voluntarily non-suit the case, and that's it. We're not looking to stipulate as to any other matters." This was the entirety of the discussion involving the stipulation. There was a brief reference by defendants' counsel during the hearing inferring that the motion to voluntarily dismiss was intended to change the venue of the litigation, but there was no further discussion on this point. We are not persuaded by defendants' general argument that plaintiff's refusal to stipulate to appear before the same trial judge if the case is refiled conclusively establishes that the motion for voluntary dismissal was "crude surrogate" for a substitution of judge. We note that nothing would prohibit defendants from presenting a motion before the presiding judge requesting the re-filed lawsuit be assigned to Judge McGrath setting forth the reasons why the matter should be returned to her calendar, an administrative decision which is obviously within the discretion of the presiding judge.

¶ 31 Alternatively, defendants argue that the motion to voluntarily dismiss should not have

been granted before the trial court imposed sanctions against plaintiff under Illinois Supreme Court Rules 219(e) and 137. Ill. S. Ct. R. 219(e) (eff. July 1, 2002); Ill. S. Ct. R. 137 (eff. Feb. 1, 1994). The determination of whether to impose sanctions is a matter within the sound discretion of the trial court. *Peterson v. Randhava*, 313 Ill. App. 3d 1, 14 (200). This determination will not be disturbed by a reviewing court absent an abuse of discretion. Id.

¶ 32 Defendants argue that Rule 219(e) and 137 sanctions are warranted because plaintiff filed its complaint without a reasonable inquiry into the factual and legal basis for the claims and, as such, could not provide the court with a response to defendant's interrogatory requesting plaintiff to identify which sales were the basis of its claims. Defendants further argue that plaintiff "pursued unreasonably broad discovery" from defendants and at the same time failed to answer Interrogatory No. 7 in violation of the trial court's January 11, 2012 order to answer within 35 days. Additionally, defendants argue that plaintiff made misrepresentations to the trial court regarding the completeness of its discovery responses.

¶ 33 Rule 219(e) provides that:

> "The court may, in addition to the assessment of costs, require the party voluntarily dismissing a claim to pay an opposing party or parties reasonable expenses incurred in defending the action including but not limited to discovery expenses, expert witness fees, reproduction costs, travel expenses, postage, and phone charges." Ill. S. Ct. R. 219(e) (eff. July 1, 2002).

Rule 219(e) does not bar a plaintiff's right to a voluntary dismissal, but instead imposes expenses

to deter abuse of a plaintiff's statutory right to voluntary dismiss. *Scattered Corp. v. Midwest Clearing Corp.*, 299 Ill. App. 3d 653, 660 (1998).

¶ 34 Rule 137 imposes a duty on litigants and attorneys to conduct a reasonable inquiry into the facts and existing law prior to filing a complaint. Ill. S. Ct. R. 137 (eff. Feb. 1, 1994). The purpose of Rule 137 is to prevent the filing of vexatious actions brought based on false allegations or without a legal foundation. *Wittekind v. Rusk*, 253 Ill. App. 3d 577, 580 (1993). The rule is penal in nature and must be strictly construed. *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 487 (1998). Whether to impose Rule 137 sanctions is within the sound discretion of the trial judge. *Id*. We will not overturn that decision "unless it represents an abuse of discretion." *Id*.

¶ 35 Defendants argue plaintiff failed to make a reasonable inquiry into the facts alleged in its complaint. Defendants contend that plaintiff's response to Interrogatory No. 7 shows that plaintiff did not and cannot pinpoint which order(s) form the basis of its claims for commissions. Therefore, defendants argue plaintiff filed the complaint without a good faith basis, factual accuracy or legal validity. In defendants' further response to plaintiff's section 2-1009 motion, defendants argue that if the court did not "hear and decide" defendants' motion for summary judgment, an alternative was to assess "reasonable costs" against plaintiff under Rule 219(e) and 137 to compensate defendants for the expenses incurred to date.

¶ 36 At the June 13, 2012 hearing, the trial court declined to enter Rules 219(e) and 137 sanctions. The circuit court, citing *In re Marriage of Webb*, 333 Ill. App. 3d 1104 (2002), stated

" '219(e)'s reference to voluntary dismissal is taken to avoid compliance with the discovery deadlines or orders, required the Circuit Court to make a preliminary finding of misconduct analogous to the unreasonable noncompliance standard invoked in Rule 219(e) cases before imposing expenses pursuant to Rule 219(e).' " The circuit court found that, "[h]ere there are various discovery disputes. I entered discovery orders on the disputes and the motions to compel. But at no time did I enter sanctions against plaintiff, and at no time did I find that their conduct rose to the level of being contumacious or an unwarranted disregard of the court's orders. And I can't [*sic*] say that at this point, as well."

¶ 37 We cannot say that this determination was an abuse of discretion. The circuit court found plaintiff's supplemental response to Interrogatory No. 7 was not in violation of any discovery order. The record shows that the parties were engaged in several discovery disputes including several motions to compel discovery against defendants and a motion for a protective order against plaintiff. Defendants take issue with the contents of the response to the interrogatory and the extensive discovery propounded by plaintiff. However, at the same time, defendants were the subject of motions to compel discovery that plaintiff claimed was necessary to complete the response to Interrogatory No. 7.

¶ 38 The circuit court considered the discovery orders, motions to compel and conduct of the parties and found that plaintiff's conduct in regards to Interrogatory No. 7 did not rise to the level of imposing sanctions against plaintiff. Defendants urged the court to rule on the summary judgment motion so as to avoid the expense involved in repetitive discovery that might occur on

re-filling. In response, the trial court correctly stated that "the defendants can, you know, move for previous discovery orders to be maintained." This is consistent with the comments to Rule 219(e) which provide that upon refiling "the court shall consider the prior litigation in determining what discovery will be permitted, and what witnesses and evidence may be barred." Ill. S. Ct. R. 219(e); See *Smith v. P.A.C.E.*,323 Ill. App. 3d 1067, 1075 (2001). Defendants, therefore, have recourse to applicable discovery rules to limit the burden and expense of discovery should this action be refiled. We find that a reasonable person could come to the same conclusion as the circuit court, therefore, the circuit court's refusal to enter sanctions was not against the manifest weight nor an abuse of discretion.

¶ 39 Lastly, Plaintiff, in its response brief, argues that we should impose Supreme Court Rule 375 (Ill. S. Ct. R. 375(b) (eff. Feb. 1, 1994)) sanctions on defendants for bringing a frivolous appeal. Plaintiff argues that this appeal is frivolous because it is based on well-established law and that defendants made material misrepresentations of the facts involved in the litigation.

¶ 40 Illinois Supreme Court Rule 375(b) permits the imposition of sanctions for frivolous appeals not made in good faith by a reasonably prudent attorney. *Dreisilker Electric Motors, Inc. v. Rainbow Electric Co.*, 203 Ill. App. 3d 304, 312 (1990). Sanctions should be imposed only in the most egregious of circumstances. *Janisco v. Kozloski*, 261 Ill. App. 3d 963, 968 (1994). We decline to enter sanctions against the defendants in this instance because, although we have found no merit in the appeal, it was not so lacking in foundation to suggest it was frivolously brought. *Swanson v. Cater*, 258 Ill. App. 3d 157, 163 (1994). Accordingly, plaintiff's request for sanctions

is denied.

¶ 41 CONCLUSION

¶ 42 For the foregoing reasons, we affirm the orders of the circuit court granting plaintiff's motion for a voluntary dismissal and denying the defendants' motion for sanctions.

¶ 43 Affirmed.