

No. 1-09-0050

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

FIRST DIVISION
DATE Feb. 28, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CLARA IOVINELLI & JOHN IOVINELLI,)	Appeal from the
)	Circuit Court of
Plaintiffs-Appellees,)	Cook County.
)	
v.)	No. 08 M1 721413
)	
LOUIS SANTARELLI & UNKNOWN OCCUPANTS,)	Honorable
)	Joan Powell,
Defendants-Appellants.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices HOFFMAN and ROCHFORD concurred in the judgment.

O R D E R

HELD: The trial court properly granted a motion to strike defendant's counterclaim when he did not seek leave of court before filing and denied defendant's subsequent motion for a substitution of judge. Defendant's failure to include a trial transcript or report of the proceedings in the record on appeal means this court must presume, pursuant to *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984), that the trial court's denial of defendant's motion to dismiss was in conformity with the law and had a sufficient factual basis.

Defendant Louis Santarelli appeals from the trial court's order, entered after a trial, granting possession of 1102 South Springinsguth Road, Unit C in Schaumburg (the condominium) to plaintiffs Clara and John Iovinelli. On appeal, Louis contends that the court erred when it granted the motion to strike his counterclaim, failed to grant his motion for a substitution of judge, and did not grant him a continuance. We affirm.

Although the record on appeal does not include a report of proceedings, the following facts can be gleaned from the common law record.

In August 2008, Clara filed this forcible entry and detainer action against her brother Louis contending that she had the right to sole possession of their late mother Maria Santarelli's condominium. Included in the record is a 1993 deed listing Maria, Clara, and John as owners of the condominium in joint tenancy.

Louis did not appear on August 29, 2008, the date set by the summons for appearance and possible trial. On October 2, an order of possession in favor of Clara was entered, but stayed. Louis subsequently appeared and moved to vacate the order of possession. On October 31, the court granted Louis's motion to vacate the order of possession, gave him 14 days to answer or otherwise plead, and set a trial date of December 11, 2008.

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Louis filed a motion to dismiss, which was granted after a hearing. The court gave Clara 14 days to file an amended complaint.

Clara's amended complaint added John as a party to the litigation, alleged Clara and John held legal title to the condominium, and asserted Louis occupied the condominium without a lease, tenancy, or agreement for occupancy. On December 10, 2008, Louis filed an answer, affirmative defenses, and counterclaim. The counterclaim alleged that he and Clara had agreed to share their mother's property equally and sought to dismiss John as a party to the suit.

A trial was held on December 11, 2008. Although no transcript is included in the record, the memorandum of orders indicates that although Louis's attorney was present in court, Louis was not. The court denied Louis's motions to continue and to dismiss the amended complaint. The court then granted Clara and John's motion to strike Louis's counterclaim. The record indicates that Louis did not seek leave of court to file the counterclaim and that Louis's attorney indicated the counterclaim "may not be germane to the issue of possession."

The record reveals that Louis's counsel then moved for a substitution of judge. The court denied the motion, holding it had already ruled on substantive motions. The court offered to bifurcate the trial, *i.e.*, have Clara and John testify on that

date and continue the trial to permit Louis to testify at a later date. Louis's counsel left the courtroom to make a phone call, and, upon his return, renewed his motion for a substitution of judge. When the court denied the motion, counsel indicated he would not participate in trial. After Clara and John testified, the court entered an order of possession in their favor.

Before turning to the merits of this appeal, we note that Clara and John have not filed an appellees' brief. However, the record is short and we may decide the merits of this appeal under the standards set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128 (1976).

In support of his appeal, Louis included a bystander's report in the appendix to his brief. However, as this document is not included in the record on appeal, it is not properly before this court and cannot be considered. See *Illinois Bell Telephone Co. v. Illinois Commerce Comm'n*, 352 Ill. App. 3d 630, 639 (2004).

Louis first contends that the trial court erred when it granted Clara and John's motion to strike his counterclaim because he did not need to seek the court's leave before filing it.

Pursuant to Supreme Court Rule 181(b)(2) (eff. Feb. 10, 2006), the defendant in a forcible detainer action must appear at the time and place specified in the summons. Under this rule, a

defendant does not need to file an answer unless ordered by the court, and when the court does not so order, the allegations of the complaint will be deemed denied. See Rule 181(b)(2) (eff. Feb. 10, 2006). Thus, an answer, if it is to be filed, is due on the date the appearance is filed; thereafter an answer may only be filed by order of the court. *Sawyer v. Young*, 198 Ill. App. 3d 1047, 1051 (1990). In other words, the appearance date in a forcible detainer actions marks the end of the time within which a written answer and counterclaim may be filed as a matter of right. *Sawyer*, 198 Ill. App. 3d at 1051.

