

2017 IL App (1st) 161782-U  
No. 1-16-1782  
Order filed September 22, 2017

Fifth Division

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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CHRISTOPHER STOLLER and MICHAEL STOLLER,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Cook County.
	)	
v.	)	No. 16 MC 600179
	)	
ROBERT NESBIT, ALAN HOVITS, JORDAN	)	Honorable
SHIFRIN, WENDY DURKEN, PAMELA PARKS,	)	Daniel J. Kubasiak,
LOVITZ SHIFRIN NESBIT, <i>et al.</i>	)	Judge, presiding.
	)	
Defendants-Appellees.	)	

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JUSTICE HALL delivered the judgment of the court.  
Presiding Justice Reyes concurred in the judgment. Justice Gordon dissented.

**ORDER**

¶ 1 *Held:* The circuit court did not err in denying the motion for substitution of judge as a matter of right.

¶ 2 Plaintiffs-appellants Michael Stoller and his uncle Christopher Stoller bring this *pro se* interlocutory appeal pursuant to Illinois Supreme Court Rule 304(a). Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). The appeal arises from a circuit court order denying the motion for substitution

of judge as of right filed by plaintiff Michael Stoller. The motion was brought pursuant to section 2-1001(a)(2) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1001(a)(2) (West 2012)). This section of the Code requires that in order for a motion for substitution of judge as of right to be considered timely, it must be brought before the judge makes any substantive rulings in the case. 735 ILCS 5/2-1001(a)(2)(ii) (West 2012).

¶ 3 Under the facts and circumstances of this case, we find that plaintiff's motion for substitution of judge as of right was properly denied as untimely because at the time plaintiff filed his motion, the judge had already made substantive rulings in the matter. Therefore, we affirm.

¶ 4 BACKGROUND

¶ 5 The following background and procedural history are relevant to the resolution of this appeal. Plaintiff Michael Stoller and his uncle plaintiff Christopher Stoller filed a multi-count first amended complaint against defendants, as captioned above. The case was assigned to Judge Diane J. Larsen in the law division of the circuit court, case No. 15 L 6334. Count IV of the complaint sought to hold defendants liable for indirect criminal contempt for allegedly violating a circuit court order dated February 23, 2015, entered in the first municipal division by Judge Daniel J. Kubasiak, case No. 13 M1 501276. The judge's order directed defendants to allow Michael Stoller to reside with Christopher Stoller in his two bedroom apartment at a senior citizens apartment complex known as the Senior Suites Lifestyle, located at 5700 N. Harlem Avenue, Chicago, Illinois. Judge Kubasiak retained jurisdiction to enforce the order.

¶ 6 On July 23, 2015, Judge Larsen severed count IV from the other counts in the complaint and transferred the severed count to Judge Moshe Jacobius, presiding judge of the chancery

division, for further transfer to the first municipal division. Judge Jacobius ordered that the case be assigned a chancery number and then transferred the matter to Judge Kenneth E. Wright, Jr., presiding judge of the first municipal division, for further assignment as he deemed appropriate. Judge Jacobius ordered that all of the other counts in the complaint which were not severed and transferred remain pending before Judge Larsen.

¶ 7 On July 31, 2015, plaintiffs filed a petition for adjudication of indirect criminal contempt against defendants in the chancery division, case No. 15 CH 11289. Plaintiffs argued that the petition was premised on defendants' violation of Judge Kubasiak's order of February 23, 2015.

¶ 8 On August 4, 2015, plaintiffs filed a *pro se* motion seeking to have their petition for indirect criminal contempt transferred from the chancery division to the criminal court. Plaintiffs alleged that the criminal court was better equipped to handle the petition. There is no indication in the record showing that the *pro se* motion was ever addressed or resolved by the circuit court. However, the petition was never transferred to the criminal court.

¶ 9 On August 12, 2015, Judge Kubasiak vacated his order of February 23, 2015, and transferred the matter to Judge Wright.

