

No. 1-18-2063

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

<i>In re</i> the Marriage of:)	Appeal from the
BETHANY DEL GALDO)	Circuit Court of
)	Cook county
Petitioner,)	
)	
and)	No. 16 D 9266
)	
MICHAEL DEL GALDO,)	
)	
Respondent-Appellee,)	Honorable
)	Naomi Hornick Schuster,
(David P. Kirsh, Third-Party Respondent-Appellant).)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Hall concurred in the judgment.

ORDER

¶ 1 *Held:* We dismissed third-party respondent’s Rule 307(a)(1) appeal from the order denying his motion for substitution of judge as a matter of right for lack of appellate jurisdiction.

¶ 2 David P. Kirsh, third-party respondent-appellant¹, filed an appearance in this action for dissolution of marriage after the circuit court entered an order relating to requests that he had made under the Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2018)). Mr. Kirsh, a lawyer with the firm of Berger Schatz that represents petitioner, Bethany Del Galdo,

¹ On appeal, Mr. Kirsh styles his status as “third-party respondent.” However, he has not filed a pleading, other than a motion for substitution of judge as of right, or sought to intervene in this case.

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then filed a motion for substitution of judge as a matter of right on his own behalf that the circuit court denied. Mr. Kirsh filed a notice of appeal from the denial of his motion pursuant to Supreme Court Rule 307(a)(1) (Ill. S. Ct. R. 307(a)(1) (eff. Nov. 1, 2017)). We dismiss the appeal for lack of appellate jurisdiction.²

¶ 3 On October 5, 2016, Ms. Del Galdo filed a petition for dissolution of her marriage to respondent-appellee, Michael Del Galdo. Mr. Del Galdo, a lawyer, is a member of the Del Galdo Law Group, LLC (the firm). The petition has not been resolved and remains pending before the circuit court.

¶ 4 Ms. Del Galdo is represented by the law firm of Berger Schatz. Mr. Kirsh, a partner at Berger Schatz, has participated in the case on behalf of Ms. Del Galdo; his name appears on many of the pleadings contained in the record on appeal.

¶ 5 The parties engaged in a multitude of discovery disputes and some of these controversies pertained to Mr. Del Galdo's production of income and billing information relating to the firm. The circuit court, in response to the disputes and pursuant to the motions of the parties, entered several protective orders relevant to those issues including orders allowing the firm to redact the names and other personal information of its clients, as well as privileged information from documents produced in discovery. Additionally, the circuit court, on occasions, quashed subpoenas issued by Ms. Del Galdo to entities in which Mr. Del Galdo had financial interests.

¶ 6 On July 24, 2018, Mr. Kirsh issued FOIA requests to nine government entities that are represented by the firm seeking records pertaining to invoices, billing, and payments to the firm. The requests listed Mr. Kirsh as the individual seeking the records. However, on several of the

² In adherence with the requirements of Illinois Supreme Court Rule 352(a) (Ill. S. Ct. R. 352(a) (eff. July 1, 2018)), this appeal has been resolved without oral argument upon the entry of a separate written order stating with specificity why no substantial question is presented.

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requests, he also included “Berger Schatz” on the address or “organization” lines, listed his address on the requests as the office address of Berger Schatz, and included his business email address at Berger Schatz. Some of the requests were sent with a cover memorandum from Berger Schatz.

¶ 7 In response, Mr. Del Galdo filed a two-count emergency motion for supervised discovery and for a temporary restraining order and preliminary injunction (emergency motion). Mr. Del Galdo asserted that the FOIA requests were harassing and intended to pressure him into a settlement.

¶ 8 In count I of the emergency motion, Mr. Del Galdo asked the circuit court to begin immediate supervision of discovery pursuant to Supreme Court Rule 201(c) (Ill. S. Ct. R. 201(c) (eff. July 1, 2014)). In count II of the emergency motion, Mr. Del Galdo asked the court to enjoin Ms. Del Galdo, Mr. Kirsh individually, and every employee at Berger Schatz from issuing any FOIA requests with respect to the case. Ms. Del Galdo filed both a response and a motion to strike and dismiss count II of the emergency motion.

¶ 9 The circuit court, on August 14, 2018, held a hearing on the emergency motion. At the hearing, Ms. Del Galdo's counsel, David Levy of Berger Schatz, argued that the circuit court lacked the authority to enter an order directed at Mr. Kirsh individually, in that he was not a party to the litigation.

¶ 10 After the hearing, the circuit court entered an order on August 24, 2018, which directed:
“To the extent that [Ms. Del Galdo], her agents, her attorneys, [Mr. Kirsh], or any member of the Berger Schatz staff receive a response to a FOIA request that relates to either party or entity in which a party holds an ownership interest, [Ms. Del Galdo’s] counsel shall promptly tender a copy to [Mr. Del Galdo].”

