

IN THE CIRCUIT COURT FOR THE FIFTH JUDICIAL CIRCUIT
CLARK COUNTY, ILLINOIS

KIRK ALLEN and JOHN KRAFT,)
Plaintiffs,)
v.)
CLARK COUNTY PARK DISTRICT)
BOARD OF COMMISSIONERS,)
Defendant.)

Case No. 2015-MR-4

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR RULE 137 SANCTIONS**

The Defendant, CLARK COUNTY PARK DISTRICT BOARD OF COMMISSIONERS, by its attorneys, Meyer Capel, A Professional Corporation, files this Memorandum of Law in support of its Motion for Rule 137 Sanctions against plaintiffs Kirk Allen and John Kraft, and states as follows:

Introduction

Plaintiffs Kirk Allen and John Kraft (“Plaintiffs”) are no strangers to the Open Meeting Act. They have previously challenged numerous acts of local government bodies, claiming technical violations of the Open Meetings Act. Plaintiffs also routinely file Freedom of Information Act requests in order to obtain information from public bodies about matters of public concern. This makes Plaintiffs’ decision to sue the Clark County Park District Board of Commissioners (the “Board”) under the Open Meetings Act rather unusual. Despite their significant experience in this area the law, Plaintiffs’ Complaint against the Board is so frivolous and without legal merit that it must have been filed for the purpose of harassing the members of the Board. Plaintiffs’ clear intent is to delay or prevent the Board’s development of the Mill Creek Park area by any means necessary. As members of the public, Plaintiffs surely have the right to civic engagement in their community. However, they have no right to abuse the judicial system in pursuit of their goals. Plaintiffs’ Complaint against the Board serves no lawful purpose. Thus,

the Board respectfully requests that this Court sanction Plaintiffs' abusive litigation conduct under Illinois Supreme Court Rule 137.

Argument

Factual Background

Plaintiffs are the principal members of a group styled as the "Edgar County Watchdogs." Through this group, Plaintiffs operate a website entitled "Illinois Leaks." Plaintiffs have filed numerous complaints under the Open Meetings Act. [E.g. *Allen v. Clark County Park District et al.*, Clark Cty. Case No. 2014-MR-18 (May 15, 2014)]. They have also filed complaints with the Illinois Attorney General's Public Access Counselor, alleging violations of the Open Meetings Act and Freedom of Information Act. E.g. OMA Request for Review against Clark County Electoral Board, No. 2015 PAC 33204 (Jan. 18, 2015) available at <http://edgarcountywatchdogs.com/2015/02/ag-inquiring-into-the-clark-county-electoral-board/>; OMA Request for Review against College of DuPage Board of Trustees, No. 2014 PAC 31511 (Sept. 28, 2014) available at <http://edgarcountywatchdogs.com/2014/09/cods-chairman-erin-birt-violates-open-meetings-law-again/>. According to their website, Plaintiffs' "purpose is to foster accountability, truth, and transparency in our local governing bodies." While some of their actions may serve that purpose, this is not such a case.

This litigation arises out of the Board's regular meeting of February 17, 2015 (the "Meeting"). The Board timely posted an agenda (the "Agenda") in advance of the Meeting, which Plaintiffs do not dispute. The Agenda lists several matters relevant to this litigation. Item IX.b. of the Agenda, describing the Board's Executive Session, is "Discussion of Lease Property, Lease Rates, Revised Covenants." (Compl. Ex. A.) The next two items on the agenda are "X. Board approval of Lease Rates" and "XI. Board Approval of Revised Covenants." (*Id.*) As Plaintiffs are well aware, and as discussed at the Meeting, these matters relate to the proposed development of a subdivision in the Mill Creek Park.

On February 18, 2015, just one day after the Meeting was held. Plaintiffs filed a pro se Complaint against the Board, alleging violations of the Open Meetings Act. The Complaint has few factual allegations and claims violations of rights that do not exist under the Open Meeting Act. Because of these significant defects, the Board filed a Motion to Dismiss the Complaint on March 2, 2015. At the time of filing of this motion for sanctions, that Motion to Dismiss is still pending.

Legal Standard

Pursuant to Illinois Supreme Court Rule 137, the signing of a pleading certifies that the pleading “is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” Ill. Sup. Ct. R. 137(a). Where that certification proves false, the court may impose sanctions against the wrongdoer, including an award of attorney’s fees and other costs to the innocent litigant. *Id.* “The purpose of the rule is to prevent abuse of the judicial process by penalizing claimants who bring vexatious and harassing actions based upon unsupported allegations of fact or law.” *Fremarek v. John Hancock Mut. Life Ins. Co.*, 272 Ill. App. 3d 1067, 1074 (1st Dist. 1995). Under the language of Rule 137, sanctions can be awarded where a pleading either is not well-grounded in fact or law *or* was interposed for an improper purpose.

