2011 IL App (2d) 101194-U
No. 2-10-1194
Order filed December 15, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

INTERNATIONAL PROFIT ASSOCIATES, INC., and INTERNATIONAL TAX ADVISORS, INC.,	)	Appeal from the Circuit Court of Lake County.
Plaintiffs-Appellees,	)	
v.	)	Nos. 07-AR-519 07-AR-553
DePATCO, INC.,	)	Honorable Diane E. Winter,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Bowman concurred in the judgment.

ORDER

Held: Trial court's denial of motion to dismiss or stay action was affirmed where defendant forfeited the argument on appeal; trial court did not abuse its discretion in barring witness whom defendant disclosed two weeks prior to bench trial; judgment against defendant was affirmed where trial court's findings on plaintiffs' breach of contract claim and on defendant's fraudulent inducement affirmative defense were not against the manifest weight of the evidence; order imposing sanctions against defendant for falsely verified discovery responses was vacated where defendant had no knowledge of its prior attorney's filing of the responses, and where sanctions included attorney fees arising out of discovery rules violations, not improperly filed responses.

¶ 1 Plaintiffs, International Profit Associates, Inc. (IPA), and International Tax Advisors, Inc. (ITA), sued defendant, DePatco, Inc., in the circuit court of Lake County, seeking to recover money defendant allegedly owed plaintiffs under various contracts for business management and tax consulting services. Following a bench trial, the court entered judgment in favor of defendant on ITA's claim, and in favor of IPA on its claim.[1] Defendant appeals from the judgment entered in favor of IPA. Defendant also appeals from (1) an order denying its motion to dismiss or stay the action pursuant to section 2-619(a)(3) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(3) (West 2010)); (2) the trial court's decision to bar witness Nancy Miller from testifying at trial; and (3) an order entering sanctions in the amount of $17,200 against defendant pursuant to Supreme Court Rule 137 (eff. Feb. 1, 1994). For the reasons that follow, we affirm in part and vacate in part.

¶ 2 I. BACKGROUND

¶ 3 Defendant is an Idaho corporation that provides construction and excavation services. Plaintiffs are corporations that provide business management and tax consulting services. In May 2007, IPA and ITA filed a two-count breach of contract complaint against defendant, alleging that defendant owed plaintiffs money under contracts for business management and tax consulting services. In the count concerning IPA's claim, plaintiffs alleged that defendant had entered into a

---

[1]The case brought against defendant by IPA and ITA (No. 07-AR-519) was consolidated with a case brought against defendant by ITA Implementation Services, Inc. (ITA-IS) (No. 07-AR-553) for purposes of discovery. The record before us does not reflect whether the cases were consolidated for trial, or how the trial court resolved ITA-IS's claims, as the record contains only the judgment order in the case brought by IPA and ITA.

contract with IPA in February 2007, under which IPA was to provide 500 hours of management consulting services at a rate of $325 per hour plus expenses. IPA further alleged that it performed 293 hours under the contract, and that defendant still owed it $47,431.79[2] for its services.

¶ 4 On July 27, 2007, defendant filed answers to plaintiffs' complaint and asserted fraudulent inducement as an affirmative defense. Defendant's allegations spanned 32 pages and contended that plaintiffs were corporate entities through which certain individuals, led by John Burgess, conducted a scheme to fraudulently induce clients into signing contracts for consulting services, which were of no value to them.

¶ 5 According to defendant's allegations, the scheme began with a telemarketer contacting a potential client to set up a sales appointment. A salesperson then arrived at the appointment and attempted to sell the client an "objective" survey of the client's business. If the salesperson successfully sold a survey, then a business analyst would arrive shortly thereafter to conduct it. Once on site, the analyst would follow a scripted routine whereby the analyst would obtain the client's financial information, concoct inflated "problem costs" that the analyst would attribute to poor business management, and present a consulting services agreement under which the analyst proposed that plaintiffs would rescue the client from its business management failures. According to defendant, the salesperson and the analyst would promise the client a three-to-one return on consulting fees, despite knowing the assurance to be false.

[2]Plaintiffs' complaint originally alleged that defendant owed IPA only $31,798.90, but, following the bench trial, the court allowed plaintiffs to amend their complaint to conform with the proofs at trial.

¶ 6 Defendant further alleged that plaintiffs trained their analysts to "psychologically manipulate" clients with the goal of "wear[ing] the client down to create urgency." For example, defendant alleged that plaintiffs' training manuals instructed the analyst to perform a "council call" to a "council of advisors" in the client's presence, in order to falsely instill confidence in the client that the analyst was backed up by a team of business experts. Defendant also alleged that the training manuals instructed analysts to "drop bombs" of misleading financial data to instill in the client fear of imminent financial meltdown. Defendant further alleged that the training manuals instructed the analyst never to leave a copy of the business survey—which allegedly consisted of boilerplate with the client's financial data plugged in—with the client, so that the client would not have the opportunity to scrutinize the analyst's claims.

¶ 7 Defendant alleged that plaintiffs succeeded in fraudulently inducing it to sign a consulting agreement by employing this scheme. According to defendant, IPA employee Gentry Stanley met with defendant's principals on February 8, 2007, to conduct a business survey. Using the misleading and deceptive tactics outlined above, Stanley fraudulently induced defendant to enter into an agreement with IPA for 500 hours of consulting services at a rate of $325 per hour plus expenses. Defendant further alleged that it had received nothing of value from IPA under the agreement.

¶ 8 A. Defendant's Two Motions to Stay Proceedings

¶ 9 Defendant's allegations in its affirmative defense mirrored the allegations of the complaint in a 2007 federal case filed by defendant and other former clients of plaintiffs against John Burgess, the founder of plaintiffs, and other individuals (*Amari Co. v. Burgess*, No. 07-C-1425). The federal case alleged that the consulting services scheme masterminded by Burgess and others violated the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. § 1961 *et seq.* (West 2010)). In February 2008, based on the pendency of the federal suit, defendant and eight other state defendants, against whom plaintiffs were pursuing similar collection suits, filed a consolidated motion to stay the state cases. Although the defendants in the state cases—which had been consolidated for purposes of discovery—did not cite section 2-619(a)(3) of the Code anywhere in their motion, they relied on cases that interpreted that section of the Code. The trial court denied the motion to dismiss or stay, and the state defendants appealed. This court affirmed the denial, reasoning that the state defendants had not met their burden of establishing that the state plaintiffs and the federal defendants were the "same parties" for purposes of section 2-619(a)(3). *International Profit Associates, Inc. v. Central Radiator Cabinet Company, Inc.*, No. 2-08-0361 (2008) (unpublished order under Supreme Court Rule 23).

¶ 10 Despite this procedural history, on March 23, 2010—the morning the bench trial was to begin in defendant's case—defendant filed another motion to dismiss or stay proceedings pursuant to section 2-619(a)(3) based on the pendency of the federal suit. Defendant argued that the new motion was distinguishable from the prior motion, because the earlier motion was based on common law principles, while the new motion was based on section 2-619(a)(3). Defendant further argued that, at the time of the earlier motion, the record had not been sufficiently developed to show that Burgess and the other federal defendants were the "same parties" as the state plaintiffs. The trial court denied the motion, finding that it was both untimely and the same motion that it had previously denied.

¶ 11 B. Trial Court's Decision to Bar Witness Nancy Miller

¶ 12 Also on the morning of the bench trial, plaintiffs objected to witness Nancy Miller testifying at trial. Miller was a former employee of IPA who, in January 2010, had signed an affidavit in connection with the federal suit in which she described various instances of IPA's deceptive business practices. For example, Miller stated in her affidavit that the "council call" performed in a prospective client's presence was a charade, during which the consultant was "simply placed on hold, while [the consultant] pretended to talk to a group of experts while no one was on the other end." Miller also stated that IPA's consultants were not actually bonded for $2,000,000, as IPA told its clients, and that IPA misrepresented to clients the educational background and business experience of its consultants.

¶ 13 Plaintiffs argued that Miller should be barred from testifying because defendant had not disclosed her in its responses to Supreme Court Rule 213(f) (eff. Jan 1, 2007) interrogatories, and because it had not disclosed Miller until March 9, 2010, just two weeks prior to trial. On that date, defendant had notified plaintiffs' counsel via e-mail of its intent to call Miller as a witness. In response, defendant argued that plaintiffs had known about Miller since at least January 2010, due to the filing of the affidavit in the federal suit, and due to defense counsel's disclosure of Miller as a witness in one of the parallel state cases being prosecuted by IPA. Defendant further argued that, because defendant had offered Miller for deposition on at least two occasions since March 9, 2010, "any prejudice [to plaintiffs] was self inflicted." The trial court barred Miller from testifying, finding that defendant's disclosure was untimely, and that Miller's testimony was not crucial to its defense.

