FOURTH DIVISION
December 14, 2017

No. 1-16-2443
No. 1-16-2535 (consolidated)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

STEWART TITLE GUARANTY COMPANY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	
	)	
DAVID IZSAK,	)	
	)	
Defendant-Appellant,	)	No. 10 CH 29529
	)	
FIFTH THIRD BANK, CHICAGO BANCORP, INC., FIRST AMERICAN BANK, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., QUICKEN LOANS, INC., BMO HARRIS BANK, N.A., BANK OF AMERICA, N.A., WASHINGTON MUTUAL BANK, JP MORGAN CHASE BANK, UNKNOWN OWNERS AND NON-RECORD CLAIMANTS, Defendants-Appellees.	)	Honorable Anna H. Demacopoulos Judge Presiding

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PRESIDING JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiff's appeal from denial of summary judgment dismissed for lack of jurisdiction. Trial court's order denying defendant's motion for substitution of judge as of right affirmed as untimely. Trial court's order appointing receiver affirmed.

¶ 2 Defendant, David Izsac, obtained several real estate mortgage loans from different lenders on the same property, 2046 West Race Avenue in Chicago (the subject property). The issue in this case is which lender has priority for its lien.

¶ 3 Plaintiff, Stewart Title Guaranty Company (Stewart Title) sued Izsak and several other lenders seeking a declaration that Stewart Title's lien was superior to all other lien claimants, and also sought mortgage foreclosure. Stewart Title alleged that a purported satisfaction (release) of its mortgage was fraudulently recorded without its knowledge, and that a number of the other lenders had similarly claimed that their mortgage liens were fraudulently or improperly released.

¶ 4 We consolidated two appeals. In Appeal No. 1-16-2443, Izsak appeals from the August 17, 2016 order denying his motion for substitution of judge as of right pursuant to section 2-1001(a)(2) of the Code of Civil Procedure (735 ILCS 5/2-1001(a)(2) (West 2014)), and from all orders later entered, including an order appointing a receiver. The trial court denied the motion after concluding that Izsak's motion was a delay tactic and was improperly brought after Izsak had an opportunity to "test the waters" and form an opinion as to the judge's view on a contested issue in the case. For the reasons that follow, we conclude that the trial court properly denied Izsak's motion for substitution of judge.

¶ 5 In Appeal No. 1-16-2535, Stewart Title appeals from the trial court's order granting defendant BMO Harris Bank, N.A. (BMO Harris)'s motion to reconsider, which reversed the trial court's prior ruling in favor of Stewart Title on BMO Harris's "Second Motion for Summary Determination of Major Issues Pursuant to 735 ILCS 5/2-1005(d)." Instead, the trial court expressly denied BMO Harris's motion. We conclude that we do not have jurisdiction over this nonfinal order, and Appeal No. 1-16-2535 is dismissed.

¶ 6 I. BACKGROUND

¶ 7 On December 9, 2005, Izsak granted BMO Harris a mortgage in the subject property to secure a revolving line of credit of $662,500. The BMO Harris mortgage was recorded on January 18, 2006.

¶ 8 On March 31, 2008, Izsak granted a mortgage to ING Bank, FSB (ING; the ING mortgage). The ING mortgage was recorded on April 21, 2008. The ING mortgage secured a loan by ING to Izsak in the original principal amount of $637,500. Izsak executed and delivered to ING a promissory note in that amount.[1]

¶ 9 After learning that Izsak had granted Fifth Third Bank a mortgage in the amount of $500,000 that was *also* secured by the subject property, ING initially brought a declaratory judgment action in 2010 against Izsak and defendant, Fifth Third Bank. ING stated that, at the time of filing its action, Izsak was current on the loan payments for the ING mortgage. ING further alleged that a release of the ING mortgage, filed with the Cook County Recorder of Deeds on March 27, 2009, was fraudulent. ING sought a judgment declaring that ING did not authorize the release, that the release be expunged from the record, and that ING was in the first lien position, with superior rights to all other lien claimants.

¶ 10 ING later assigned all rights to the ING mortgage and loan to Stewart Title, the title insurance underwriter for ING. In 2014, Stewart Title filed a second amended complaint. The complaint alleged that Stewart Title had recently learned that a number of other lenders had similarly claimed that their mortgage liens were fraudulently or improperly released. These lenders were added as defendants. Stewart Title also alleged that Izsak had stopped making his monthly mortgage payments to ING on February 1, 2011. Count I of the complaint sought

[1] Although Izsak granted mortgages on the subject property to other defendants, additional factual background is not necessary to the disposition of the issues in this appeal.

declaratory relief, including a declaration that the ING mortgage was in the first lien position, with superior right to all other lien claimants. Count II sought mortgage foreclosure against Izsak and Fifth Third Bank.

