2016 IL App (2d) 151195-U
No. 2-15-1195
Order filed September 8, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DON LINDENFELSER,	)	Appeal from the Circuit Court
	)	of Kane County.
Petitioner-Appellee,	)	
	)	
v.	)	No. 15-OP-790
	)	
DANIEL B. JONES,	)	Honorable
	)	John G. Dalton,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: As the trial judge's denial of respondent's substitution motion, for lack of "reasonable notice," was subject to review for an abuse of discretion, the lack of an official record of the relevant hearing required us to affirm per *Foutch*.

¶ 2 Respondent, Daniel B. Jones, appeals from the denial of his motion to vacate an order of the circuit court of Kane County granting petitioner, Don Lindenfelser, a two-year plenary stalking no-contact order. The only issue raised on appeal is whether the trial court erred in denying respondent's motion for substitution of judge as of right (735 ILCS 5/2-1001(a)(2)(ii) (West 2014)). According to respondent, because the motion was improperly denied, the subsequent stalking no-contact order was unauthorized and should be vacated. He asks that we

remand the matter for a new hearing before a different judge. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On September 29, 2015, petitioner filed a *pro se* verified petition for a stalking no-contact order, seeking to protect himself, his wife, and his two children from respondent. The petition alleged that on September 29, 2015, respondent, who was petitioner's next-door neighbor, attempted to hit the passenger side of petitioner's car with his Dodge Ram truck at an intersection, while petitioner was driving 45 miles per hour with his son in the passenger seat. The petition further alleged that, on September 11, 2015, respondent placed a "dead rabbit cut-off head" on the rear deck of petitioner's home. The petition sought an order prohibiting respondent from stalking or threatening petitioner and his family, prohibiting respondent from contacting petitioner and his family in any way, ordering respondent to stay at least 100 feet from petitioner and his family, including at particular locations, and prohibiting respondent from possessing a firearm owner's identification card or buying or possessing firearms.

¶ 5 The trial court set the matter for a hearing on October 15, 2015. In addition, the court issued an emergency stalking no-contact order against respondent, which was set to expire on the date of the hearing.

¶ 6 On October 2, 2015, respondent was personally served with a summons and the petition. The summons advised respondent that he must answer or file his appearance within seven days after service. He was further advised that if he failed to do so a stalking no-contact order may be entered against him by default.

¶ 7 On October 15, 2015, respondent's attorney filed his appearance. He also filed a handwritten motion for substitution of judge, which read: "Pursuant to 735 ILCS 5/2-1001(ii) [*sic*] the respondent hereby requests that this matter be assigned to a different judge."

¶ 8 Following an evidentiary hearing,[1] the trial court entered a plenary stalking no-contact order, which prohibited respondent from stalking or threatening petitioner and his family, prohibited respondent from contacting petitioner and his family, ordered respondent to stay at least 100 feet from petitioner and his family, including at particular locations, and prohibited respondent from entering and remaining at petitioner's residence. In addition, the order provided as follows:

> "Respondent's (through his attorney ***) oral motion for a continuance is denied. Petitioner is present with three additional witnesses, has a subpoena out for a fourth, and objects. Further, Respondent's (through his attorney) unfiled and unscheduled Motion for a Substitution of Judge (without notice) is denied."

¶ 9 On October 29, 2015, respondent (now with new counsel) filed a motion to vacate the judgment. Respondent alleged that, on October 15, 2015, respondent was not available as he "was out of state on a previously planned/and paid for vacation" and that "it was believed (by [respondent's] then counsel) that a continuance could be secured." He maintained that he had a meritorious defense to the allegations raised in the petition and that vacating the order and setting the matter for a hearing would not prejudice petitioner. He further argued that the motion for substitution of judge should have been heard by the trial court prior to the commencement of the hearing and that he was entitled to the substitution as a matter of right.

[1] Although a full evidentiary hearing took place, the record does not contain a report of proceedings or a substitute (see Ill. S. Ct. R. 323 (eff. Dec. 13, 2005)).