¶ 14 C. Bench Trial

¶ 15 The bench trial began on March 23, 2010, and lasted three days. Gregory Stoddard, president and co-owner of defendant with his brothers[3], testified regarding his experience with plaintiffs. He testified that a telemarketer contacted him on February 6, 2007, and told him that IPA was helping small businesses in the area and would like to meet with him. This piqued Gregory's

[3]Daniel Stoddard was the only other brother who testified at trial.

interest, since defendant was located in a small town in Idaho with a population of 3,000 to 4,000 people. Gregory agreed to the meeting, and the next day, IPA senior area manager Donald Leisy arrived.

¶ 16 According to Gregory, Leisy told him that IPA was one of the fastest growing companies in the United States, that its annual sales were in the eight figures, that it had over 2,000 employees, and that it had succeeded in helping small businesses like defendant. Leisy informed Gregory about the availability of a survey, which he assured Gregory would provide him with an "objective" and "unbiased" picture of how defendant's business was doing. Leisy said the analysts who performed the surveys were experts and included former CEOs of large corporations and independently wealthy individuals who had owned their own businesses. When Gregory asked what other businesses in the area IPA was helping, Leisy reported that this information was confidential. He told Gregory that, in fact, IPA's consultants were bonded for $2,000,000, which would cover damages in case an IPA consultant accidently leaked a client's confidential information. Leisy gave Gregory several brochures, one of which included purported endorsements from several past U.S. presidents.

¶ 17 Gregory testified that he agreed to the survey, in large part, because he felt assured that the analyst who would conduct the survey would be an expert who could give him unbiased feedback on how defendant's business was doing. Moreover, because Leisy had told Gregory that he would not have to pay for the survey if he were unsatisfied, Gregory considered it a "no lose" situation. The next day, February 8, 2007, IPA senior business analyst Gentry Stanley arrived to perform the survey, dressed in a suit and tie and "looking like an executive."

¶ 18 According to Gregory, Stanley got to work right away. He told Gregory that he would need access to a telephone and a fax machine, because he faxed a lot of information back to his team of experts in Chicago. Stanley requested copies of defendant's financial statements and tax returns, and inquired into other details about the business. After approximately a day and a half of crunching numbers, Stanley presented Gregory with his recommendations.

¶ 19 Gregory testified that Stanley prefaced his recommendations with a stipulation. Stanley told him that IPA would not take defendant as a client unless it could ensure that defendant would get a three-to-one return on its consulting fees. With that stipulation, Stanley conducted the "council call" to his "council of experts." Stanley performed the call in Gregory's presence, although Gregory testified that he could hear only Stanley's side of the conversation. According to Gregory, Stanley and the council were "determining whether or not they could take us as a client."

¶ 20 Stanley then presented the completed survey to Gregory. The survey, which was admitted into evidence at trial, was a 46-page document that, in general, used defendant's financial data for the years 2002 to 2005 to calculate "problem costs" in various categories and to calculate an "optimal profit target." Regarding problem costs, the survey claimed defendant had lost profits of $823,242 due to "poor control" over direct material, $1,251,242 due to "inefficient control" of general and administrative costs, $472,993 due to "inefficient control" of interest expense, $656,984 due to "inefficient control" of repairs and maintenance, $567,160 due to "inefficient control" of cost of goods sold, $291,145 due to "inefficient control" of "other direct" expenses, and $362,704 due to "inefficient control" of "cost of operations." The survey reported that, while defendant's profit was 5.48% of revenue in 2005, its "optimal profit target" was 17.6% of revenue.

¶ 21 According to Gregory, Stanley gave no explanation for why he concluded that defendant had engaged in "inefficient control" over the various categories of expenses. Nonetheless, Gregory testified that the numbers "scared [him] to death." Gregory said that he had a degree in civil engineering, not in business. He testified that Stanley warned him that, if he did not fix defendant's management problems, defendant "may not be in business very long." Gregory said that this "was really devastating to us, coming from a professional, someone who had been in charge of multi-million dollar corporations." Accordingly, when Stanley presented the survey to him, Gregory felt compelled to hire IPA, and he signed an agreement for 500 hours of consulting services at a rate of $325 per hour. Gregory also paid $1,200 as a fee for the survey.

¶ 22 Stanley's testimony varied in some respects from Gregory's testimony. Stanley admitted that he told Gregory that he would not recommend defendant as a client unless he were confident that it could receive a three-to-one return on consulting fees. However, Stanley testified that he had been confident that defendant could have received that return. Stanley also admitted that IPA had instructed him never to leave copies of a completed survey with a client. However, Stanley denied that he ever told Gregory that defendant was at risk for bankruptcy if it did not address its management problems through a consulting project.

¶ 23 Regarding the "problem costs" outlined in the survey, Stanley testified that these amounts were calculated in accordance with the generally accepted accounting principles (GAAP). He testified that he used a computer program called the Field Accounting Software Package (FACS) to calculate problem costs and the client's "optimal performance." According to Stanley, the FACS system took data from the four most recent years "and select[ed] the best percentage performance and use[d] that percentage against the most recent year of sales to calculate the actual optimal percentage." Stanley testified that this was a standard method under GAAP for "actually measuring the problem costs of a particular line item" in a financing statement.

¶ 24 The testimony was consistent as to what occurred in the days after Gregory signed the consulting agreement. IPA senior business consultant Neal Best and senior project manager William Scheyer arrived to begin the consulting project. Scheyer and Best drafted a "Value Enhancement Program," which outlined the goals and scope of work to be completed during the consulting project.

The document provided, among other things, that IPA would implement "Value Enhancement Practices" to improve accounting controls, would "document all efforts/materials produced during the course of the project [and] assemble all procedures and recommendations in a manual," and would "provide [defendant] with an electronic copy of all materials."

¶ 25 Subsequently, Best performed work under the consulting agreement for approximately eight weeks. At the end of each week, Best completed a "Value Enhancement Review," which described the work that he had completed that week. Either Gregory or his brother Daniel, who is one of the co-owners of defendant, signed each review, initialing each page. The brothers also rated Best's performance on each review, consistently rating his work either "4 out of 5"or "5 out of 5." At the time they signed each review, the brothers would tender a check to Best for that week's consulting fees.

¶ 26 Both Gregory and Daniel testified that they received nothing of value from IPA under the contract. Gregory testified that defendant never received copies of the "Value Enhancement Practices" or electronic copies of any documents IPA produced. Daniel testified that, while IPA had attempted to implement some of IPA's suggestions, such as a purchase order procedure, IPA had subsequently abandoned the changes because they did not work. In contrast, Scheyer testified that, during the project, IPA accomplished several things, including installing a new process for field management, implementing employee reviews, changing the process for bidding on construction jobs, and showing the Stoddards how to "manage the business by the numbers."

¶ 27 Gregory further testified that, in April 2007, he and his brother began to have doubts about the value of IPA's services. According to Gregory, at the beginning of the consulting project, Scheyer had assured him that IPA would be committed to helping defendant even in the event of cash flow problems. Given their newfound doubts, the brothers came up with a "test" to determine whether IPA would hold true to its word. The Stoddards issued $400,000 in checks to vendors but failed to record a deposit that was necessary to cover the checks, thus making it appear that they had overdrawn defendant's bank account. When it became clear that IPA would not continue to work for defendant without being paid, the consulting project was "recessed" until defendant's cash flow improved. The parties never resumed the project.