¶ 11 On January 8, 2015, BMO Harris filed a "Second Motion for Summary Determination of Major Issues Pursuant to 735 ILCS 5/2-1005(d)." BMO Harris argued that its lien was "first and prior, paramount and superior to any and all other liens claimed on or against the Subject Property."

¶ 12 After briefing and argument, the trial court entered two orders. On April 10, 2015, the court ruled on BMO Harris's motion as follows: "Stewart Title and its predecessors in interest had the right to rely on the releases of the [BMO] Harris Bank mortgage and Bank of America mortgage, recorded September 1, 2006 and February 6, 2007, respectively." The court also denied as premature a motion for partial summary judgment brought by Stewart Title.

¶ 13 BMO Harris moved for clarification. In its June 4, 2015 order the trial court ruled:

> "The April 10, 2015 order *** is clarified as follows: (a) the order of priority of liens against the subject property is as follows: First: Stewart; Second: Bank of America; Third: BMO Harris; (b) the court considered arguments of Equity and Public Policy including those presented by Stewart and BMO Harris, but the Court's sole basis for the April 10, 2015 order is the Conveyances Act, 765 ILCS 5/30; (c) the April 10, 2015 order is further clarified per the transcript of proceedings that occurred today in court."

¶ 14 BMO Harris moved for reconsideration on July 6, 2015. Meanwhile, the trial judge was transferred and, on November 15, 2015, another judge was assigned his calendar.

¶ 15 On February 8, 2016, the trial court ordered the parties to submit briefs addressing the recent decision, *M&T Bank v. Mallinckrodt*, 2015 IL App (2d) 141233 (a case that had not been addressed in the motion to reconsider but was relevant to the merits of the motion). In *Mallinckrodt*, this court reversed the trial court's order granting partial summary judgment on the question of lien priority, ruling that a genuine issue of material fact existed as to whether the parties had reasonably relied on the mortgagor's fraudulent payoff statement.

¶ 16 After briefing and hearing argument, the trial court determined that a genuine issue of material fact existed as to whether Stewart Title issued its mortgage without notice of the prior mortgage, as Stewart Title had contended. In its May 6, 2016 order, the trial court: (1) granted BMO Harris's motion to reconsider; (2) reversed the orders of April 10, 2015 and June 4, 2015; and (3) denied BMO Harris's second motion for summary determination of major issues. (This order is one of the two orders at issue in this appeal.)

¶ 17 On June 1, 2016, BMO Harris filed a verified petition to appoint a receiver on the property, and requested that Stephen Saunders be appointed as receiver. BMO Harris set the petition for hearing on June 8, 2016.

¶ 18 On June 7, 2016, the day before the scheduled hearing on the petition to appoint a receiver, Izsak filed an appearance through counsel, Seth Kaberon.

¶ 19 On June 8, 2016, the parties appeared in court for a status hearing on BMO Harris's verified petition to appoint a receiver. There is no transcript of the hearing in the record. The court entered a briefing schedule on the petition to appoint a receiver, and set it for hearing on August 17, 2016. The court also ordered that Izsak had until July 6, 2016 to answer or otherwise plead to the complaint and Bank of America's crossclaim.

¶ 20 On June 15, 2016, an additional appearance was filed on behalf of Izsak. On the same day, the additional counsel filed a motion for substitution of judge as of right pursuant to section 2-1001(a)(2).

¶ 21 On June 27, 2016, the court ordered Izsak to file a brief in support of that motion for substitution to address the timeliness of his motion. The court entered a briefing schedule and set the matter for hearing on August 17, 2016—piggybacking the hearing already scheduled on the motion for appointment of a receiver.

¶ 22 On August 17, 2016, after a hearing, the trial court denied Izsak's motion for substitution of judge "for the reasons stated on the record." The court also made a finding pursuant to Illinois Supreme Court Rule 304(a) (Ill. S. Ct. Rule 304(a) (eff. Feb. 26, 2010)), that there was no reason to delay either enforcement of or appeal from (1) the court's order denying Izsak's motion for substitution of judge and (2) the court's order of May 6, 2016. The court also granted BMO Harris's motion to appoint a receiver.

¶ 23 Izsak filed a notice of interlocutory appeal from the order denying his motion for substitution of judge as of right. Stewart Title filed a notice of interlocutory appeal from the May 6, 2016 order (see *supra*, ¶ 16).

¶ 24 Izsak filed a motion to stay the proceedings on the action pending in the trial court. This court granted that stay and consolidated the appeals.