¶ 10 On March 14, 2016, in the chancery division, defendants filed a motion to dismiss plaintiffs' entire lawsuit with prejudice, on the basis that on "October 16, 2015, the parties engaged in a Settlement Conference before [United States District Court Judge Matthew F. Kennelly of the Northern District of Illinois] and resolved the controversies involved in this case pursuant to the terms and conditions discussed before Judge Kennelly." Attached as Exhibit A to the defendants' motion to dismiss was a motion to dismiss filed by plaintiffs acknowledging a settlement agreement between the parties.

¶ 11 On March 23, 2016, Judge Thomas More Donnelly of the first municipal division entered an order directing the plaintiffs to file their response to the defendants' motion to dismiss, no later than April 20, 2016, and directed defendants to file their reply to the plaintiffs' response, no later than May 4, 2016. The judge set the matter for hearing on May 26, 2016. The judge also entered the plaintiffs' petition for indirect criminal contempt and continued the matter to May 26, 2016.

¶ 12 On May 10, 2016, Judge Jacobius transferred the matter to Judge Wright, Jr., who in turn assigned the matter to Judge Kubasiak and struck the continued date of May 26, 2016.

¶ 13 On May 17, 2016, plaintiff Michael Stoller filed a motion for substitution of judge seeking to have Judge Kubasiak substituted as of right on the alleged basis that pursuant to *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971), a "Judge's Order which is the subject of the indirect criminal contempt violation may not preside over the contempt hearing." After conducting a hearing on the motion, Judge Kubasiak denied the motion.

¶ 14 In an order entered on June 23, 2016, Judge Kubasiak determined that his prior orders of February 23, 2015, and August 12, 2015, amounted to substantial rulings directly related to the plaintiffs' petition for indirect criminal contempt, and therefore plaintiff's motion for substitution of judge, filed after these two orders were entered, was not timely.

¶ 15 Judge Kubasiak continued both the plaintiffs' petition for indirect criminal contempt and the defendants' motion to dismiss the complaint. The order included language indicating it was final and appealable under Supreme Court Rule 304(a). This appeal followed.

¶ 16 ANALYSIS

¶ 17 The sole issue on appeal is whether Judge Kubasiak erred in denying the motion for substitution of judge as of right filed by plaintiff Michael Stoller. We answer this question in the negative.

¶ 18 At the outset, we note that no appellee's brief has been filed in this case. Nonetheless, we will address the merits of this appeal under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976) (in the absence of an appellee's brief, a reviewing court should address an appeal on the merits where the record is simple and the claimed errors are such that the court may easily decide the issues raised by the appellant).

¶ 19 In civil cases substitution of judge is governed by section 2-1001 of the Code (735 ILCS 5/2-1001 (West 2012)). A party is generally entitled to one substitution of judge without cause as a matter of right. 735 ILCS 5/2-1001(a)(2)(i) (West 2012). The trial judge must grant such a motion if it is presented before a trial or hearing begins and before the judge has ruled on any substantial issue in the case. 735 ILCS 5/2-1001(a)(2)(ii) (West 2012). A substantial ruling is one that directly relates to the merits of the case. *In re Estate of Gay*, 353 Ill. App. 3d 341, 343 (2004).

¶ 20 A petition for substitution of judge as of right is untimely if it is filed after the judge has ruled on a substantive issue in the case. *In re Austin D.*, 358 Ill. App. 3d 794, 800 (2005). The reason for this rule is that it prevents litigants from "judge shopping" after they have formed an opinion that the judge may be unfavorably disposed toward their cause. *In re Austin D.*, 358 Ill. App. 3d at 800. Review is *de novo*, since it is a question of law as to whether a trial court's ruling is substantial. *Partipilo v. Partipilo*, 331 Ill. App. 3d 394, 398 (2002).

¶ 21 In the instant case, review of the record shows that by the time plaintiff Michael Stoller filed his motion to substitute Judge Kubasiak as a matter of right in regard to the plaintiffs'

petition for indirect criminal contempt, the judge had already issued two rulings directly relating to the merits of the petition. Therefore, plaintiff Michael Stoller's motion for substitution of Judge Kubasiak as of right was not timely filed. Accordingly, we affirm Judge Kubasiak's ruling denying the motion for substitution of judge as a matter of right.