¶ 28 Following the bench trial, the parties filed memoranda in support of their positions. On July 7, 2010, the trial court entered its judgment order. The court found that the parties had entered into an agreement to perform a survey of defendant's business and, subsequently, a consulting agreement. The court found:

> "IPA performed the survey and provided services under the Service Contract until DePatco 'recessed' the project. Prior to the recess, DePatco's officers signed weekly reviews indicating the progress and work performed by IPA was average and no criticism of the work was noted by [d]efendant. The [c]orporate [o]fficers of the [d]efendant also approved the amount of each invoice and issued checks in payment of the weekly invoice. At trial, [d]efendant asserted the amounts claimed by IPA *** were not owed because [p]laintiffs had committed fraud to induce [d]efendant to enter into the agreements and [p]laintiffs failed to provide all the documents and work product required under the agreements.
>
> ***
>
> The [d]efendant claims IPA's survey of defendant[']s business was not objective, unbiased and was performed by an analyst who received a commission which was not disclosed. Based on this claim, defendant argued IPA committed fraud in the inducement. In support of this position, defendant failed to present evidence that the survey presented to

defendant contained any untrue statements. The Court further finds that the survey utilized accounting information provided by defendant. The [d]efendant presented no evidence that the analysis or problem costs presented by IPA contained false statements. Further, defendant provided no evidence that the "3 to 1" assurance made by IPA was a false statement when made to the defendant. The consulting services rendered were those approved by the defendant and did address the problem costs from the analysis. The [d]efendant did not prove the documents were merely generic forms. The [d]efendant had contracted with IPA for services in the past. The [d]efendant cannot reasonably rely on IPA's claim to conduct an objective and unbiased analysis of the business when the [d]efendant knew that IPA's business was to remediate business problems. IPA obviously had an interest in obtaining a [s]ervice [a]greement after the survey. Therefore, the fact that the fee paid for the survey was paid as a commission to the [a]nalyst is not a material fact that IPA had to disclose. Finally, evidence that [p]laintiff utilizes a marketing strategy designed to obtain clients and receive payments for services which is aggressive and at times disingenuous, does not mean the conduct implementing the strategy is fraudulent. The Agreement for Services contains an integration clause, a disclaimer of warranties and a cancellation clause. The fact [p]laintiff created pressure, urgency and appealed to [d]efendant's desire for increased profits and net spendable monies does not constitute fraud in the inducement. The fact that [p]laintiff's business model is designed to insure payment and requires customers to rate performance and agree to all charges on a weekly basis does not amount to fraud. While these practices are designed to achieve high ratings, as a customer is not inclined to be openly critical of the consultant who is in their office daily at the time of the rating[,] such practices do not amount to fraud.

***

> The Agreement for Services did not provide for delivery of the Implementation Registers, Electronic Binder and/or Value Practices to the [d]efendant, so failure of delivery of the documents does not constitute breach of the Agreement for Services. The [d]efendant approved the Value Enhancement Plan called for in the Agreement for Services and IPA preformed their obligations under the Agreement and their performance was approved by the principals of the [d]efendant."

Based on these findings, the trial court entered judgment in the amount of $47,431.79 plus costs in favor of IPA and against defendant.

¶ 29 On August 5, 2010, defendant filed a motion to reconsider the judgment. Defendant argued, in part, that the trial court had wrongly concluded that the consulting agreement did not provide for delivery of the "Implementation Registers," the "Electronic Binder," or the "Value Enhancement Practices." Defendant pointed to the "Value Enhancement Plan," to which the consulting agreement referred, and which stated that IPA would implement the "Value Enhancement Practices," would assemble a manual that reported "all work that was performed during the course of the project," and would provide defendant with "an electronic copy of all materials." After a hearing on September 20, 2010, the trial court denied defendant's motion to reconsider, but amended the portion of its July 7, 2010, order referring to delivery of the electronic materials: "In hearing the motion to reconsider, I do see that the electronic binder is provided for in the value enhancement plan. So I would amend that portion of the order." Even with this amendment, however, the court declined to alter its judgment, stating that it "d[id] not find that a partially completed electronic binder would have much, if any, value to the client, and that the client has received that binder through the discovery process years ago."

¶ 30 D. Rule 137 Sanctions

¶ 31 The first two and a half years of litigation were plagued by discovery disputes. Because this background is relevant to the order imposing sanctions pursuant to Rule 137 from which defendant appeals, we recount it here.

¶ 32 Initially, the defendant was represented by attorney Robert Reda. In April 2008, while Reda was defendant's attorney, plaintiffs filed their first motion to compel responses to written discovery. On April 17, 2008, the trial court ordered defendant to respond to written discovery within 14 days. On May 5, 2008, plaintiffs filed their first motion for sanctions,[4] contending that defendant had failed to comply with the order. The trial court ordered the defendant to pay plaintiffs $2,500 in sanctions[5], and ordered defendant to respond to written discovery by June 6, 2008.

¶ 33 On June 26, 2008, plaintiffs filed their second motion to compel and for sanctions pursuant to Rule 219(c). Plaintiffs alleged that, although defendant had responded to plaintiffs' discovery requests in early June 2008, the answers were defective in various regards, in part because Reda had merely reproduced certain answers to written discovery that defendant had filed as a plaintiff in the federal suit. Plaintiffs also asserted that the verification pages attached to defendant's discovery responses were simply copies of the verification pages used in the federal suit. Before the trial court

[4]Although plaintiffs did not designate the Code section or supreme court rule under which they brought the motion, the motion was in the nature of a motion for sanctions pursuant to Rule 219(c). See Ill. S. Ct. R. 219(c) (eff. July 1, 2002).

[5]The trial court imposed this sanction against the consolidated state defendants jointly and severally, as the cases being prosecuted by plaintiffs were still consolidated for purposes of discovery at this point.

ruled on plaintiffs' motion, the court granted Reda leave to withdraw as attorney for defendant, because a conflict of interest had arisen after plaintiffs filed a defamation case against Reda and the consolidated state defendants in the circuit court of Cook County.

¶ 34 On August 14, 2008, the trial court granted attorney Leon Edelson leave to appear as attorney for defendant, and plaintiffs filed their third motion to compel and for sanctions pursuant to Rule 219(c). According to plaintiffs' counsel, at some point shortly after Edelson appeared in the case, he told the trial court that defendant had not reviewed or verified the discovery responses that Reda had filed, and that he wanted to withdraw the discovery responses and file new ones. Presumably, the trial court permitted Edelson to withdraw the responses, because, on September 29, 2008, the trial court granted defendant 21 days to respond to written discovery. On October 24, 2008, plaintiffs filed their fourth motion for sanctions pursuant to Rule 219(c), alleging that defendant had failed to comply with the order. The trial court ordered defendant to answer written discovery by November 3, 2008. On November 14, 2008, plaintiffs filed their fifth motion for sanctions pursuant to Rule 219(c), as well as a petition for attorney fees.

¶ 35 Meanwhile, the trial court had scheduled defendant's case for arbitration on November 19, 2008. Defendant and Edelson failed to appear at the arbitration, and no arbitration hearing was held. Later that day, upon learning that defendant had failed to appear at the arbitration, the trial court entered a default judgment in the amount of $51,945.64 in favor of IPA and ITA. The trial court also ordered defendant to pay $600 in sanctions to plaintiffs for failing to appear at the arbitration. During the same hearing, the trial court ruled on plaintiffs' outstanding motion for sanctions and entered an order barring defendant from introducing at trial evidence or testimony for which plaintiffs had sought discovery.[6] The trial court also ordered defendant to pay $3,675 in attorney fees to plaintiffs.

¶ 36 On January 26, 2009, the trial court granted attorneys Stephen Kehoe and Linda Abens leave to appear for defendant. Kehoe and Abens filed a motion to vacate the default judgment; however, in April 2009, the trial court struck the motion without prejudice at the request of defendant's next attorney, Mark Van Donselaar. Plaintiffs' counsel filed a petition for attorney fees arising out of the stricken motion, which the trial court denied on August 24, 2009.

¶ 37 On April 14, 2009, the trial court granted the law firm of Churchill, Quinn, Richtman & Hamilton, Ltd. (Churchill) leave to appear as attorneys for defendant. On May 6, 2009, Churchill attorney Van Donselaar filed a new motion to vacate the default judgment. On June 18, 2009, the trial court granted the motion.

¶ 38 On September 25, 2009, Van Donselaar filed a motion to vacate the November 19, 2008, order barring defendant from introducing evidence at trial. On September 29, 2009, the trial court granted defendant's motion and ordered defendant to indicate to plaintiffs what discovery it had previously answered.

¶ 39 Pursuant to the order, on October 2, 2009, defendant filed a "report regarding completion of discovery," in which Van Donselaar stated that he had shown defendant the discovery responses that Reda had previously tendered, and that defendant's representatives could not "determine whether they were ever shown said documents, for purposes of verifying them." The report further

[6]The trial court entered the order in the consolidated state cases being prosecuted by IPA, which explains why the trial court entered the order even though it was simultaneously entering default judgment against defendant.

stated that plaintiffs' counsel had previously indicated in open court "that [d]efendant's previous counsel, Leon Edelson, moved to vacate the *** discovery responses [filed by Reda]." Accordingly, on October 8, 2009, the trial court ordered defendant to tender new answers to written discovery.

¶ 40 Subsequently, defendant tendered its "superceding responses" to plaintiffs' written discovery. In the introductory paragraphs of its interrogatory answers, defendant stated that it "hereby revokes and repudiates any interrogatory answers purportedly made and served on its behalf by Robert Reda *** or by Leon Edelson." Defendant stated that it "had no such knowledge of such answers prior to the engagement of [attorney Van Donselaar]."