¶ 25 II. ANALYSIS

¶ 26 A. APPEAL NO. 1-16-2443

¶ 27 Izsak appeals from the August 17, 2016 order denying his motion for substitution of judge as of right pursuant to section 2-1001(a)(2) of the Code of Civil Procedure (735 ILCS 5/2-1001(a)(2) (West 2014)). He additionally appeals from all orders later entered, including the

order appointing a receiver. We review *de novo* the trial court's denial of a motion for substitution of judge as of right. *Colagrossi v. Royal Bank of Scotland*, 2016 IL App (1st) 142216, ¶ 29.

¶ 28 Section 2-1001(a)(2) provides:

> "(i) Each party shall be entitled to one substitution of judge without cause as a matter of right.
>
> (ii) 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.
>
> (iii) If any party has not entered an appearance in the case and has not been found in default, rulings in the case by the judge on any substantial issue before the party's appearance shall not be grounds for denying an otherwise timely application for substitution of judge as of right by the party." 735 ILCS 5/2-1001(a)(2) (West 2014).

¶ 29 Izsak argues that he timely brought his petition for substitution of judge as of right because, at the time he brought it, he had just entered an appearance and had not been found in default. Stewart Title counters that the trial court properly exercised its right to deny the motion because it was not timely, was brought for delay purposes, and was brought after Izsak "tested the waters." We agree with Stewart Title.

¶ 30 As this court has explained, "[t]he statute's requirement that the motion be timely is to prohibit litigants from 'judge shopping' by seeking a substitution after they have formed an opinion that the judge may be unfavorably disposed toward the merits of their case." *Petalino v. Williams*, 2016 IL App (1st) 151861, ¶ 18. "Accordingly, a motion for substitution of judge as of

right must be (1) *filed at the earliest practical moment* before commencement of trial or hearing and (2) before the trial judge considering the motion rules upon any 'substantial issue' in the case." (Emphasis added.) *Id*.

¶ 31 The majority of the districts of the appellate court, including this one, have concluded that, even where the trial court has not ruled on a substantial issue, a motion for substitution of judge should be denied if the moving party had an opportunity to "test the waters" and form an opinion as to the judge's view on a contested issue in the case. See, *e.g.*, *Colagrossi v. Royal Bank of Scotland*, 2016 IL App (1st) 142216, ¶ 39; *Ramos v. Kewanee Hospital*, 2013 IL App (3d) 120001, ¶ 88; *Bowman v. Ottney*, 2015 IL App (5th) 140215, *aff'd on other grounds* 2015 IL 119000; but see *Schnepf v. Schnepf*, 2013 IL App (4th) 121142 (rejecting "test the waters" doctrine as obsolete).

¶ 32 The Illinois Supreme Court has not resolved the conflict among the districts of this court as to the validity of the "testing the waters" doctrine. In *Bowman v. Ottney*, 2015 IL 119000, the parties presented arguments relating to the continued validity of the "test the waters" doctrine. See *id*. ¶ 27. But the court declined to address the doctrine's validity, because the court's review was limited to the certified question presented to the court. *Id*.

¶ 33 Despite the conflict, the "testing the waters" doctrine "remains a viable objection to substitution of judge motions as of right in the First District." *Colagrossi*, 2016 IL App (1st) 142216, ¶ 36. "Keeping parties from testing the waters maintains the integrity of the court, prevents the waste of judicial resources, and obstructs dilatory tactics." *Id.* ¶ 39.

¶ 34 And while our supreme court did not address the doctrine's validity in *Bowman*, as part of its analysis, the court explained that "the principle that section 2-1001(a)(2) should be read as favoring substitution does not require a construction that permits a party to engage in 'judge

shopping.' " *Bowman*, 2015 IL 119000, ¶ 18. The court also wrote that "though not expressly included in the statute, this court has long recognized that courts may take into consideration the circumstances surrounding a motion for substitution of judge and may deny the motion if it is apparent that the request has been made as a delay tactic." *Id*.

¶ 35 In sum, we similarly believe that a trial court may take the surrounding circumstances into consideration when determining whether "the moving party had an opportunity to test the waters and form an opinion as to the court's reaction to his or her claim." *Partipilo*, 331 Ill. App. 3d at 398. With these principles in mind, we consider Izsak's contention that the trial court improperly denied his motion for substitution of judge as of right.

¶ 36 The hearing and subsequent ruling on the motion for substitution took place on August 17, 2016. As we noted previously, August 17 had originally been the date for the hearing on the motion for appointment of a receiver, and the motion to substitute was set for that same date and time.

