

FILED
2/8/2024 4:22 PM
IRIS Y. MARTINEZ
CIRCUIT CLERK
COOK COUNTY, IL
2022L010905
Calendar, U
26336566

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL R. DULBERG, INDIVIDUALLY)
AND THE PAUL R. DULBERG)
REVOCABLE TRUST)

Plaintiffs,)

vs.)

KELLY N. BAUDIN *A/K/A* BAUDIN &)
BAUDIN, BAUDIN & BAUDIN AN)
ASSOCIATION OF ATTORNEYS, LAW)
OFFICES OF BAUDIN & BAUDIN,)
BAUDIN & BAUDIN LAW OFFICES,)
WILLIAM RANDAL BAUDIN II *A/K/A*)
BAUDIN & BAUDIN, BAUDIN &)
BAUDIN AN ASSOCIATION OF)
ATTORNEYS, LAW OFFICES OF)
BAUDIN & BAUDIN, BAUDIN &)
BAUDIN LAW OFFICES, KELRAN, INC)
A/K/A THE BAUDIN LAW GROUP, Ltd.,)
JOSEPH DAVID OLSEN, *AIKJA*)
YALDEN, OLSEN & WILLETTE LAW)
OFFICES, CRAIG A WILLETTE, *A/KIA*)
YALDEN, OLSEN & WILLETTE LAW)
OFFICES, RAPHAEL E YALDEN II,)
AIK/A YALDEN, OLSEN & WILLETTE)
LAW OFFICES, ADR SYSTEMS OF)
AMERICA, LLC., ASSUMED NAME ADR)
COMMERCIAL SERVICES, ALLSTATE)
PROPERTY AND CASUALTY)
INSURANCE COMPANY)

CASE NO. 2022L010905

Defendants

FILED DATE: 2/8/2024 4:22 PM 2022L010905

**PLAINTIFFS' RESPONSE TO DEFENDANT ADR SYSTEMS OF AMERICA, LLC'S
RULE 137 MOTION FOR SANCTIONS**

NOW COMES the Plaintiffs PAUL R. DULBERG AND THE PAUL R. DULBERG REVOCABLE TRUST by and through their attorney, Alphonse A. Talarico and Alphonse A. Talarico, individually for their **RESPONSE TO DEFENDANT ADR SYSTEMS OF AMERICA, LLC'S ILLINOIS SUPREME COURT RULE 137 MOTION FOR SANCTIONS** states as follows:

PREAMBLE: This matter, as concerns Movant ADR Systems Of America, LLC (herein after referred to as ADR) began on or before October 31, 2016 when the Bankruptcy Judge signed multiple orders authorizing the Bankruptcy Trustee to retain the Baudin Defendants to pursue Dulberg's claims pending in 12 LA 178 through "Binding Mediation" on a form used by Movant ADR which was fully executed as to additional terms, but was unsigned by the parties. What should be noted is that the additional terms were discussed and approved by the Bankruptcy Judge on that date. (Please see Movant ADR's Exhibit A (exhibits to "The Complaint" #6(a), 6(b), 7 and 8 which is referred to but not reproduced herein)

At the time Respondent Paul R. Dulberg (hereinafter referred to as Dulberg and including The Paul R. Dulberg Revocable Trust which was not yet in existence) was represented by named Defendants WILLIAM RANDAL BAUDIN II and KELLY N. BAUDIN in prosecuting his claims in a pending case designated as 12 LA 178 and that case was an asset of a Bankruptcy Estate Bk. No. 14-83578. (Please see Movant's Exhibit A #19 "The Complaint" which is referred to but not reproduced herein)

There was a second "Binding Mediation" agreement on a form used by Movant ADR allegedly signed by the Parties on the day that the "Binding Mediation" hearing took place which

contained different terms than the unsigned “Binding Mediation” agreement approved by the Bankruptcy Judge. (Please see Movant’s Exhibit A exhibit to the “Complaint” #11) Please note that the second “Binding Mediation” agreement was not only signed by the parties, which Respondent Dulberg vehemently denies as to his signature, but by a non-party named Walter Norman who presumably was an employee or agent of Movant ADR.

Respondent Dulberg’s Complaint (“Nature of the Case page 3, #3” and Count 4 BREACH OF CONTRACT AGAINST DEFENDANT ADR SYSTEMS OF AMERICA, LLC, ASSUMED NAME ADR COMMERCIAL SERVICES Movant’s Exhibit A paragraph 93 pages 30 to 32) reasonably state a valid cause of action under Illinois Law.

FACTS:

Respondent Dulberg filed this suit on December 8, 2022 on the sixth anniversary of the “Binding Mediation” hearing held on December 8, 2016.

On February 24, 2023 Movant filed its 735 ILCS 5/2-615 Motion to Dismiss which was fully briefed and heard on May 25, 2023.