¶ 41 On October 13, 2009, plaintiffs filed a motion for sanctions pursuant to Rule 137. Plaintiffs contended that "a fraud ha[d] been committed upon [p]laintiffs and upon [the trial court]." Plaintiffs argued that, given defendant's statements in its superceding responses to written discovery, defendant admitted that Reda had filed the preceding discovery responses in violation of Rule 137. Plaintiffs further argued that, as a consequence of Reda's filing the falsely verified discovery responses, plaintiffs had incurred significant attorney fees litigating numerous motions related to outstanding written discovery.

¶ 42 Meanwhile, defendant substituted attorneys one more time. On November 23, 2009, attorney Van Donselaar moved to withdraw. On December 21, 2009, attorney Merle Royce filed his appearance on behalf of defendant.

¶ 43 The trial court did not conduct a hearing on plaintiffs' October 13, 2009, motion for sanctions until September 20, 2010. Following the hearing, the court ordered plaintiffs' counsel to submit an attorney fees petition limited to the time period from August 2008 to November 2009, representing the time between Edelson's withdrawal of the preceding discovery responses and Van Donselaar's filing of the superceding responses. On October 27, 2010, after plaintiffs' counsel submitted the amended petition, the court entered sanctions against defendant and in favor of plaintiffs in the amount of $17,200, representing 40 hours of court time between August 2008 and November 2009 at a rate of $300 per hour and 20 hours of non-court time at a rate of $250 per hour, plus $200 for expenses incurred because a paralegal had to attend a court hearing. This timely appeal followed.

¶ 44 II. ANALYSIS

¶ 45 Defendant appeals from the following: (1) the order denying defendant's motion to dismiss or stay the action pursuant to 2-619(a)(3) of the Code; (2) the trial court's decision to bar witness Nancy Miller from testifying at trial; (3) the order entering judgment in favor of IPA; and (4) the order entering sanctions in the amount of $17,200 against defendant pursuant to Rule 137. We address each in turn.

¶ 46 A. Order Denying Motion to Dismiss or Stay

¶ 47 Defendant's notice of appeal indicates that defendant appeals from the trial court's March 23, 2010, denial of its section 2-619(a)(3) motion to dismiss or stay the action. However, defendant appears to have abandoned this issue, because defendant offers no argument with respect to the motion in its opening brief. Accordingly, we affirm the trial court's denial of the motion to dismiss or stay. See *Pace Communications Services Corp. v. Express Products, Inc.*, 408 Ill. App. 3d 970, 981 (2011) (holding that the appellant's failure to provide argument in its appellate brief resulted in forfeiture under Supreme Court Rule 341(h)(7) (eff. July 1, 2008)). We decline to overlook defendant's forfeiture of the issue and to *sua sponte* research the issues, formulate arguments, and then decide the issues. See *Skidis v. Industrial Commission*, 309 Ill. App. 3d 720, 724 (1999) (stating that "this court will not become the advocate for, as well as the judge of, points an appellant seeks to raise").

¶ 48 B. Trial Court's Decision to Bar Witness Nancy Miller

¶ 49 Defendant argues that the trial court erred when it barred witness Nancy Miller from testifying at trial. Defendant contends that the trial court wrongly concluded both that defendant's disclosure was untimely and that Miller's testimony was not crucial to its defense.

¶ 50 Defendant argues that its disclosure was not untimely because plaintiffs had known of the potential for Miller being a witness for some time, such that plaintiffs would not have been surprised or prejudiced by Miller's testimony. Defendant points out that it disclosed Miller in its preceding Rule 213(f) disclosures, which attorney Reda tendered to plaintiffs in June 2008, even though attorney Edelson apparently later withdrew those disclosures. Further, defense counsel asserts that he had scheduled Miller to testify at an arbitration hearing in January 2010 for one of the parallel state cases being prosecuted by IPA, although Miller was ultimately unable to attend that hearing. Finally, defendant argues that it offered Miller for deposition at least two times during the two weeks between its initial disclosure on March 9, 2010, and the bench trial on March 23, 2010.

¶ 51 Defendant also argues that Miller's testimony was crucial to its fraudulent inducement defense. Defendant refers to Miller's affidavit filed in the federal case, which outlined Miller's potential testimony and which defense counsel also provided to plaintiffs on March 9, 2010, via e-mail. Defendant contends that Miller would have testified "as to the fraudulent representations and devices used by IPA to solicit consulting clients." Specifically, Miller would have testified that IPA's business surveys were biased, that the promise of a three-to-one return was false, that the council call was a sham, and that problem costs were concocted to scare clients.

¶ 52 Supreme Court Rule 213(f) provides that "[u]pon written interrogatory, a party must furnish the identities and addresses of witnesses who will testify at trial ***." Ill. S. Ct. R. 213(f) (eff. Jan. 1, 2007). Rule 213(i) imposes a duty on a party to supplement its discovery responses whenever new or additional information becomes known. Ill. S. Ct. R. 213(i) (eff. Jan. 1, 2007). The committee comments to Rule 213(f) state that it is meant "to prevent unfair surprise at trial, without creating an undue burden on the parties before trial." Ill. S. Ct. R. 213(f), Committee Comments (adopted March 28, 2002).

¶ 53 Supreme Court Rule 219(c) empowers a trial court to enter sanctions for a party's unreasonable failure to comply with the rules regarding discovery. Ill. S. Ct. R. 219(c) (eff. July 1, 2002). "A party's noncompliance is 'unreasonable' where there has been a deliberate and pronounced disregard for a discovery rule." *H & H Sand & Gravel Haulers Co. v. Coyne Cylinder Co.*, 260 Ill. App. 3d 235, 242 (1992). Once a court has imposed a sanction, "the sanctioned party has the burden of establishing that the noncompliance was reasonable or justified by extenuating circumstances." *In re Estate of Andernovics*, 311 Ill. App. 3d 741, 746 (2000). One available sanction is to bar a witness from testifying at trial. Ill. S. Ct. R. 219(c)(iv) (eff. July 1, 2002). We review a trial court's decision to impose a sanction under Rule 219(c) for an abuse of discretion. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 120 (1998). To determine whether the trial court abused its discretion, we look to the criteria upon which the court was to base its decision, including "(1) the surprise to the adverse party; (2) the prejudicial effect of the proffered testimony or evidence; (3) the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) the timeliness of the adverse party's objection to the testimony or evidence; and (6) the good faith of the party offering the testimony or evidence." *Shimanovsky*, 181 Ill. 2d at 123-24.

¶ 54 Defendant urges us to review *de novo* the trial court's decision to bar Miller from testifying, because the facts are uncontroverted, and because we can "independently decide the propriety of the sanction," without deferring to the trial court. However, defendant's argument is without merit. The issue before us is not whether it was proper for the trial court to apply Rule 219 to the undisputed facts, but whether the court abused its discretion in choosing to impose a particular sanction under Rule 219. Compare *In re Marriage of Bonneau*, 294 Ill. App. 3d 720, 723 (1998) (reviewing *de novo* the issue of whether a discovery privilege applied to undisputed facts) with *Shimanovsky*, 181 Ill. 2d at 123 (reviewing for abuse of discretion the trial court's imposition of a particular sanction under Rule 219).

¶ 55 Initially, we conclude that the trial court did not abuse its discretion in concluding that defendant unreasonably failed to comply with Rule 213(f). We note that the parties do not dispute that defendant failed to disclose Miller in its "superceding" Rule 213(f) interrogatory answers. Moreover, defendant did not establish that its failure to comply with the rule was reasonable or justified by extenuating circumstances. As we discuss below, defense counsel knew that Miller was a potential witness in January 2010, yet he took no formal action to disclose Miller as a witness in the present case until March 9, 2010, just two weeks prior to trial.

¶ 56 After reviewing the record in light of the relevant criteria, we cannot say that the trial court abused its discretion in barring Miller from testifying at trial. While we agree with defendant that, given Miller's affidavit in the federal case, Miller's testimony would have provided ~~significant~~ support for its fraudulent inducement defense, the nature of the testimony is but one criterion relevant to a trial court's decision to impose sanctions. The other five criteria weigh in favor of affirming the sanction.

¶ 57 Regarding the surprise to the adverse party, we cannot agree with defendant that plaintiffs would not have been surprised had the trial court permitted Miller to testify. Although defendant points out that Miller was disclosed in its preceding 213(f) disclosures, which attorney Reda tendered in June 2008, defendant does not contest that its subsequent counsel revoked those disclosures. Moreover, the preceding 213(f) disclosures merely referred to defendant's witness disclosures in the federal case, which disclosed Miller along with 32 other witnesses. Notably, the federal disclosures did not indicate that Miller would testify regarding plaintiffs' allegedly fraudulent business practices, but merely identified Miller as a business analyst with knowledge of plaintiffs' business.