¶ 37 We have a transcript of that August 17 hearing in the record. But much of the discussion at that hearing concerned a previous hearing on June 8, 2016, the day after Izsak appeared in the case. As a reminder, that June 8 hearing was when the parties first appeared on the motion for appointment of a receiver, after which the trial court set a briefing schedule and set August 17 for the hearing date. (See *supra* ¶ 19.) Unfortunately, we do not have a transcript of that June 8 hearing, because no court reporter was present. Izsak has a lot to say about the absence of that transcript, which we will consider in our analysis.

¶ 38 So we will first review the transcript of the August 17 hearing, starting with the arguments made by counsel and then those made by the trial court.

¶ 39 At the August 17 hearing, BMO Harris, opposing the motion to substitute, claimed the motion was untimely—it was not filed "at the earliest practical moment" (*Petalino*, 2016 IL App (1st) 151861, ¶ 18)—because the attorney for Izsak who was present at the June 8 hearing, Seth Kaberon, did not move for substitution of judge at that time. BMO Harris found Mr. Kaberon's failure to move for substitution on June 8 particularly notable "considering that [Mr. Kaberon had] already substituted [this particular trial judge] in a different proceeding" concerning these same issues regarding Izsak.

¶ 40 It is undisputed that Mr. Kaberon—who was not present on August 17—appeared at the June 8 hearing and did not move for substitution of judge at that time.[2]

¶ 41 BMO Harris noted that, at the June 8 hearing, Mr. Kaberon "came in, not only asked for a briefing schedule but made substantive argument about his client's position, not only on the motion to appoint receiver, just generally in the stance of the case. Your Honor made certain comments." BMO Harris argued that the court "made comments and asked questions of [Izsak's attorney] that would certainly lead to the same holding that was in *Colagrossi*." Specifically, BMO Harris noted that the court "heard a contested issue, let [Izsak's attorney] know what [the court]'s position at least at that moment was on a contested issue." Thus, according to BMO Harris, Izsak's counsel "tested the waters" with the trial judge on June 8, 2016.

[2] Indeed, the trial court weighed in at this point of the hearing, stating: "I also want to make a record that Mr. *** Seth Kaberon, who is not here today on behalf of Mr. Izsak *** specifically asked for August 17th [as a hearing date on the motion for appointment of receiver] because he had another case on my call on that same day, and he was in fact in my courtroom this morning on that case."

¶ 42 Counsel for Stewart Title joined BMO Harris's argument. Counsel for defendant Bank of America likewise noted Mr. Kaberon's presence at the June 8 hearing and made an additional statement about the June 8 hearing, when the parties were discussing BMO Harris's motion to appoint a receiver:

> "[T]here was specific conversation going on before your Honor and interplay between the attorneys and the Court with regard to the status of the property, who was currently occupying it, whether it was subject to a tenancy by a third party and there was monies being called [*sic*], and so there [were] substantive issues being discussed with regards to that specific motion.
>
> We had discussed other issues as far as the status of the case, but I want the record to reflect that there was definite interplay between all the parties and the Court with regards to the motion to appoint receiver, and while your Honor did make some comments *** you didn't make any ruling, *** but again, it falls into this rubric of he was testing the waters, and when he saw when he dipped his toe in he might get a little burned, that's when he filed his motion to substitute judge."

¶ 43 So while there is no transcript or bystander report for the June 8, 2016 hearing, the events that transpired during that prior hearing were discussed on the record during the August 17, 2016 hearing. And it is important to note that Izsak's counsel at the August 17 hearing did *not* dispute the accuracy of those recollections. Rather, he merely noted that he was not there—Mr. Kaberon, his co-counsel, was—and he could not "say exactly what was said." Instead, he argued that Izsak was entitled to a substitution of right under the statute, *even if* the court may have heard

"substantive discussion about the merits of the case," because no substantive ruling was made on June 8.

¶ 44 We now turn to the trial court's comments, which were not based solely on the events that transpired during the June 8 hearing. Rather, the court took into consideration the circumstances surrounding Izsak's motion and this case that the trial court described as having "many twists and turns." The court denied Izsak's motion for substitution of judge on two bases: (1) the motion was a delay tactic; and (2) it was improperly brought after he had an opportunity to test the waters and form an opinion as to court's view on a contested issue.

¶ 45 The court first addressed the fact that Izsak had been served by publication. The court noted the reason that the previous trial judge had allowed service by publication, namely, that there had been "an intentional avoiding of service" by Izsak, necessitating service by publication.

¶ 46 The court also opined that Izsak was using the substitution-of-judge statute as "an intentional delay tactic to avoid an adverse ruling which will have a negative monetary effect on the subject of this litigation, namely the [subject] property."