The portion of the transcript attached as Respondent Dulberg’s Exhibit #1 that pertains to Movant ADR’s 735 ILCS 5/2-615 Motion to Dismiss begins on Page 6 Line 5 to Page 14 Line 4.

On Page 14 line 3 it should be noted that the Honorable Court gave Respondent Dulberg 21 days to replead.

The Order for that day was prepared by Movant ADR’s attorney and is attached as Respondent Dulberg’s Exhibit #2.

It should be noted that said order was erroneously drafted by Movant ADR's attorney as it did not contain any time limit for Respondent Dulberg to replead.

The next relevant date was September 21, 2023, the date set for the hearing on Defendant Allstate Property and Casualty Insurance Company Motion for Summary Judgment.

The Transcript for September 21, 2023 is attached as Respondent Dulberg's Exhibit #3.

Two items from that transcript are of note:

First, the Honorable Judge Otto was in error thinking that Summary Judgment granted to Defendant Allstate Property and Casualty Insurance Company ended this matter for all parties; (Please see Respondent Dulberg's Exhibit 3 page 19 line 7-page 20 line 7 attached)

Second, that Movant ADR's attorney, or anyone in his stead, was present physically or remotely (Please see Respondent Dulberg's Exhibit 3 page 2 line 1 -15) and that neither Movant ADR's attorney or anyone in its stead objected to the proposed order circulated before presentment to Judge Otto which Order was signed and entered that day. Please see Respondent Dulberg's Exhibit 4 attached clearly stating that this order is final and appealable.)

On October 11, 2023 Movant ADR filed its DEFENDANT ADR SYSTEMS OF AMERICA, LLC'S REQUEST FOR STATUS CONFERENCE. This motion was set for October 31, 2023 which was (10) ten days after Respondent Dulberg's time to file and serve his Notice of Appeal. (Please see Respondent Dulberg's Exhibit 5 attached).

On October 17, 2023, Respondent Dulberg filed and served his Notice of Appeal. (Please see Respondent Dulberg's EXHIBIT 6 attached)

It should be noted that said Notice of Appeal specifically names Movant ADR and was served on Movant ADR's attorney of record. Also there were no objections filed in this Appellate matter regarding the Appellate Court's jurisdiction.

On October 31, 2023, two weeks after the Appellate Court took jurisdiction the Honorable Michael F. Otto entered an order changing his May 25, 2023 order dismissing Respondent Dulberg's action against Movant ADR pursuant to 735 ILCS 5/2-615 from "without Prejudice" to "with Prejudice".

Please note that this is the third "Final and Appealable order entered by the Honorable Judge Otto, only the first was an ISCR 304(a) order. (Please see Respondent Dulberg's EXHIBIT 7 attached)

On November 17, 2023 Movant ADR filed this Motion and "Noticed" it up for the first time on December 12, 2023.

ARGUMENT

RESPONDENT DULBERG'S SUIT BASED UPON THE DIFFERENCE BETWEEN TWO MOVANT ADR CONTRACTS WAS A VALID REASON FOR BRINGING THIS ACTION

There is no dispute as to the fact that there were at least two "Binding Mediation" agreements. The first was the unsigned *but presented and approved by the Bankruptcy Judge* with noted changed term when compared with the executed and accepted contract Movant ADR voluntarily turned over to Respondent Dulberg's attorney upon request.

The many differences were stated in Respondent Dulberg's Complaint and reproduced here as a courtesy to the reader.

COUNT 4

BREACH OF CONTRACT AGAINST DEFENDANT ADR SYSTEMS OF AMERICA, LLC., ASSUMED NAME ADR COMMERCIAL SERVICES

93. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 89, inclusive, of this Complaint, as if fully restated herein.

94. There was a valid and enforceable contract between Plaintiff Paul R. Dulberg and Defendants ADR SYSTEMS OF AMERICA, LLC., ASSUMED NAME ADR COMMERCIAL SERVICES and ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY dated December 8, 2016. (Please see Exhibit 11 attached)

95. There existed an unsigned/undated draft of this agreement presented to Plaintiff's Bankruptcy Judge on October 31, 2016 by Defendant Joseph David Olsen. (Please see Group Exhibit 6B attached)

96. Major terms within the two agreements were changed including but not limited to:

- a. Notifications under the title on page one;
- b. Language under Parties B;
- c. page 4 F1.b. regarding who is liable to Plaintiff;
- d. page 5 V.A.1. ADR Systems Fee Schedule;
- e. page 5 V ADR Systems Fee Schedule boxed information;
- f. page 6 section v number 5.

97. The specified language of Paragraph III. B. Amendments to the Agreement were not followed.

98. Plaintiff did all that was required of him under the terms of the contract.

99. Defendant breached the contract by not following the terms regarding amending the

contract.