¶ 10 On November 9, 2015, the trial court denied the motion to vacate the judgment. The order reads:

> "Notice and motion to vacate no stalking order/no contact order is denied. Court indicating that on 10-15-15 [respondent] was represented by counsel, that a full evidentiary hearing took place, [respondent] was not present at the hearing. Counsel for [respondent] *** appears this date and requests that the motion to vacate be scheduled for a hearing so that [respondent's counsel] can argue the motion to vacate. The Court having denied said request as well this date. Plaintiffs appeared and objected. Motion merely argues same defense presented [at] hearing."

¶ 11 Respondent timely appealed.

¶ 12 II. ANALYSIS

¶ 13 Respondent argues that the trial court erred when it denied his motion for substitution of judge as of right, which was brought under section 2-1001(a)(2) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1001(a)(2) (West 2014)). According to respondent, because he presented the motion prior to the beginning of the hearing and before the trial court ruled on any substantial issue in the case, he had the absolute right to have his motion granted. Petitioner responds that the motion was properly denied, because respondent did not provide "reasonable notice" of the motion, as required under section 2-1001(b) of the Code (735 ILCS 5/2-1001(b) (West 2014)).

¶ 14 Under section 2-1001(a)(2)(i) of the Code, a civil litigant is entitled to one substitution of judge without cause as a matter of right. 735 ILCS 5/2-1001(a)(2)(i) (West 2014). "An application for substitution of judge as of right shall be made by motion and shall be granted if it is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case, or if it is presented by consent of the parties." 735 ILCS 5/2-

1001(a)(2)(ii) (West 2014). Section 2-1001(b) of the Code provides further that "[a]n application for substitution of judge may be made to the court in which the case is pending, reasonable notice of the application having been given to the adverse party or his or her attorney." 735 ILCS 5/2-1001(b) (West 2014).

¶ 15 We first address the parties' dispute over the appropriate standard of review. Respondent contends that the standard of review is *de novo*, because " '[t]he right to substitution of judge is absolute when properly made, and the circuit court has no discretion to deny the motion.' " *Schnepf v. Schnepf*, 2013 IL App (4th) 121142, ¶ 27 (quoting *Cincinnati Insurance Co. v. Chapman*, 2012 IL App (1st) 111792, ¶ 23). In response, petitioner contends that, according to *Peerless Enterprises, Inc. v. Kruse*, 317 Ill. App. 3d 133, 141 (2000), we review a trial court's determination on the sufficiency of notice for an abuse of discretion. In *Peerless*, this court found that a trial court may deny a motion for substitution of judge if reasonable notice has not been given to the adverse party and that what constitutes reasonable notice depends on the facts and circumstances of each case. *Id.* According to petitioner, respondent's argument for *de novo* review incorrectly assumes that the motion here was properly made, a fact that respondent does not even address in his initial brief.

¶ 16 We agree with petitioner. Respondent failed to acknowledge in his initial brief the "reasonable notice" provision contained in section 2-1001(b) of the Code. For the first time in reply, he contends that the "reasonable notice" provision is applicable only to motions seeking substitution of judge for cause under section 2-1001(a)(3) of the Code (735 ILCS 5/2-1001(a)(3) (West 2014)). According to respondent, "[h]ad the legislature deemed it important to insert a notice requirement into [section 2-1001(a)(2) of the Code], in addition to the minimal requirements which must be met for substitution of right, [citation] it could have done so, but it

did not." This argument is tenuous at best. Based on respondent's argument, we could equally find that, had the legislature deemed it important to insert a notice requirement in section 2-1001(a)(3) of the Code, it would have so stated. However, given that the requirements for motions for substitution as of right and for cause are both contained in section 2-1001(a) of the Code, we have no reason to believe that the legislature did not intend for the "reasonable notice" requirement contained in section 2-1001(b) to apply to them both.