¶ 47 The trial court then discussed a number of different timelines to explain its decision, which the court believed fulfilled its duty "to maintain the integrity of the Court system by not rewarding such dilatory behavior but rather to hold litigants and their attorneys accountable for their attempted gamesmanship." The judge explained that, on December 4, 2015, she first presided over the case of *David Izsak v. Illinois Department of Professional Regulation* (No. 15 CH 11811), a case involving the revocation of Izsak's real estate license as a result of the conduct alleged in the case before us (licensure revocation case). On that date, the judge granted a motion for substitution as of right filed by Izsak's attorney of record at the time, Jeffrey Strange and Associates (which is also counsel for Izsak in this case). The court believed this was

noteworthy because December 4, 2015 was a Friday and the very next Monday, December 7, 2015, was the first time she presided over the instant case. Izsak and his attorney knew at that time that she was assigned to this case.

¶ 48 The court also took judicial notice of the administrative record in Izsak's license revocation case, noting that Izsak was represented by Mr. Kaberon (the same attorney who appeared at the June 8 hearing). The trial court noted that, in the license revocation case, Izsak filed a motion on December 2, 2014, seeking to disqualify an expert. Notably, the motion referenced the case currently before this court:

> "BMO Harris Bank is a party to an action to foreclose upon [Izsak's] home, which is now pending in the Circuit Court of Cook County chancery division as Case No. 2010 CH 29529."
>
> * * *
>
> "On information and belief, BMO Harris Bank is seeking to establish priority payout from the foreclosure action. As such, BMO Harris Bank's position in the chancery case is directly adverse to [Izsak]. BMO Harris Bank's position in the chancery case will be adverse if it can prove that [Izsak], rather than BMO Harris Bank itself, was responsible for the filing of erroneous mortgage release documents."

¶ 49 The court noted that the motion went on to "further elaborate on what the chancery case is all about." The court found it significant that Izsak did not file an appearance in the case before us until June 7, 2016—the day before the initial presentation of BMO Harris's motion for appointment of a receiver—yet Izsak appeared to be quite familiar with the case going back to 2014. The trial court found it clear from those statements and Izsak's motion that he and his attorneys were strictly monitoring the status of this case:

"What Mr. Izsak was doing was testing the waters from the outside by strictly monitoring what was happening in this courtroom without filing an appearance.

It is reasonable to then conclude that Mr. Izsak was continuing to monitor the litigation in the months that followed my assignment to this calendar."

¶ 50 As the court noted, during this window of time, substantial rulings were made in the instant case, including the May 6, 2016 order that reversed the orders of April 10, 2015 and June 4, 2015. The court also noted that later filings on various motions were sent to Izsak at the subject property's address, as well as multiple other addresses. The court also stated that it had "made specific findings as it relates to Mr. Izsak's conduct and any possible fraudulent behavior by several individuals."

¶ 51 The court also discussed at length Mr. Kaberon's involvement in the instant case after BMO Harris filed its motion for a receiver to be appointed. As the court explained:

"Notice was sent to Mr. Izsak the same way that notice had been sent on all of the other motions in the case. The motion was then spindled for June 8th of 2016.

The night before, on June 7th of 2016, Mr. Seth Kaberon filed his appearance in this matter electronically in the clerk's office. No notice was sent to opposing counsel.

*** Mr. Kaberon also represented Mr. Izsak at the hearing before the Illinois Department of [Professional] Regulation as well as the 2011 municipal case that was referenced in the motion for [service by] publication.

Mr. Kaberon appeared before the Court on June 8th. At that time, he stood in a pile of lawyers before the Court, and I did not recognize Mr. Kaberon as being related to this case.

I then asked him to identify himself, which was the first time he was identified that [*sic*] he was here representing Mr. Izsak.

*** This Court expressed concern to Mr. Kaberon at that time for the late appearance in the case and advised him about the previous rulings that I had made, and at that time, there was a request for 21 days to respond or otherwise plead.

Additionally, *** there [were] conversations about what the status of the property was because BMO Harris had already filed [the] motion for a receiver.

At no time did Mr. Kaberon indicate *** that there ever was going to be a motion challenging service nor any motion for substitution of judge. Furthermore, there was no written motion as a response to the motion for a receiver that had been filed at that time.

The Court inquired of Mr. Kaberon at that time as to what his legal basis was going to be to file an objection to the motion for a receiver.

I entertained argument by BMO Harris Bank and all the other parties present before the Court joined in that motion.

Mr. Kaberon, the defense attorney at that time, indicated that he objected, and the Court inquired, again, as to what his legal theory was to the objection of opposing ***the receiver. Mr. Kaberon indicated he wanted to put his arguments in writing, and a briefing schedule was then entered requiring a response to be filed by July 6th of 2016.