100. Plaintiff suffered pecuniary injury in an amount in excess of \$261,000.00 because the contract under the changed terms should not be allowed to regulate the procedure.

Taken as a whole it should be obvious that not pursuing Movant ADR as a Defendant would be malpractice on the part of Respondent Dulberg's attorney.

It should be additionally noted that although the "Binding Mediation" agreement was unsigned, the terms as they existed were the terms presented and authorized by the Bankruptcy Court. The hearing date on the unsigned contract of the was December 8, 2016, the same date that the Parties (mysteriously?) arrived at Respondent ADR's hearing offices to then execute with Movant ADR's acceptance, the second "Binding Mediation" agreement.

Although the Honorable Michael F. Otto granted Movant ADR 735 ILCS 5/2-615 Motion To Dismiss he did it "without prejudice" leaving open the possibility of Respondent Dulberg's elaboration on the enforceability of an unsigned *but fully approved* "Binding arbitration" agreement.

The law is clear regarding what is required of a Respondent when facing ISC Rule 137 allegations in order to defeat the same. Respondent Dulberg made an extensive investigation into the facts contained in his Complaint by obtaining and reviewing all information available pertaining to the Bankruptcy Case titled U.S. Bankruptcy Court Northern District of Illinois (Western Division) Bankruptcy Petition #: 14-83578 and the "Binding Mediation" file before including Movant ADR as a named Defendant and his cause of action for Breach of Contract is a recognized cause of action in Illinois pursuant to Ill.S.Ct. Rule 239(a), (d)(ii) and Illinois Pattern Jury Instructions-Civil 700.01 Breach of Contract-terms of conduct Not In Dispute.

MOVANT ADR' MOTION FOR RULE 137 SANCTIONS WAS FILED AND SET FOR HEARING AFTER THE TRIAL COURT NO LONGER HAD JURISTION

The Honorable Judge Michael F. Otto's second Final and Appealable Order was entered on September 21, 2023. (Please see Respondent Dulberg's Exhibit 3) Movant ADR was neither represented for that hearing date nor did Movant ADR representative object to the proposed order as circulated among all counsel of record.

This Honorable Court is requested to take Judicial Notice (Illinois Rules of Evidence 201(b)) of the fact that thirty (30) days after September 21, 2023 was October 21, 2023.

Respondent Dulberg filed his Notice of Appeal on October 17, 2023 (Please see Respondent Dulberg's Exhibit 6).

Movant ADR was Noticed as required, but did not object.

During the thirty (30) days from September 21, 2023 to October 21, 2023 Movant ADR filed a **REQUEST FOR STATUS** and did not file a Motion for 137 Sanctions. (Please see Respondent Dulberg's Exhibit 8)

A "Request for Status" in a civil matter is not a "Post Judgement" motion because it was not directed at the final judgment and therefore did not toll the time the trial court retained jurisdiction.

In *Stanila v. Joe*, 2020 Il App (1st) 191890, No.1-19-1890 (Ill.App. Dec22, 2020) on page 10-11 paragraph 23 Justice Cobbs clearly states that to be a proper post-judgment motion said motion must be directed at the trial court's final judgment.

¶ 23 These cases illustrate the principle that in determining whether a postjudgment motion is properly directed at the judgment, we must look at the substance of the motion rather than its caption. See *Heiden*, 396 Ill. App. 3d at 140; see also *Shutkas Electric, Inc.*, 366 Ill. App. 3d at

81 (citing *J.D. Marshall International, Inc. v. First National Bank of Chicago*, 272 Ill. App. 3d 883, 888 (1995)). Here, defendant's filing invited the court to treat the "motion to vacate" as a motion to dismiss a complaint, not as a postjudgment motion directed at the final judgment.

Although

Page 11

defendant's motion was labeled as a "motion to vacate" and the introductory paragraph repeated this request, the body of the motion clearly attacked plaintiff's complaint rather than the court's June 25 final order. Defendant's motion did not request the court to vacate its order granting plaintiff's motion to reconsider nor did it request the court to vacate its judgment as to the entry of a new eviction order. Instead, the motion contained arguments for dismissal of plaintiff's complaint, set forth a standard of review for its dismissal, and further requested dismissal of the complaint in its prayer for relief without referencing the circuit court's final judgment. As such, we find that the substance of the motion sought a different type of relief: dismissal of plaintiff's complaint rather than vacation of the circuit court's final judgment. Accordingly, we find that defendant's motion to vacate was not a proper postjudgment motion and, thus, did not toll the time for filing a notice of appeal. Therefore, we must dismiss this appeal for lack of jurisdiction. *Stanila v. Joe*, 2020 IL App (1st) 191890, No. 1-19-1890 (Ill. App. Dec 22, 2020)

Here it is clear that Movant ADR's REQUEST **FOR STATUS** did not pertain to the Order entered September 21, 2023.