“The test to be utilized in determining whether the rule has been violated is an objective standard of what was reasonable under the circumstances at the time the assertions were made. Therefore, subjective good faith is not sufficient to meet the burden of Rule 137.” *Wittekind v. Rusk*, 253 Ill. App. 3d 577, 580 (3d Dist. 1993) (citations omitted). Likewise, though a party’s bad faith supports an award of sanctions, sanctions may be awarded even absent a showing of bad faith. *Krautsack v. Anderson*, 223 Ill. 2d 541, 562 (2006). Put another way, when deciding whether sanctions are proper, the court should consider “(1) the degree of bad faith by the opposing

party; (2) whether an award of fees could deter others from acting under similar circumstances; and (3) the relative merits of the parties' positions." *Penn v. Gerig*, 334 Ill. App. 3d 345, 354 (4th Dist. 2002). Where the circumstances warrant it, sanctions can be imposed against *pro se* litigants. See *Rusk*, 253 Ill. App. 3d at 581.

Plaintiffs' Complaint is Not Well-Founded in Fact or Law

There are few facts in Plaintiffs' Complaint. In essence, Plaintiffs alleged that the Board violated the Open Meetings Act by "failing to post an agenda that adequately identified the subject matter" of the certain actions and by "refusing to advise the public of what was up for discussion, refusing to precede [sic] the votes by a public recital of the nature of the matter being considered and other information that would inform the public of the business being conducted, thus preventing them from participating" (Compl. ¶ 26.) According to Plaintiffs, this conduct violates 5 ILCS 120/2.02(c), 120/1, 120/2(e), and 120/2.06(g).

The Agenda items at issue described "Board approval of Lease Rates" and "Board Approval of Revised Covenants." (Compl. Ex. A.) Plaintiffs claim this description is inadequate because it did not contain the actual lease rates and covenants. (Compl. ¶ 14.) These descriptions are more than adequate under the Open Meetings Act and supporting case law. The Act itself only requires the agenda to set forth the "general subject matter" of actions to be taken by the Board at a meeting. 5 ILCS 120/2.02(c). Even matters not included on an agenda may be considered at a meeting. 5 ILCS 120/2.02(a). The law is clear that "[the] Open Meetings Act does not require that an agenda be specifically detailed or that it be tailored to reach those specific individuals whose private interests are most likely to be affected by the actions of the public body." *In re Foxfield Subdivision*, 396 Ill. App. 3d 989, 997, 920 N.E.2d 1102, 1110 (2d Dist. 2009). Typically, only a super-generic agenda item like "NEW BUSINESS" is insufficient for the purposes of the Act. *Rice v. Bd. of Trustees of Adams Cnty.*, Ill., 326 Ill. App. 3d 1120, 1123 (4th Dist. 2002). Further, nothing in the Open Meetings Act requires dissemination of the actual documents being

discussed at a meeting. “Rule 137 allows sanctions when a party asserts a legal proposition that is contrary to established precedent.” *Polsky v. BDO Seidman*, 293 Ill. App. 3d 414, 427 (2d Dist. 1997). Because it is clear under the law that the Agenda is sufficient, Plaintiffs’ complaint is not well-grounded in fact or law.

Additionally, Plaintiffs have failed to plead any violation that occurred during the Meeting itself. Plaintiffs’ allegations of failure to comply with 5 ILCS 120/2(e) and 120/2.06 are contradicted by the facts in the Complaint itself. Section 2(e) requires “public recital of the nature of the matter being considered” while section 2.06 requires the Board to allow the public the opportunity to address public officials pursuant to rules promulgated by the public body. Plaintiffs repeatedly admit that there was some discussion of the disputed items in the Agenda. (Compl. ¶¶ 18, 19 & 21.) At the same time, Plaintiffs insist that they must be apprised of the “substance” of items considered at the Meeting. The law contains no such requirement, and the Board cannot be penalized for failing to follow a law that doesn’t exist. Similarly, Plaintiffs failed to allege that anybody was prevented from addressing the Board at the Meeting or that the Board’s rules were violated. They only allege that members of the public were denied “meaningful” participation in the Meeting. This “meaningful” standard exists nowhere in the law or the Board’s rules. The Board permits and encourages public participation to the fullest extent of the law and did not prevent the public from exercising their rights to participate.