On June 8th, when Mr. Kaberon appeared before this Court on behalf of [Izsak], he had an opportunity to file a motion for substitution of judge, just like they had done in the previous case. Since that date, Mr. Kaberon has not filed a single document nor appeared a single time before this Court. No answer, no motion. Nothing."

¶ 52 The court then noted that the firm Jeffrey Strange and Associates filed its additional appearance electronically on June 15, 2016, again with no notice to the opposing parties. As the court noted, that firm also filed the motion for substitution and later represented to the court that it was unaware of Mr. Kaberon's appearance or the briefing schedule concerning the motion to object to the appointment of the receiver. The court further noted that the firm then filed a motion for an extension of time to respond. The court struck the motion for a number of reasons, including the fact that it contained numerous inaccuracies. As the court further stated:

> "There is no doubt in my mind that Mr. Izsak was just sitting back and watching, and the minute that it was going to negatively impact him, he filed his appearance. It's frequent. It's repetitive, and it wastes judicial resources."

¶ 53 Based on these findings, the court denied the motion for substitution of judge to maintain the integrity of the Court, preserve judicial resources, and curtail the dilatory tactics of [Izsak]. The court also opined that it could not imagine that Izsak's behavior was what the statute intended to protect and promote.

¶ 54 For many reasons, we find no error in the trial court's ruling.

¶ 55 We first address Izsak's complaint that, in ruling on Izsak's petition for substitution of judge, "the trial court recounted its memory of the June 8, 2016 hearing" because "[t]here is no transcript of proceedings of the June 8, 2016 hearing, nor is there any bystander report made for that court appearance." Izsak does not explain why, exactly, it was impermissible for the trial court to rely on its memory. We could consider the argument forfeited for lack of support, but we would not agree with the argument, in any event.

¶ 56 This court has long held that, in determining whether a request for substitution of judge was properly denied, the appellate court may defer to the trial court's recollection of unrecorded

hearings, as long as the trial court's memory is not contradicted by the record. See, *e.g.*, *In re Estate of Gay*, 353 Ill. App. 3d 341, 344 (2004); *Rodisch v. Commacho–Esparza*, 309 Ill.App.3d 346, 350 (1999); *Paschen Contractors, Inc. v. Illinois State Toll Highway Authority*, 225 Ill. App. 3d 930, 935 (1992). As we explain below, the trial court's memory of the June 8 hearing was not contradicted by the record in any way; indeed, the record supports the court's memory.

¶ 57 First, the defense attorneys at the August 17 hearing had the same recollection as the trial court. They spoke at length, and wrote in their supporting papers below in some detail, that the June 8 hearing involved a substantive discussion of the issues—including but not limited to the motion to appoint a receiver.

¶ 58 Second, Izsak's counsel at the August 17 hearing did not, in any way, dispute that recollection. True, the attorney at the August 17 hearing was not the same lawyer representing Izsak at the June 8 hearing—Mr. Kaberon—but neither defendants nor the trial court are responsible for which lawyer shows up for another party. Izsak was the one who filed the motion for substitution, and the defendants had already put Izsak on notice through briefing that they opposed the motion based on the "testing the waters" doctrine, specifically referencing the substantive discussions about the case at the June 8 hearing. So if the lawyer who could speak to that very issue did not appear on August 17, that decision lies with no party but Izsak.

¶ 59 Indeed, one could argue that it is rather telling that Mr. Kaberon did *not* show up to dispute the defendants' recollection of the June 8 hearing—particularly given, as the trial court noted and we recounted above, that Mr. Kaberon was the lawyer who had specifically requested the hearing date of August 17 for the motion to appoint a receiver, because Mr. Kaberon was already scheduled to appear before this trial judge on another case that day. The trial court found

Mr. Kaberon's absence on August 17 significant for this reason, noting as well that Mr. Kaberon had, in fact, appeared before her earlier that day.

¶ 60 Because the trial court's recollection of the June 8 hearing was not contradicted by the record, it was not error for the trial court to rely on its memory of that hearing, nor is it improper for this court to so rely.

¶ 61 That aside, for the reasons stated below, the trial court correctly ruled that the motion for substitution was not timely. As we already explained, "a motion for substitution of judge as of right must be (1) filed at the earliest practical moment before commencement of trial or hearing and (2) before the trial judge considering the motion rules upon any 'substantial issue' in the case." *Petalino*, 2016 IL App (1st) 151861, ¶ 18.