Ill. S.Ct.R. 137(b) states that “Motions brought pursuant to this rule **MUST** [Emphasis added] be filed within 30 days of the entry of final judgment, or if a timely post-judgment MOTION [Emphasis added] is filed, within 30 days of the ruling on the post-judgment”

Movant ADR Motion for Rule 137 Sanctions was not filed until November 17, 2023 nor set until December 12, 2023.

RULE 137’s PENAL NATURE REQUIRES THIS HONORABLE COURT TO STRICTLY CONSTRUE THE RULE AGAINST MOVANT ADR

In *Sanchez v. City of CHICAGO*, 352 Ill.App.3d 1015, 817 N.E.2d 1068, 1077, 288 Ill.Dec.418 (1st Dist. 2004) No. 1-03-2594 while discussing the appropriateness of barring witnesses from testifying the Court stated “Rule 137’s penal nature requires us to strictly construe the rule against the movant. *Gershak v. Feign*, 317 Ill.App.3d 14, 22, 250 Ill.Dec. 384, 738 N.E.2d 600 (2000). The sanction damaged the plaintiff out of proportion to any misconduct committed by his attorney. At their depositions, the witnesses testified to their awareness of the damaged sidewalk and past occurrences of people falling on the hole. Most of their testimony was consistent with the witness statements. The trial judge should not have barred these witnesses completely where much of their testimony was unrefuted and necessary to the plaintiff’s case. Under the facts of this case, barring the witnesses was not an appropriate penalty for Rule 137 violations.” 817 N.E.2d 1077.

Movant ADR cannot and did not advance sufficient allegations to establish that Respondent Dulberg motives in naming Movant ADR as a Defendant after extensive investigation into the role Movant played in the occurrences surrounding the “Binding Mediation” on December 8, 2016 (the date was set on the unsigned “Binding Mediation” agreement submitted and approved by the Bankruptcy Court and was still the date when the Parties arrived at Movant ADR’s

hearing location and the second agreement with changed terms was signed) were in any way improper.

SANCTIONS PURSUANT TO RULE 137 SHOULD BE RESERVED FOR THE MOST EGREGIOUS CASES

In *WEBBER v Wight & Company*, 368 Ill.App.3d 1007, 858 N.E.2d 579, 601, 306 Ill.Dec. 782 (1st Dist. 2006) No. 1-04-1622 Presiding Justice FITZGERALDSMITH stated “The party requesting the imposition of Rule 137 sanctions bears the burden of proof and must show that the opposing party made untrue and false allegations without reasonable cause for the mere purpose of invoking harassment or undue delay of the proceedings. See *Technology Innovation*, 315 Ill.App.3d at 243-44, 247 Ill.Dec. 797, 732 N.E.2d 1129. Because of Rule 137's penal nature, courts must construe it strictly, must make sure the proposing party has proven each element of the alleged violation with specificity, and should reserve sanctions for the most egregious cases. See *Dowd*, 181 Ill.2d at 487, 230 Ill.Dec. 229, 693 N.E.2d 358; *Technology Innovation*, 315 Ill. App.3d at 244, 247 Ill.Dec. 797, 732 N.E.2d 1129; *Barrett*, 343 Ill.App.3d at 1197, 279 Ill.Dec. 113, 799 N.E.2d 916. Ultimately, the primary consideration on review is whether the trial court's decision was "informed, based on valid reasoning, and follows logically from the facts." *Technology Innovation*, 315 Ill.App.3d at 244, 247 Ill. Dec. 797, 732 N.E.2d 1129.”

Again, here as before, Respondent Dulberg advances, that he did an extensive investigation into the Bankruptcy Court and “Binding Mediation” matters, and his cause of action “Breach of Contract” was a recognized cause of action in Illinois.

WHEREFORE, Respondents Plaintiffs PAUL R. DULBERG, INDIVIDUALLY AND THE PAUL R. DULBERG REVOCABLE TRUST and Alphonse A. Talarico, individually, pray that this Honorable Court deny Movant ARD Motion for Rule 137 Sanctions in its entirety and for any other relief that is fair and equitable.

Dated: February 8, 2024,

Respectfully submitted,

By: /s/ Alphonse A. Talarico

ARDC 6184530

CC 53293

707 Skokie Boulevard suite 600

Northbrook, Illinois 60062

(312) 808-1410

contact@lawofficeofalphonsetalarico.com

Attorney for Plaintiffs: Plaintiffs PAUL R. DULBERG, INDIVIDUALLY AND THE PAUL R. DULBERG REVOCABLE TRUST and Alphonse A. Talarico, Individually.