¶ 58 Likewise, it is of no help to defendant that its attorney had disclosed Miller as a witness in January 2010 in one of the parallel state cases being prosecuted by IPA. Instead, that consideration seems relevant to the sixth factor, the good faith of the party offering the testimony. Obviously defense counsel knew that Miller was a potential witness in January 2010; however, counsel waited until March 9, 2010, to disclose Miller as a witness via e-mail. Moreover, the record contains no indication as to whether defense counsel disclosed the anticipated subject matter of Miller's testimony in the parallel case.

¶ 59 Similarly, regarding prejudice to the adverse party, we do not agree that plaintiffs would not have been prejudiced by Miller's testifying. Defendant's disclosure on March 9, 2010, was two weeks before the scheduled start of the bench trial, and a day after the trial court had ordered the parties to complete four other depositions. Given the timing of the disclosure and the work to be completed prior to trial, we cannot say that plaintiffs would not have been prejudiced had they been required to depose a fifth witness and to prepare for an important cross-examination during the two-week period. Simply because defendant offered to make Miller available for deposition during this time does not overcome the prejudice, nor make it "self-imposed."

¶ 60 Regarding the diligence of the adverse party and the timeliness of its objection, we conclude that both criteria support the trial court's decision to impose the sanction. Plaintiffs in this case filed at least eight motions regarding discovery, and they diligently followed up each time defendant failed to properly respond to written discovery. Additionally, plaintiffs objected to defendant's late disclosure in a March 18, 2010, e-mail to defense counsel. Plaintiffs' counsel also renewed his objection on the morning of the bench trial. Given the circumstances, we cannot say that this objection was untimely.

¶ 61 Finally, regarding the good faith of the party offering the testimony, we conclude that this criterion offers no reason to reverse the sanction. As discussed above, defendant knew of Miller's potential to be a witness at least as early as January 2010, yet defendant failed to disclose her until March 9, 2010, which defense counsel did via e-mail. Similarly, although defendant disclosed Miller in its preceding responses to 213(f) interrogatories, which were subsequently withdrawn, defendant did not disclose Miller in its superceding responses. This suggests a lack of diligence on the part of the defendant, not good faith. Finally, despite the purported importance of Miller's testimony to its case, defendant did not take any formal action before the trial court until March 23, 2010, the morning of the bench trial. Given this background, we cannot say that the trial court abused its discretion in barring Miller, or that the sanction was "unjust."

¶ 62 C. Judgment and Order Denying Motion to Reconsider

¶ 63 Defendant appeals from the order entering judgment in favor of IPA. Defendant argues that the judgment should be reversed, because the trial court erred in finding that it did not prove its fraudulent inducement affirmative defense and its contention that IPA failed to perform its obligations under the contract.

¶ 64 1. Fraudulent Inducement Defense

¶ 65 Regarding its fraudulent inducement defense, defendant asserts that IPA made at least five material misrepresentations upon which it relied in entering into the consulting agreement. The alleged misrepresentations include (1) IPA's statement that the survey would be "objective" and "unbiased," (2) IPA's failure to disclose that the survey fee was in fact a sales commission paid to Leisy, (3) IPA's three-to-one assurance, (4) the "problem costs" outlined in the survey, and (5) IPA's uniform attribution of the problem costs to the mismanagement of defendant's business.

¶ 66 Fraudulent inducement is an affirmative defense that may render a contract unenforceable. *Jordan v. Knafel*, 378 Ill. App. 3d 219, 229 (2007). The defense is available where a contract was procured through misrepresentation. *Jordan*, 378 Ill. App. 3d at 229. The misrepresentation must have been "(1) one of material fact; (2) made for the purpose of inducing the other party to act; (3) known to be false by the maker, or not actually believed by him on reasonable grounds to be true, but reasonably believed to be true by the other party; and (4) *** relied upon by the other party to his detriment." *Jordan*, 378 Ill. App. 3d at 229. The party asserting fraudulent inducement as a defense has the burden of proving it by clear and convincing evidence. *Warren Chevrolet, Inc. v. Bemis*, 197 Ill. App. 3d 680, 686 (1990).

¶ 67 Defendant urges us to review the trial court's findings regarding its fraudulent inducement defense under the clearly erroneous standard, because the material facts adduced at trial were largely undisputed, and because the trial court's reasons for rejecting its defenses were "legally insufficient." However, we agree with plaintiffs that the applicable standard of review is whether the trial court's findings were against the manifest weigh of the evidence. See *Warren Chevrolet*, 197 Ill. App. 3d at 686 (holding that trial court's determination that the defendant did not prove fraudulent inducement defense was not against the manifest weight of the evidence); *First National Bank of Elgin v. St. Charles National Bank*, 152 Ill. App. 3d 923, 934 (1987) (holding that trial court's determination that the defendants failed to establish fraudulent inducement defense was against the manifest weight of the evidence). " 'A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence.' " *Dargis v. Paradise Park, Inc.*, 354 Ill. App. 3d 171, 177 (2004) (quoting *Judgment Services Corp. v. Sullivan*, 321 Ill. App. 3d 151, 154 (2001)).

¶ 68 a. "Objective" and "Unbiased" Survey and the Sales Commission

¶ 69 Defendant argues that IPA misrepresented that the survey would be "objective" and "unbiased," and that defendant reasonably relied on this representation in agreeing to conduct the survey. Defendant asserts that the survey was neither objective nor unbiased, because the fee for the survey was a sales commission, a fact that IPA did not disclose to defendant. It is not disputed that IPA told defendant that the survey would be objective and unbiased, nor is it disputed that the survey fee was in fact a sales commission paid to senior area manager Leisy. However, after reviewing the record, we cannot conclude that either of these alleged misrepresentations was sufficient to prove a fraudulent inducement defense.

¶ 70 Ordinarily, statements of opinion cannot give rise to a fraudulent inducement defense. *Heider v. Leewards Creative Crafts, Inc.*, 245 Ill. App. 3d 258, 265 (1993). Under certain circumstances, however, a statement that would otherwise be an opinion may qualify as one of fact that could give rise to the defense:

> " 'Wherever a party states a matter which might otherwise be only an opinion but does not state it as the expression of the opinion of his own but as an affirmative fact material to the transaction, * * * the statement clearly becomes an affirmation of the fact within the meaning of the rule against fraudulent misrepresentation.' " *Heider*, 245 Ill. App. 3d at 265-66 (quoting *Perlman v. Time, Inc.*, 64 Ill. App. 3d 190, 197 (1978)).

Examples of statements of opinion that qualify as factual assertions include a jeweler's statement as to the value of a diamond, or a physician's statement upon a matter of health. *Heider*, 245 Ill. App. 3d at 266 (citing W. Keeton, *Prosser & Keeton on the Law of Torts* § 109, at 761 (5th ed.

1984)); see also *James v. Lifeline Mobile Medics*, 341 Ill. App. 3d 451, 456 (2003) (citing *Wilkinson v. Appleton*, 28 Ill. 2d 184, 188-89 (1963)) (statements as to matters of opinion generally do not amount to fraud unless relating "to a specific extrinsic fact materially affecting the value of matters at issue and where that fact is one peculiarly within the knowledge of the speaker"). In these situations, a statement of opinion "carrie[s] with it an implied assertion that the speaker kn[ows] facts which would justify the opinion, and thus could be taken as a statement of fact." *Heider*, 245 Ill. App. 3d at 266.

¶ 71 We cannot conclude, under the circumstances, that IPA's statements crossed the line from opinion to fact. When IPA claimed that the survey would be "objective" and "unbiased," it was not implicitly making claims regarding facts that were exclusively within IPA's knowledge. The circumstances here—a consulting company selling consulting services to a business—were qualitatively different than the circumstances under which a jeweler makes statements as to the value of a diamond or a physician makes statements on matters of health. In those situations, the jeweler and the physician have exclusive knowledge of the facts necessary to verify their opinions. Here, IPA did not have exclusive knowledge of any facts necessary to verify its statements. As the trial court reasoned, any subjectivity or bias on IPA's part was obvious given the transactional context—IPA was seeking to sell consulting services to defendant. Moreover, IPA's statements were not verifiable by reference to extrinsic facts in the same way a jeweler's or a physician's statements are verifiable by reference to extrinsic facts. See also *Heider*, 245 Ill. App. 3d at 266 (holding that a realtor's statement that material applied to beams in a warehouse was "not a problem" was a statement of opinion that carried with it an implied assertion that the material did not contain asbestos). Consequently, we conclude that IPA's statements were simply opinions, and that defendant could not have reasonably interpreted them otherwise.