¶ 17 Contrary to respondent's argument, the issue here is not whether the motion was "presented before trial or hearing beg[an] and before the judge to whom it [was] presented ha[d] ruled on any substantial issue in the case" (735 ILCS 5/2-1001(a)(2)(ii) (West 2014)); instead, the issue is whether respondent provided "reasonable notice" (735 ILCS 5/2-1001(b) (West 2014)) of the motion to petitioner. Because the issue concerns whether notice was reasonable, which depends on the facts and circumstances of each case, we review the trial court's determination on the issue for an abuse of discretion. See *Peerless*, 317 Ill. App. 3d at 141 (a reviewing court should not disturb a trial court's determination as to the sufficiency of notice absent an abuse of discretion); see also *Koch v. Carmona*, 268 Ill. App. 3d 48, 57-58 (1994) ("What constitutes reasonable notice depends on the facts and circumstances of each case, and a trial judge's determination as to the sufficiency of notice will not be disturbed absent an abuse of discretion."); *Weisberg v. Pickens*, 193 Ill. App. 3d 558, 561 (1989) ("[T]he determination of whether reasonable notice has been given is left to the discretion of the trial court, and absent an abuse of that discretion the trial court's ruling on the sufficiency of notice will not be disturbed on appeal."); *Intini v. Schwartz*, 78 Ill. App. 3d 575, 578 (1979) (what is reasonable notice depends upon the circumstances of each particular case, and in the absence of an abuse of discretion the trial court's ruling as to sufficiency of notice will not be disturbed on appeal).

¶ 18 The cases relied on by respondent to support his claim that we should review the matter *de novo* are readily distinguishable, as none of the cases concerned whether "reasonable notice" had been given. See *Village of East Dundee v. Village of Carpentersville*, 2016 IL App 2d 151084, ¶ 11 (the issue was whether there had been a ruling on a substantial issue in the case); *In re Chelsea H.*, 2016 IL App (1st) 150560, ¶ 54 (same); *Curtis v. Lofy*, 394 Ill. App. 3d 170, 176 (2009) (same) ; *Gay v. Frey*, 388 Ill. App. 3d 827, 831-32 (2009) (same) ; *IRMO Paclik*, 371 Ill. App. 3d 890, 894 (2007) (same); *Rodisch v. Commacho-Esparza*, 309 Ill. App. 3d 346, 350-51 (1999) (same); *In re Estate of Gay*, 353 Ill. App. 3d 341, 343 (2004) (issue concerned the timeliness of the motion); *Scroggins v. Scroggins*, 327 Ill. App. 3d 333, 336 (2002) (same).

¶ 19 Having concluded that we must review the trial court's ruling for an abuse of discretion, the question becomes whether the absence of a transcript or suitable substitute impacts our review. "[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Id.* at 392. Here, respondent failed to include a report of proceedings from the October 15, 2015, hearing or a substitute (see Ill. S. Ct. R. 323 (eff. Dec. 13, 2005)). Given our standard of review, we find that *Foutch* is applicable here. See *Gakuba v. Kurtz*, 2015 IL App (2d) 140252, ¶ 22 (presumption that the court acted properly in absence of a complete record applies "especially" when standard of review is abuse of discretion). Without an adequate record of the claimed error, we presume that the trial court's order had a sufficient factual basis and conformed with the law. *Foutch*, 99 Ill. 2d at 391-92.

¶ 20 Respondent's reliance (during oral argument) on *In re Marriage of Crecos*, 2015 IL App (1st) 132756, in support of his position that *Foutch* should not apply, is unpersuasive. Like the other cases relied on by respondent, *Crecos* is distinguishable because the issue concerned not whether reasonable notice was given but whether the motion was timely in accordance with section 2-1001(a)(2)(ii) of the Code. *Id.* ¶ 25. Given that the standard of review for such a determination is *de novo*, the First District found that the absence of a transcript of the hearing on the motion did not hinder review. *Id.* ¶ 21. That is not the case here.

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 23 Affirmed.