Here, although Louis filed an appearance on October 8, 2008, he did not file an answer or counterclaim at that time. Pursuant to Rule 181(b)(2), from that date forward he could only file an answer or counterclaim with the court's permission. *Sawyer*, 198 Ill. App. 3d at 1051. On October 31, the trial court gave Louis 14 days to file an answer or otherwise plead. He filed a motion to dismiss which was subsequently granted. At that point the court gave Clara permission to file an amended complaint, however, the court did not give Louis permission to file an answer or counterclaim. Louis's subsequent filing of his answer, affirmative defenses, and counterclaim without first seeking leave of court was improper and the court properly granted the motion to strike the counterclaim. *Sawyer*, 198 Ill. App. 3d at 1051.

Louis next contends that the trial court erred when it denied his oral motion for a substitution of judge pursuant to section 2-1001(a)(2) of the Code of Civil Procedure (see 735 ILCS 5/2-1001(a)(2) (West 2008)), because the order striking his counterclaim was "patently null," and could not be considered a ruling on a substantive issue.

Civil litigants are entitled to one substitution of judge without cause as a matter of right. 735 ILCS 5/2-1001(a)(2)(i) (West 2008). The trial court shall grant a party's motion for substitution of judge as of right when the motion is "presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case." 735 ILCS 5/2-1001(a)(2)(ii) (West 2008).

A ruling that directly relates to the merits of the case, such as a ruling on a motion to dismiss, is a ruling on a substantial issue in the case. *Rodisch v. Commacho-Esparza*, 309 Ill. App. 3d 346, 350-51 (1999). The trial court has no discretion to deny a proper motion for a substitution of a judge as of right. *Rodisch*, 309 Ill. App. 3d at 350. The issue of whether the court ruled on a substantial issue in the case is reviewed *de novo*, with a reviewing court leaning toward favoring, as opposed to defeating, a substitution of judge. *Powell v. Dean Foods, Co.*, Nos. 1-08-2513, 08-2554 cons., slip op. at 8 (Sept.

10, 2010), *pets. for leave to appeal pending*, Nos. 111714, 111717 (filed Jan. 10, 2011).

Initially, this court notes that Louis's argument is premised on the assertion that the trial court's order striking his counterclaim is a "null" order. As the trial court properly struck the counterclaim, this argument must fail. Additionally, the memorandum of orders indicates that at the December 11, 2008 pretrial hearing, the court denied defense counsel's motion for a continuance, denied defense counsel's motion to dismiss the amended complaint, and granted Clara and John's motion to strike Louis's counterclaim before defense counsel moved for a substitution of judge. Because the motion was made after the hearing had begun and the court had rendered substantial rulings in the case, including a ruling on a motion to dismiss, the court properly denied the motion for a substitution of judge. *Rodisch*, 309 Ill. App. 3d at 350-51.

Louis finally contends that the trial court abused its discretion when it did not continue the trial because he was not present at trial.

The record on appeal does not include a transcript of the December 11, 2008, trial, or other appropriate substitute (see Supreme Court Rule 323 (eff. Dec. 13, 2005)). Any doubts raised by the insufficiency of the record must be resolved against Louis, who, as the appellant, has the burden to present this

court with a sufficiently complete record of the trial court proceedings to support his claims of error. *Midstate Siding & Window Co. v. Rogers*, 204 Ill. 2d 314, 319 (2003), citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Accordingly, when the issue on appeal relates to the conduct of a hearing or proceeding, the absence of a transcript or other record of that proceeding means that this court must presume that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. *Midstate Siding & Window Co.*, 204 Ill. 2d at 319.

Here, Louis contends that the trial court abused its discretion when the court knew that he was in Florida, yet permitted the trial to commence. However, despite the unusually detailed memorandum of orders the absence of a record of the proceedings at trial is fatal to his case because this court cannot discern from the record the arguments made by the parties with regard to the motion for a continuance, or why the court ruled as it did. In such circumstances, this court must presume that the trial court's denial of Louis's motion for a continuance was both legally and factually correct. *Midstate Siding & Window Co.*, 204 Ill. 2d at 319.

For the reasons stated above, the judgment of the trial court is affirmed.

Affirmed.