¶ 72 We also agree with the trial court that IPA's silence concerning the sales commission was not a material misrepresentation of fact that could form the basis for a fraudulent inducement defense. While a party's silence may give rise to a fraudulent inducement defense where the party had an intent to deceive and the circumstances "create[d] the opportunity and duty to speak" (*Washington Courte Condominium Association-Four v. Washington-Golf Corp.*, 267 Ill. App. 3d 790, 815 (1994)), those circumstances were not present here. As the trial court reasoned, it is well known that salespeople often earn commissions. Defendant cites no authority to support its assertion that IPA was under a duty to publicize this well-known fact.

¶ 73 Defendant argues that, under the above reasoning, fraudulent inducement would not be available as a defense any time a misrepresentation was made incidental to a sales transaction. Defendant contends that "one could not to [*sic*] rely on an auto manufacturer's or salesman's representations about the gasoline consumption of a car *** because they are in the business of selling cars." However, defendant's analogy misses the mark. Were a salesperson to misrepresent a car's fuel efficiency, this arguably would satisfy the material misrepresentation element of a fraudulent inducement defense, since a car's fuel efficiency is an extrinsic fact potentially material to a customer who is deciding whether to purchase a car. However, were a salesperson to fail to disclose that he earned a commission for each car sold, this ordinarily would not satisfy the material misrepresentation element.

¶ 74 Defendant nonetheless argues that IPA's silence regrading the sales commission was material, because Gregory testified that knowledge of the sales commission would have altered his decision to purchase the survey. "A misrepresentation is 'material' if it is such that, had the other party been aware of the statement, he would have conducted himself differently." *Heider*, 245 Ill. App. 3d at 266 (citing *Brown v. Broadway Perryville Lumber Co.*, 156 Ill. App. 3d 16, 24 (1987)).

However, Gregory's testimony does not support defendant's assertion. Gregory testified that he thought the survey was a "no lose" situation, because Leisy told him that he would not have to pay for the survey if he were unsatisfied with it. It was only after Stanley completed the survey that defendant paid the $1,200 survey fee. Accordingly, we cannot conclude that defendant would not have agreed to the survey had it known that the fee was a sales commission.

¶ 75 Similarly, it would be unreasonable to conclude that defendant would not have signed the consulting agreement had it known that Stanley earned a commission on all consulting fees collected during the project. The consulting agreement that defendant signed provided for 500 hours of consulting services at a rate of $325 per hour, for a total bill of $162,500 for the completed project. The contention that Gregory would not have signed the agreement had he known that a portion of this sum was destined for the wallets of IPA employees seems implausible.

¶ 76 b. Three-to-One Assurance

¶ 77 Next, defendant argues that IPA's three-to-one assurance was a material misrepresentation sufficient to prove fraudulent inducement. It is not disputed that IPA made the three-to-one assurance. Nonetheless, we agree with the trial court that the assurance was insufficient to give rise to a fraudulent inducement defense.

¶ 78 A fraudulent inducement defense ordinarily must be based upon a misrepresentation of past or present fact. *McDonald v. McDonald*, 408 Ill. 388, 394-95 (1951). An assurance or prediction as to a future event generally cannot form the basis for the defense. *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 334 (1977); *McDonald*, 408 Ill. at 394-95. An exception to this rule is where one party promises future conduct without the intent to perform, and where the promise is part of a scheme to defraud. *Steinberg*, 69 Ill. 2d at 334; *McDonald*, 408 Ill. at 395; *Sullivan v. Sullivan*, 79 Ill. App. 2d 194, 199 (1967). However, even under the exception, the party asserting fraud must still prove that the promised future conduct either did not or would not have occurred—in other words, that the promise of future conduct was in fact a misrepresentation. See *Steinberg*, 69 Ill. 2d at 333-34 (statement in medical school's admissions catalog that it would evaluate applicants on the basis of listed criteria could form the basis for an action for fraud if plaintiff could prove that medical school actually based its admissions decisions on unpublished criteria, such as monetary pledges made on behalf of applicants); *McDonald*, 408 Ill. at 395 (reasoning that, in order to prove that promise was fraudulent, the plaintiff had to prove that the defendant "in fact" broke the promise).

¶ 79 Initially, we conclude that the three-to-one assurance was a promise that concerned a future event. Senior business analyst Stanley testified at trial that he told the Stoddards he would not recommend defendant as a client unless he were confident that it could receive a three-to-one return on its consulting fees. Although Stanley's statement concerned a present event in one sense—that he recommended defendant as a client because he was then confident that defendant could receive a three-to-one return—the three-to-one assurance itself concerned a future event—that defendant would receive a three-to-one return if it completed the consulting project. Accordingly, the three-to-one assurance could give rise to a fraudulent inducement defense only if IPA made it without the intent to follow through on the assurance, if it was in fact a misrepresentation, and if it was part of a scheme to defraud. See *Steinberg*, 69 Ill. 2d at 334; *McDonald*, 408 Ill. at 395.

¶ 80 We agree with the trial court that the defendant did not present clear and convincing evidence that IPA did not intend to follow through with the three-to-one assurance at the time it was made. When asked on cross-examination whether he believed that a three-to-one return on consulting fees had been possible in defendant's case, senior business analyst Stanley testified, "Yes, clearly, easy." Of course, fraudulent intent is difficult to prove, but defendant did not present evidence that would have rebutted Stanley's testimony or would have established that IPA had a fraudulent intent in making the assurance.

¶ 81 We also conclude that defendant did not present clear and convincing evidence that the three-to-one assurance was in fact a misrepresentation. Because the project was recessed after the Stoddards made it appear that defendant was suffering from a cash flow problem, we have no basis to conclude whether the three-to-one assurance was in fact a misrepresentation. As plaintiffs argue in their brief, it would be impossible for us to determine whether the consulting project would have generated a three-to-one return, because the consulting project was never completed.

¶ 82 We find unpersuasive defendant's argument that it was not required to prove that IPA made the three-to-one assurance knowing it to be false, but only that IPA made the assurance with reckless disregard for its truth or falsity. Although a misrepresentation may be fraudulent where a party makes the representation with reckless disregard for its truth, a party asserting fraud still must prove that the misrepresentation was in fact false. See *Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 128 Ill. 2d 179, 193-94 (1989) (holding that the defendant's misrepresentation as to amount of company's liabilities was fraudulent even though the defendant made the misrepresentation with reckless disregard for its truth). Because we cannot conclude that the three-to-one assurance was in fact false, it is inapposite whether IPA made the assurance with reckless disregard for its truth.

¶ 83 Similarly, we are unable to conclude that the record contained clear and convincing evidence that the three-to-one assurance was part of a scheme to defraud. Again, fraud requires proof of a material misrepresentation of fact, and we have uncovered none. As the trial court reasoned:

> "[E]vidence that [p]laintiff utilizes a marketing strategy designed to obtain clients and receive payment for services which is aggressive and at times disingenuous, does not mean the conduct implementing the strategy is fraudulent. *** The fact [p]laintiff created pressure,

> urgency and appealed to [d]efendant's desire for increased profits and net spendable monies does not constitute fraud in the inducement. The fact that [p]laintiff's business model is designed to insure payment and requires customers to rate performance and agree to all charges on a weekly basis does not amount to fraud."

High pressure sales tactics do not cross the line and become fraud unless and until there is a material misrepresentation of fact.

¶ 84 c. Problem Costs and Uniform Attribution to Mismanagement

¶ 85 Defendant next argues that the "problem costs" outlined in the survey were material misrepresentations sufficient to prove its fraudulent inducement defense. Defendant contends that the problem costs were "contrived" and "misleading." Defendant further argues that, while the survey made the calculations of the problem costs "appear scientific, all IPA actually d[id wa]s use any deviations from the client's best year to prove mismanagement." Defendant asserts that "[n]o business, of course, c[ould] always generate its best numbers year after year."

¶ 86 We cannot agree with defendant that the problem costs were misrepresentations. As the trial court reasoned, IPA used data from defendant's financial statements for the years 2002 to 2005 to calculate the problem costs. The portion of the survey that presented the problem costs clearly displayed how IPA calculated the costs. As shown in the survey, for a given category of expenses—for example labor—IPA simply divided each year's total revenue by each year's total labor costs to calculate the "return on labor" for each year. IPA then took the best "return on labor" and compared it to the most recent year's "return on labor" to determine how much extra revenue defendant could have generated in the most recent year had it achieved its best "return on labor" that year. Consequently, all of the information needed to determine whether the problem costs were reliable was clearly outlined in the survey. Daniel Stoddard testified that he had a bachelor's degree in accounting, and that he was present at the meeting during which Stanley presented the survey and the problem costs. Even though Gregory testified that he was "scared to death" by the problem costs, we cannot rescue the Stoddards from their failure to scrutinize IPA's calculations prior to signing the consulting agreement.