¶ 22 Accordingly, for the reasons set forth above, we affirm the judgments of the circuit court of Cook County.

¶ 23 Affirmed.

¶ 24 JUSTICE GORDON, dissenting:

¶ 25 I must respectfully dissent. First, the majority opinion involves the interpretation of the incorrect statute. The majority notes that “[i]n civil cases substitution of judge is governed by section 2-1001 of the Code [citation].” *Supra* ¶ 19. While this statement may be true as a general matter, the majority overlooks the law governing contempt proceedings and, more specifically, the law governing criminal contempt proceedings, as is applicable to the instant case. “A person charged with indirect criminal contempt is entitled to all of the constitutional protections and procedural rights afforded to other criminal defendants.” *SKS & Associates, Inc. v. Dart*, 2012 IL App (1st) 103504, ¶ 20. Thus, the procedure for substitution of judge in such a case is governed by section 114-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/114-5 (West 2014)). See *Bangaly v. Baggiani*, 2017 IL App (1st) 152454, ¶ 52 (“A defendant in an indirect criminal contempt proceeding may move for a substitution of judge under section 114-5 of the Code of Criminal Procedure of 1963 \*\*\*.”); *SKS & Associates*, 2012 IL App (1st) 103504, ¶ 21 (“A defendant in an indirect criminal [contempt] proceeding may \*\*\* move for a substitution of judge under section 114-5 of the Code of Criminal Procedure of 1963 \*\*\*.”); *Hoga v. Clark*, 113 Ill. App. 3d 1050, 1059 (1983) (“Although such proceedings are not strictly criminal in nature, a

motion for substitution of judge in a case involving indirect criminal contempt is governed by section 114-5 of the Code of Criminal Procedure of 1963 \*\*\*\*.”). See also *People ex rel. Kunce v. Hogan*, 67 Ill. 2d 55, 63 (1977) (discussing section 114-5 in connection with a contempt finding). I also note that while the majority claims that plaintiff’s motion for substitution “was brought pursuant to section 2-1001(a)(2) of the Code of Civil Procedure” (*supra* ¶ 1), plaintiff, in fact, filed the motion both under section 2-1001(a)(2) of the Code of Civil Procedure and under section 114-5 of the Code of Criminal Procedure of 1963. Thus, the majority should have been interpreting section 114-5 of the Code of Criminal Procedure of 1963, not section 2-1001(a)(2) of the Code of Civil Procedure.

¶ 26 Of course, as the Code of Criminal Procedure of 1963 (Code) is aimed at criminal proceedings, section 114-5 speaks in terms of the “defendant” and the “State.” See 725 ILCS 5/114-5 (West 2014). However, “[i]ndirect criminal contempt charges may be prosecuted by either the State’s Attorney, counsel for a litigant, or *amicus curiae* appointed by the court.” *In re Marriage of Betts*, 200 Ill. App. 3d 26, 59 (1990); see also *Marcisz v. Marcisz*, 65 Ill. 2d 206, 210 (1976) (“Contempts are not crimes defined by statute and in the circuit court may be prosecuted, as in this case, by counsel for a litigant, by the State’s Attorney or by an *Amicus curiae* appointed by the court.”). Thus, since plaintiff in the instant case is the petitioner who initiated the contempt proceedings, plaintiff’s position with respect to those proceedings is analogous to that of the “State” in general criminal proceedings.