Plaintiffs attempt to get around the Board’s clear compliance with the Open Meetings Act by trying to expand the scope of the law. They do so by citing to Section 1 of the Act and by appealing to the “spirit” of the Open Meetings Act. Section 1 of the Open Meetings act is a policy statement. It is well established under Illinois law that legislative policy statements do not create enforceable substantive rights. *Illinois Indep. Tel. Ass’n v. Illinois Commerce Comm’n*, 183 Ill. App. 3d 220, 237 (4th Dist. 1988) (citing *Brown v. Kirk*, 64 Ill.2d 144 (1976)). The policy statement in the Open Meetings Act, however compelling it may be, cannot be used by the

Plaintiffs to create a right to understand the “substance” of Board actions. Nor can it be used to create a “meaningfulness” standard for public participation in the Board’s meetings. Plaintiffs have made no argument why the Open Meetings Act should be extended to include new requirements, nor would any such argument be remotely supported by the law. Plaintiffs’ Complaint is not well-grounded in fact or law. For that reason, it is proper to sanction Plaintiffs under Rule 137.

Plaintiff’s Complaint was Filed for the Purpose of Harassing the Board and Delaying its Lawful Activities

It is clear that this dispute is not a product of Plaintiffs’ professed interest in “accountability, truth, and transparency.” Rather, this litigation is about Plaintiffs’ longstanding dislike of the current members of the Board. Plaintiffs wish to delay their initiatives and prevent their re-election. One major area of disagreement is the development of the Mill Creek Park, a public park owned by the Clark County Park District and managed by the Board. Plaintiffs oppose this development, and are seeking to delay or prevent it by any means necessary. See John Kraft, *Clark County Park District violated Election Code*, ILLINOIS LEAKS (Feb. 27, 2015), <http://edgarcountywatchdogs.com/2015/02/clark-county-park-district-violated-election-code/>. The filing of this litigation is one such means of delaying development. See John Kraft, *Clark County Park District violates 14th Amendment and Park District Code*, ILLINOIS LEAKS (Feb. 28, 2015), <http://edgarcountywatchdogs.com/2015/02/clark-county-park-district-violates-14th-amendment-and-park-district-code/> (“[T]hese people [the Board] will stop at nothing to give away use of park district property This is unacceptable and should not be tolerated.”).

Plaintiffs are also attempting to prevent the reelection of the Board’s members in the upcoming April 2015 election. They are doing so through their Illinois Leaks website, where they encourage voters to reject current board members. For example, in a recent Illinois Leaks post, Kraft wrote:

Gather your facts, purge the board of those that cannot follow the law, and purge the board of those that wish to create a housing subdivision out of pristine forested areas that belong to the people of Clark County and were promised for recreational purposes.

John Kraft, *Clark County Park District violated Election Code*, ILLINOIS LEAKS (Feb. 27, 2015), <http://edgarcountywatchdogs.com/2015/02/clark-county-park-district-violated-election-code/>; see also John Kraft, *Mill Creek Park Master Planning meeting 2-27-2015*, ILLINOIS LEAKS (Feb. 28, 2015), <http://edgarcountywatchdogs.com/2015/02/mill-creek-park-master-planning-meeting-2-27-2015-video/> (“This subdivision has been a sore spot for many district residents in the past year when they learned of the possibility. All indications are that the current board is attempting to ram-rod this through prior to the election in April.”). Plaintiffs have also previously placed the Board under citizens’ arrest, arguing violations of the Open Meeting Act. Kirk Allen, *Citizen arrests Clark County Park District Board!*, ILLINOIS LEAKS (May 13, 2014), <http://edgarcountywatchdogs.com/2014/05/citizen-arrests-clark-county-park-district-board/>.

Plaintiffs’ dispute with the Board is longstanding and multifaceted. Of course, Plaintiffs are free to publish their opinions about the Board and the Mill Creek Park and to exercise their rights as concerned citizens. The Board has no interest in stifling Plaintiffs’ right to free expression or civic engagement. These issues are merely raised to shed light on the Plaintiffs’ bad faith in the prosecution of this litigation. The timing of this litigation is also clear evidence of Plaintiffs’ bad faith. The Meeting was held on February 17, 2015 and the Plaintiffs’ Complaint was filed on February 18, 2015—the next day. Plaintiffs do not allege in their Complaint that they made any efforts to obtain information either by attending the Meeting and raising objections or by requesting information under the Freedom of Information Act. This lack of other effort, combined with the immediate filing of the Complaint, shows that Plaintiffs’ chief goal is the harassment of the Board. This Court should not tolerate such an abuse of the judicial process.

For the foregoing reasons, Defendant Clark County Park District Board of Commissioners respectfully requests that this Court sanction Plaintiffs’ abusive litigation conduct under Rule 137,

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