¶ 62 First, the motion was not made at the first practical moment. Mr. Kaberon appeared on Izsak's behalf on the June 8 hearing, where argument was heard on the appointment of a receiver, though no ruling was made. Izsak was not a stranger to this trial judge; she also inherited Izsak's license-revocation case from the predecessor judge, and Izsak immediately moved for substitution of judge on that case, as the trial court recounted in her ruling. (See ¶ 47.) But at the June 8 hearing, Izsak's attorney, Mr. Kaberon, did not move for substitution or give any hint of a plan to do so.

¶ 63 Second, this trial judge had already made a substantial ruling in this case. On May 6, 2016, the judge had reconsidered and reversed the grant of summary determination in favor of BMO Harris, which had originally been entered by her predecessor judge. That ruling concerned the priority of lienholders in the case; it was clearly an important, if not the most important, ruling in the case. See *Colagrossi*, 2016 IL App (1st) 142216, ¶ 30 (ruling is "substantial" when it relates directly to merits of case). Had Izsak already appeared in the case at that time, there

would be no question that a motion for substitution that came *after* that substantive ruling would have been properly denied as untimely. See *Petalino*, 2016 IL App (1st) 151861, ¶ 18.

¶ 64 Of course, Izsak had not yet appeared; he did not file an appearance until the eve of the hearing on the appointment of a receiver, specifically on June 7. But the trial court provided ample support for the notion that Izsak had been closely following the case. Despite his "intentional avoiding of service" in this case, Izsak was ultimately served in this matter back in 2010, and he had received the party's filings since that time. Indeed, his pleadings in the related license-revocation case showed that he was aware of the progress of the proceedings in this case at least as far back as 2014, even though he had not formally appeared. That notion is buttressed by the strategic timing of his appearance just before the hearing on the motion to appoint a receiver, the granting of which would impact him adversely. As BMO Harris put it in the trial court, Izsak "had knowledge of the proceedings for six years[] and chose to appear only to defend BMO's petition to appoint receiver which would cut off Izsak's rental income (from a property in which he incurred millions of dollars of fraudulent mortgages)." (Parenthetical in original.)

¶ 65 So even though Izsak had not yet formally appeared in the case, the trial court found that he was well aware of the proceedings. Thus, in every real sense of the word, Izsak was aware of the trial court's substantial ruling on May 6, whether or not he had formally appeared. A motion for substitution after that substantial ruling is not timely. *Id*.

¶ 66 Because we have determined that the motion was not made at the first practical moment and occurred after the trial court had made a substantial ruling in the case, we could affirm the trial court's ruling without consideration of the "testing the waters" doctrine.

¶ 67 But that doctrine supplies an independent basis for affirmance. The trial court's recollection of the June 8 hearing, unrebutted by Izsak and supported by the record, shows that the June 8 hearing involved substantive argument about the motion for appointment of a receiver; that the trial court, in its words, "made specific findings as it relates to Mr. Izsak's conduct and any possible fraudulent behavior by several individuals;" that the trial court complained of the dilatory tactics of Izsak; and that the trial court made statements about other substantive rulings in this case. The court need not affirmatively rule on a legal issue to give some indication of her leanings on the merits of the case. See *Colagrassi*, 2016 IL App (1st) 142216, ¶ 30 (examples of substantial issues include when party moving for substitution "has discussed issues with the trial judge, who then indicates a position on a particular point."); *Partipilo v. Partipilo*, 331 Ill. App. 3d 394, 398 (2002) (same); *Paschen Contractors*, 225 Ill. App. 3d at 937 (same). The record clearly shows that the trial court had explained its views on a number of issues relative to Izsak, that Izsak had tested the waters not only "from the outside" while he monitored the proceedings from afar, but also during the June 8 hearing, and that the motion for substitution was prompted by Izsak's belief that the trial judge was not going to rule in his favor.

¶ 68 Finally, the trial court also determined that Izsak was using the substitution as a delay tactic. *Nasrallah v. Davilla*, 326 Ill. App. 3d 1036, 1040 (2001) (substitution as of right may be denied if shown that motion was made for dilatory purposes). We have recounted the supporting facts at length already. Izsak had been served in this case for 6 years before formally appearing; his pleadings in related cases showed that he was monitoring this case; he waited to appear until the day before a hearing on a motion for appointment of a receiver that would significantly hurt him financially if granted; he asked for a hearing on that motion 5 weeks out from that date; and

then in the interim, he piggybacked a motion for substitution of judge onto that hearing date. The trial court properly determined that Izsak was doing everything he could to delay a ruling on the motion for appointment of receiver. We uphold the trial court's ruling on this ground as well.

¶ 69 For these reasons, we affirm the trial court's denial of the motion for substitution of judge.