¶ 87 We are unpersuaded by defendant's argument that the problem costs must have been misrepresentations because some of them asserted "lost profits" for a given category of expenses that were greater than total expenses in a given year for that category. For example, the problem cost for "interest expense" was $472,993, even though defendant's highest interest expense for a single year was $66,088. Similarly, taken as a whole, the problem costs totaled $4,885,594, even though defendant's annual revenues were approximately $7 million. This amounted to a "potential profit" of almost 70% of revenue, even though the survey stated that, in its best year, defendant's profit had equaled only 5.5% of revenue. If anything, this disparity revealed that the problem costs were inherently unreliable, and that defendant could not have reasonably relied on them in making the decision to sign the consulting agreement.

¶ 88 Similarly, defendant's emphasis on IPA's practice of never leaving a copy of the survey with a client is misplaced. Again, if anything, this practice should have put the Stoddards on notice that something was amiss. Given the inherent unreliability of IPA's bold assertions in the survey, a reasonable businessperson—especially one with a degree in accounting—would have demanded the opportunity to scrutinize the survey prior to signing a consulting agreement.

¶ 89 Finally, defendant asserts that IPA's "uniform attribution of problem costs to a lack of management skill or control" was also a material misrepresentation. Defendant argues that "[a] number of things outside the control of the client could [have] account[ed] for any of the disparities in a client's numbers from year to year." However, even were defendant's profit disparities not due to business mismanagement, we cannot conclude that IPA's assertions were misrepresentations that could form the basis for a fraudulent inducement defense.

¶ 90 Again, a statement that would otherwise be opinion may form the basis for fraud if the statement "carried with it an implied assertion that the speaker knew facts which would justify the opinion, and thus could be taken as a statement of fact." *Heider,* 245 Ill. App. 3d at 266. In order for a party to have relied on a statement of opinion as a statement of fact, however, the underlying facts must have been "peculiarly within the realm of knowledge of [the speaker]." *Heider*, 245 Ill. App. 3d at 266. Here, the exact opposite was true. Any facts necessary to verify IPA's assertions that the "problem costs" were due to mismanagement were within defendant's control. Stanley, who had been on defendant's premises for approximately two days and who had examined defendant's tax returns and financial statements, told the Stoddards that they were mismanaging their business. The Stoddards knew the facts upon which Stanley had based his opinions of mismanagement, and any information necessary to verify Stanley's claims was available to them.

¶ 91 Based on the foregoing, we cannot conclude that the trial court's finding that defendant failed to prove its fraudulent inducement defense was against the manifest weight of the evidence.

¶ 92 2. Failure to Perform Defense

¶ 93 Defendant next argues that the trial court erred in finding that it did not prove that IPA failed to perform all of its obligations under the contract. Defendant contends that, because IPA failed to deliver the "Value Enhancement Practices" or the "Electronic Binder" of all documents generated during the project, IPA cannot recover the outstanding consulting fees under the contract.

¶ 94 After reviewing the record, we cannot conclude that the trial court's finding that defendant failed to prove that IPA did not perform its obligations under the contract was against the manifest weight of the evidence. Defendant asserts that IPA never implemented the "Value Enhancement

Practices" or delivered the "Electronic Binder" as outlined in the "Value Enhancement Program." However, neither the consulting agreement nor the "Value Enhancement Program" provided a specific time for implementation of the "Value Enhancement Practices" or delivery of the electronic files. The "Value Enhancement Program" did state that the first phase of the consulting project—which included implementation of the "Value Enhancement Practices" and delivery of the "Electronic Binder"—would "be completely developed and implemented in 375 hours, +/- 10%." However, the consulting project was "recessed" after IPA had completed only 293 hours of work. Additionally, senior project manager Scheyer testified that a client typically would not sign any document to acknowledge receipt of the "Value Enhancement Practices" until the last day of the project. Accordingly, simply because IPA had not implemented the "Value Enhancement Practices" or delivered the electronic files prior to the recess does not prove that IPA did not perform its obligations under the contract.

¶ 95 Defendant also directs us to the following provision in the consulting agreement:

> "Each day the IPA staff will discuss and/or present the work completed to the Client, and discuss further work to be performed in relation to the Value Enhancement Program. All work developed during the course of the engagement will be presented to the Client prior to implementation and/or installation."

Based on the record before us, we cannot conclude that IPA did not comply with this contract provision. As the trial court reasoned, IPA presented its progress to the Stoddards in weekly "Value Enhancement Reviews." Each review described the work the consultant had completed that week, as well as the work that would be completed the next week. The Stoddards signed each review, initialing every page. The Stoddards also rated the consultant's performance either "4 out of 5" or

"5 out of 5" every week. This evidence does not support the conclusion that IPA did not perform its obligations under the contract.

¶ 96 We also find unpersuasive defendant's argument that IPA's willingness to "recess" the consulting project was an anticipatory breach, which "put an end to the contract for all purposes." As plaintiffs point out, to the extent that IPA discontinued its work under the agreement, the Stoddards invited IPA to do so when they made it appear that defendant was suffering from a cash flow problem and could not pay the consulting fees. The consulting agreement specifically provided that "[c]lient will pay all invoices in full, upon presentation." If anything, IPA was willing to "recess" the project based upon defendant's anticipatory breach.

¶ 97 Based on the foregoing, we cannot conclude that the trial court's finding that defendant failed to prove that IPA did not perform its obligations under the contract was against the manifest weight of the evidence.

¶ 98 D. Order Imposing Rule 137 Sanctions

¶ 99 The last order from which defendant appeals is the October 27, 2010, order requiring it to pay plaintiffs $17,200 in attorney fees as a sanction for violating Rule 137. Defendant argues that the trial court erred in entering sanctions against it because plaintiffs' petition for sanctions was deficient, because defendant could not have been held vicariously liable for the unauthorized acts of its prior counsel, and because the sanctions were unreasonable since they included attorney fees that were not attributable to defendant's violation of Rule 137.

¶ 100 Supreme Court Rule 137 (eff. Feb. 1, 1994) provides for sanctions against a party or its attorney who signs a "pleading, motion or other paper" that is not well grounded in fact or warranted by existing law. The rule permits a court to impose sanctions "upon the person who signed [the paper], a represented party, or both." Ill. S. Ct. R. 137 (eff. Feb. 1, 1994). The sanctions may include reasonable attorney fees incurred as a direct result of the improper filing. Ill. S. Ct. R. 137 (eff. Feb. 1, 1994). While a "pleading, motion or other paper" may include an improperly signed discovery filing, the rule is not a basis for sanctioning general discovery violations that are covered by more specific rules, such as Rule 219. *In re Marriage of Adler*, 271 Ill. App. 3d 469, 476 (1995); *Diamond Mortgage Corporation of Illinois v. Armstrong*, 176 Ill. App. 3d 64, 71-72 (1988). A trial court's decision to impose sanctions is entitled to significant deference, and we will not disturb the trial court's decision absent an abuse of discretion. *Feret v. Schillerstrom*, 363 Ill. App. 3d 534, 542 (2006).

¶ 101 1. Plaintiffs' Petition for Sanctions

¶ 102 We disagree with defendant that plaintiffs' petition for sanctions was deficient. A petition for sanctions under Rule 137 "must identify: (1) the offending pleading, motion, or other paper; (2) which statements in the document were false; and (3) the fees and costs that directly resulted from the untrue allegations." *Adler*, 271 Ill. App. 3d at 476. Here, plaintiffs' petition identified the offending documents as defendant's preceding responses to written discovery, which attorney Reda served on plaintiffs on June 5, 2008. The petition also identified the false statements as the falsely verified answers contained in those discovery responses. The petition referenced the two verification pages attached to defendant's responses—one verification page was attached to defendant's answers to interrogatories and one was attached to defendant's responses to requests for production of documents. The verification pages were signed by Gregory Stoddard and stated that he had "reviewed the foregoing document" and that "the answers made herein are true, correct and complete to the best of my knowledge and belief."[7] Finally, the petition identified the fees and costs that plaintiffs alleged resulted from the falsely verified discovery responses.

¶ 103 2. Defendant's Liability for Attorney Reda's Sanctionable Conduct

¶ 104 We next address defendant's argument that the trial court erred in imposing Rule 137 sanctions against it for attorney Reda's unauthorized tendering of falsely verified discovery answers. Because the interpretation of a supreme court rule is a question of law, our review is *de novo*. *People v. Stefanski*, 377 Ill. App. 3d 548, 550-51 (2007); *Heckinger v. Welsh*, 339 Ill. App. 3d 189, 191 (2003). We must strictly construe the rule, since it is penal in nature. *Stefanski*, 377 Ill. App. 3d at 551; *People v. One 1984 Pontiac Parisienne Sedan*, 323 Ill. App. 3d 717, 720 (2001).