¶ 27 Section 114-5(c) of the Code of Criminal Procedure of 1963 (Code) provides that, “[w]ithin 10 days after a cause has been placed on the trial call of a judge the State may move the court in writing for a substitution of that judge on the ground that such judge is prejudiced against the State. Upon the filing of such a motion the court shall proceed no further in the cause

but shall transfer it to another judge not named in the motion. The State may name only one judge as prejudiced, pursuant to this subsection.” 725 ILCS 5/114-5(c) (West 2014). Thus, “[u]nder this statute, substitution is automatic if the motion is filed within 10 days after the cause has been placed on the trial call of a judge, the motion names only one judge, the motion is made in writing, the motion alleges that the trial judge is prejudiced against the State, and the motion is made before any substantive rulings in the case.” *People v. Schneider*, 375 Ill. App. 3d 734, 748 (2007).

¶ 28 In the case at bar, plaintiff’s motion satisfied all of section 114-5(c)’s requirements. First, plaintiff’s contempt petition was assigned to Judge Kubasiak on May 12, 2016, and the motion for substitution was filed on May 17, 2016, within 10 days of the matter being assigned to Judge Kubasiak. Second, the motion was made in writing. Third, the motion names only one judge— Judge Kubasiak. Fourth, the motion alleges that the judge is prejudiced against plaintiff. And fifth, the motion was filed before any substantive rulings were made in the contempt case, given that there appear to have been no rulings on any matter made between the date the contempt petition was transferred to Judge Kubasiak and the date of the filing of the motion for substitution. Accordingly, the motion for substitution should have been granted and it was reversible error for it to have been denied. See *People v. Langford*, 246 Ill. App. 3d 460, 465 (1993) (“If a motion for automatic substitution is improperly denied, all action by the trial court subsequent to the improper denial is void.”).

¶ 29 Furthermore, even if the civil statute applied, which it does not, the majority’s reasoning would still be fatally flawed. As the majority notes, under section 2-1001(a)(2) of the Code of Civil Procedure, a party is generally entitled to one substitution of judge without cause as a matter of right, provided that the motion is presented before a 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) (West 2014). “A substantial ruling is one that directly relates to the merits of the case.” *In re Estate of Gay*, 353 Ill. App. 3d 341, 343 (2004). The majority, and the trial court below, found that plaintiff’s motion for substitution of judge was untimely because at the time of the petition, “the judge had already issued two rulings directly relating to the merits of the petition.” *Supra* ¶ 21. Those “rulings” referred to by the majority were Judge Kubasiak’s February 23, 2015, and August 12, 2015, orders in case no. 13 M1 501276. The February 23, 2015, order was the order that the defendants allegedly violated that gave rise to the contempt charge, and the August 12, 2015, order was an order vacating the February 23 order. Thus, the “rulings” relied on by the majority form the basis of the contempt petition itself and, as a result, are not considered as a substantial ruling; there were no rulings by the trial court in the contempt proceeding. Criminal contempt proceedings may properly be commenced due to disobedience of a court order. See *In re Marriage of Betts*, 200 Ill. App. 3d 26, 45 (1990) (“Criminal contempt may \*\*\* consist of disobedience of a court order \*\*\*.”). However, under the majority’s view, there is no way a party to such contempt proceedings may seek a substitution of judge as of right. This cannot be the case.

¶ 30 A criminal contempt proceeding is a new action, with a new case number. See *Levaccare v. Levaccare*, 376 Ill. App. 3d 503, 509 (2007) (“indirect criminal contempt proceedings \*\*\* constitute separate and distinct proceedings not part of the original case being tried”); *People v. Budzynski*, 333 Ill. App. 3d 433, 438 (2002) (“indirect criminal contempt is a separate and distinct proceedings in and of itself and is not part of the original case being tried when the contemptuous act occurred” (citing *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 396 (1990))). Thus, even if the majority’s application of the civil substitution statute was proper, it

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must be the case that, unless the judge has made a substantive ruling *relating to the contempt proceeding itself*, substitution as a matter of right should be permitted. The practical application of the majority's reasoning would render substitution of judge impossible when the allegedly contemptuous conduct is noncompliance with a court order. In the case at bar, the trial judge did not make any rulings between the time the contempt petition was assigned to the judge and the time of the filing of the motion for substitution. Accordingly, under either the civil or criminal substitution statute, the majority's analysis is incorrect and I must, therefore, respectfully dissent.