¶ 70 We next address Izsak's argument that this court should reverse the trial court's order appointing a receiver. As BMO Harris correctly notes, Izsak makes no substantive argument against the granting of its motion. The only argument that Izsak raised regarding the trial court's order appointing a receiver was that the court should not have ruled on the motion and instead should have granted his motion for substitution. See *People v. Tate*, 2016 IL App (1st) 140598, ¶ 20 ("when a motion for substitution of judge is improperly denied, all subsequent action by the trial judge, beyond transfer of the matter, is void."). But we have already held that the trial court properly denied the motion for substitution, so the premise of Izsak's argument has been rejected. Thus, we affirm the trial court's judgment appointing a receiver.

¶ 71 B. APPEAL NO. 1-16-2535

¶ 72 In Appeal No. 1-16-2535, Stewart Title appeals from the orders of May 6, 2016, and August 17, 2016. In its August 17, 2016 order, the trial court made a Rule 304(a) finding as to its prior May 6, 2016 order. In that prior order, the trial court had: (1) reversed the trial court's previous orders; and (2) *denied* BMO Harris's Second Motion for Summary Determination. Although the parties never raised the issue, we have an independent duty to determine our own jurisdiction. *Almgren v. RushPresbyterian-St. Luke's Medical Center*, 162 Ill. 2d 205, 210 (1994). When our jurisdiction is lacking, we must dismiss the appeal. *Id*.

¶ 73 Illinois Supreme Court Rule 304(a) (eff. March 8, 2016) provides that "an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both." Thus, Rule 304(a) language must be included in an order when a party seeks to appeal the order that is *final* with respect to one or more but not all of the *claims*.

¶ 74 But the mere inclusion of Rule 304(a) language in an order is not sufficient, in and of itself, to confer appellate jurisdiction on a non-final order. *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 24; *EMC Mortgage Corp. v. Kemp*, 2012 IL 113419, ¶ 14 ("It is well settled that the inclusion of the special [304(a)] finding in the trial court's order cannot confer appellate jurisdiction if the order is in fact not final.") (quotation marks omitted); *Deerfield Management Co. v. Ohio Farmers Insurance Co*., 174 Ill. App. 3d 837, 840 (1988) ("[T]he trial court's finding that there was 'no just reason to delay enforcement or appeal' did not make the interlocutory order denying summary judgment a final judgment."). For two independent reasons, we conclude that the order under review was not final and thus, despite the Rule 304(a) language added by the trial court, we lack jurisdiction over Appeal No. 1-16-2535.

¶ 75 The first reason the order is not appealable is that the motion at issue was brought under section 2-1005(d), *i.e.*, for a "Summary determination of major issues." 735 ILCS 5/2-1005(d) (West 2014). There is a distinction between an "issue" and a "claim." Even where a court *grants* a motion for summary judgment, it is appealable only if it disposes of a "claim" as opposed to an "issue." Recently, our supreme court reiterated the principle that " 'where an order disposes only of certain issues relating to the same basic claim, such a ruling is not subject to review under Rule 304(a).' " *Carle Foundation v. Cunningham Township*, 2017 IL 120427, ¶ 18 (quoting *Blumenthal*, 2016 IL 118781, ¶ 27); see also *Morningside North Apartments I, LLC v. 1000 N.*

LaSalle, LLC, 2017 IL App (1st) 162274, ¶ 8 ("An order entered pursuant to section 2-1005(d) *** is not a final order as it does not dispose of a claim. Such an order is interlocutory and, therefore, not appealable.").

¶ 76 A second and independent reason the trial court's May 6 order was not final is that it *denied* BMO Harris's motion for summary determination. The denial of a motion for summary judgment is not a final order; it is interlocutory in nature, leaving a claim still pending and undecided. *Clark v. Children's Memorial Hospital*, 2011 IL 108656, ¶¶118-19; *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 57 ("Because the *denial* of summary judgment leaves a case still pending and undecided, it cannot be a final order.") (emphasis in original); see also *Watts v. City of Chicago*, 325 Ill. App. 3d 288, 291 (2001) ("An order denying summary judgment is interlocutory in nature and may be modified or vacated at any time before final judgment.").

¶ 77 For the foregoing reasons, we lack jurisdiction over the trial court's interlocutory order denying BMO Harris's "Second Motion for Summary Determination of Major Issues Pursuant to 735 ILCS 5/2-1005(d)." Accordingly, we dismiss Appeal No. 1-16-2535.

¶ 78 Appeal No. 1-16-2443; Affirmed.

¶ 79 Appeal No. 1-16-2535; Dismissed.