¶ 105 Rule 137 specifically permits a trial court to impose sanctions "upon the person who signed [the paper], a represented party, or both." Ill. S. Ct. R. 137 (eff. Feb. 1, 1994). Nonetheless, defendant contends that a represented party cannot be sanctioned for its attorney's unauthorized conduct that violates Rule 137. The only case defendant cites in which the court held that a represented party could not be sanctioned under Rule 137 was *In re Marriage of Devick*, 335 Ill. App. 3d 734 (2002), in which the court held that the party could not have been sanctioned because she had not been named in the petition for sanctions. *Devick*, 335 Ill. App. 3d at 742. *Devick* is distinguishable from our case, however, because defendant was named in plaintiffs' petition for sanctions. Moreover, although defendant cites cases holding that the general rules of agency apply to the attorney-client relationship, the cases do not involve Rule 137 and are distinguishable. See

[7] Plaintiffs contended in their June 26, 2008, motion to compel discovery and for sanctions that the verification pages attached to the responses were the "exact same" verification pages that had been attached to defendant's discovery responses filed in the parallel federal case.

Horwitz v. Holabird & Root, 212 Ill. 2d 1, 14 (2004) (holding that a client was not liable for the intentional torts of its attorney absent a showing that the client directed, controlled, authorized, or ratified the attorney's conduct); *Illinois Armored Car Corp. v. Industrial Commission,* 205 Ill. App. 3d 993, 998-99 (1990) (holding that attorney's signature on appeal bond was not sufficient under section 19(f) of the Workers' Compensation Act even though attorney was agent of client). Defendant cites no Illinois case, and we have found none, holding that the rules of agency dictate whether a trial court may impose Rule 137 sanctions against a represented party for its attorney's unauthorized violation of the rule.

¶ 106 Although we have found no Illinois case directly on point, it is appropriate for us to look to cases interpreting Federal Rule of Civil Procedure 11 for guidance, because the federal rule is "almost identical" to Rule 137. *Stefanski*, 377 Ill. App. 3d at 551. Cases interpreting the federal rule have held that a represented party must have been partially at fault for a violation or at least have been "personally aware or otherwise responsible" for an attorney's improper filing, before a court may impose sanctions against the represented party. See *Tenkku v. Normandy Bank,* 348 F.3d 737, (8th Cir. 2003) ("as there was no showing that [the represented party] violated Rule 11 or vexatiously multiplied the proceedings, the court erred in imposing the sanction on [the party], as opposed to her counsel"); *White v. General Motors Corporation, Inc.*, 908 F.2d 675, 686 (10th Cir. 1980) ("Sanctions must be *** levied upon the person responsible for the violation. *** [T]he sanctioning of a party requires specific findings that the party was aware of the wrongdoing."); *Brown v. Artus*, 647 F. Supp. 2d 190, (N.D.N.Y. 2009) (Rule 11 sanctions against a represented party are proper only where the party " 'had actual knowledge that the filing of the papers constituted wrongful conduct' " (quoting *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452,1474 (2d Cir. 1988)); *Friesing v. Vandergrift*, 126 F.R.D. 527, 529 (S.D. Tex. 1989) (to impose

Rule 11 sanctions on a client, "the party must be personally aware of or otherwise responsible for the bad faith procedural action").

¶ 107 The case law in Illinois contains some support for interpreting Rule 137 in this manner. In *Spiegel v. Hollywood Towers Condominium Association*, 283 Ill. App. 3d 992 (1996), the appellate court upheld the imposition of Rule 137 sanctions against a represented party for his attorney's filing of motions to dismiss that were not warranted by existing law where the party "took a very active part in his own defense." *Spiegel*, 283 Ill. App. 3d at 1001. Similarly, in *Edwards v. Estate of Harrison*, 235 Ill. App. 3d 213 (1992), the appellate court upheld the imposition of Rule 137 sanctions against a represented party for filing a complaint that was not well grounded in fact where the party had verified the complaint. *Edwards*, 235 Ill. App. 3d at 223. In each of these cases, imposition of sanctions against the represented party was warranted given the party's participation in the violation of the rule. The corollary to this view is that, where a represented party did not participate in its attorney's violation of the rule, and was not even aware of it, sanctions against the party would be improper.

¶ 108 The purpose underlying Rule 137 also supports concluding that a represented party must have participated in some way in a violation of the rule, or at least have been aware of the violation, before a court may impose sanctions against the party. The purpose of the rule is to penalize litigants who abuse the judicial process by filing frivolous or false matters without a basis in law or fact or for purposes of harassment. *Edwards v. City of Henry*, 385 Ill. App. 3d 1026, 1034 (2008); *Ashley v. Scott*, 266 Ill. App. 3d 302, 305 (1994). Where a client was not at fault for a violation and had no knowledge of an attorney's filing of a false pleading, motion, or other paper, there is no conduct on the part of the represented party to penalize.

¶ 109 In this case, the record is clear that defendant had no knowledge of attorney Reda's tendering of the falsely verified discovery responses at the time Reda served them on plaintiffs. In defendant's "superceding" responses to discovery—which were properly verified—Gregory Stoddard stated that attorney Reda had never shown him the prior discovery responses for his review. Plaintiffs do not question this; in fact, they necessarily concede it, since it was the sole basis for their petition for sanctions pursuant to Rule 137. Because it is undisputed that defendant had no knowledge of Reda's tendering of the June 2008 discovery responses, we conclude that the trial court abused its discretion in imposing Rule 137 sanctions against defendant, rather than against attorney Reda.

¶ 110 This brings us to one final consideration. Plaintiffs' petition for sanctions did not name attorney Reda (or any of defendant's attorneys), or request sanctions against him. Instead, the petition named only defendant. We believe that this fact highlights the inappropriateness of Rule 137 sanctions in this case. Rule 137 is designed to penalize the attorney or litigant who violates the rule, yet plaintiffs' petition for sanctions did not request sanctions against the very attorney who was at fault for the violation that occurred here. Accordingly, we vacate the order imposing sanctions against defendant.

¶ 111 3. Reasonableness of the Sanctions

¶ 112 We also agree with defendant that the trial court abused its discretion when it imposed $17,200 in sanctions for attorney Reda's improper tendering of the discovery responses. The sanctions that the trial court imposed included attorney fees that plaintiffs incurred from August 2008 through November 2009. However, the issue of the falsely verified discovery responses had been resolved at some point prior to September 29, 2008, when the trial court permitted attorney Edelson to withdraw the responses signed by Reda, and granted defendant 21 days in which to tender new responses. From that point on, any attorney fees that plaintiffs incurred were due to defendant's failure to timely respond to written discovery, not due to Reda's improper tendering of falsely verified discovery responses. The proper basis for sanctions would have been Rule 219, covering violations of the discovery rules, not Rule 137, covering false filings. See *Adler*, 271 Ill. App. 3d at 476; *Armstrong*, 176 Ill. App. 3d at 71-72.

¶ 113 The procedural history of this case supports our conclusion. Attorney Reda served the falsely verified discovery responses on plaintiffs on June 5, 2008. On June 26, 2008, plaintiffs filed a motion to compel and for sanctions arising out of the improper responses. On August 14, 2008, the trial court granted Reda leave to withdraw and granted attorney Edelson leave to appear. According to plaintiffs' counsel, as soon as Edelson filed his appearance, he urged the trial court to permit him to withdraw defendant's discovery responses because defendant had not reviewed them. Apparently, the trial court permitted this, because on September 29, 2008, the trial court ordered defendant to answer written discovery within 21 days. Unfortunately, it took defendant until October 2009 to file its "superseding" responses to written discovery. Part of the reason for the delay was that, after defendant and Edelson failed to appear at the arbitration scheduled for November 19, 2008, the trial court entered default judgment against defendant, which was not vacated until June 18, 2009. On November 19, 2008, as a discovery sanction for the consolidated defendants' failure to timely respond to written discovery, the trial court also barred all of the consolidated defendants from presenting any evidence at trial, and this order was not vacated until September 29, 2009.

¶ 114 Given this background, it is clear that the attorney fees plaintiffs incurred between the end of September 2008 and November 2009 arose out of defendant's failure to timely respond to written discovery, not out of attorney Reda's improper tendering of falsely verified discovery responses in

June 2008, which were withdrawn at some point before the end of September 2008. This consideration provides further support for our decision to vacate the order imposing sanctions.

¶ 115 III. CONCLUSION

¶ 116 For the above reasons, we affirm the judgment of the circuit court of Lake County, but we vacate the October 27, 2010, order entering Rule 137 sanctions against defendant.

¶ 117 Affirmed in part and vacated in part.