¶ 11 Additionally, as to count I of the emergency motion, the court denied Mr. Del Galdo's request to supervise discovery "based on [Ms. Del Galdo's] counsel's representation that he submitted the FOIA requests that are the subject of [Mr. Del Galdo's] [emergency] [m]otion individually [and] not as [Ms. Del Galdo's] counsel or agent." The court also granted Ms. Del Galdo's motion to strike and dismiss count II of the emergency motion, which sought injunctive relief.

¶ 12 On August 31, 2018, Mr. Kirsh filed a "*pro se*" appearance and a motion for substitution of judge as a matter of right under section 2-1001(a)(2) of the Code of Civil Procedure (735 ILCS 5/2-1001(a)(2) (West 2018)), but did not seek leave to file the appearance, or to intervene in the case. In his motion, Mr. Kirsh stated that the August 24, 2018, order was directed against him and had "the effect of naming [him] as a party." He contended that, because the court had not ruled on or expressed an opinion on any substantive matter since that date, he was entitled to a substitution of judge as a matter of right. The court, after a hearing on the motion for substitution, entered an order stating that the August 24, 2018, order had not been entered against Mr. Kirsh individually but, rather, as agent of Ms. Del Galdo and, therefore, the motion for substitution was denied and Mr. Kirsh "individually is dismissed as a party to this matter, as a [*pro se*] [a]pppearance was filed."

¶ 13 Mr. Kirsh has appealed only from the order denying his motion for substitution of judge as a matter of right pursuant to Supreme Court Rule 307(a)(1) (Ill. S. Ct. R. 307(a)(1) (eff. Nov. 1, 2017)).

¶ 14 On appeal, Mr. Kirsh argues that the circuit court erred in denying his motion for substitution of judge as of right and asks that we reverse that order. Mr. Del Galdo argues that this court lacks jurisdiction as the order denying the motion for substitution of judge is an

interlocutory order that cannot be appealed under Rule 307(a)(1) and, in the alternative, counsel for a party is not entitled to a substitution of judge as of right.

¶ 15 We will first consider whether appellate jurisdiction exists, as that question “must be decided prior to addressing the ‘merits’ of an appeal.” *In re Marriage of Nettleton*, 348 Ill. App. 3d 961, 967 (2004) (citing *In re Marriage of Blanchard*, 305 Ill. App. 3d 348, 351 (1999)).

¶ 16 Except as specifically provided by Illinois Supreme Court Rules, this court only has jurisdiction to review final judgments, orders, or decrees. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); *Almgren v. Rush-Presbyterian-St. Luke's Medical Center*, 162 Ill. 2d 205, 210 (1994). “A judgment or order is final for purposes of appeal if it disposes of the rights of the parties, either on the entire case or on some definite and separate part of the controversy, and, if affirmed, the only task remaining for the trial court is to proceed with execution of the judgment.” *Brentine v. DaimlerChrysler Corp.*, 356 Ill. App. 3d 760, 765 (2005).

¶ 17 We have held that an order denying a motion for substitution of judge for cause (*Inland Commercial Property Management, Inc. v. HOB I Holding Corp.*, 2015 IL App (1st) 141051, ¶ 19), or as of right (*Marriage of Nettleton*, 348 Ill. App. 3d at 969), is not a final order (*id.*). Rather, such an order is “an interlocutory order that is appealable on review from a final order.” *Inland Commercial Property Management, Inc.*, 2015 IL App (1st) 141051, ¶ 19.

¶ 18 The parties do not contend that the order denying the motion for substitution of judge was a final order. The dissolution action remains pending. Further, Mr. Kirsh did not seek to intervene in this case, nor did he file any other pleading. The circuit court “dismissed” Mr. Kirsh’s *pro se* appearance finding that the August 24, 2018, order did not apply to him individually. This order “dismissing” Mr. Kirsh’s *pro se* appearance cannot be considered as a final adjudication of any separate claim of Mr. Kirsh in this case.

¶ 19 Mr. Kirsh brings this appeal pursuant to Illinois Supreme Court Rule 307(a)(1), “which allows for the appeal of an interlocutory order that grants, modifies, refuses, dissolves, or refuses to dissolve an injunction.” *Ward v. Hilliard*, 2018 IL App (5th) 180214, ¶ 16. We must determine whether the order that denied Mr. Kirsh’s motion for substitution of judge as of right falls within the meaning of “injunction” and, therefore, would be appealable under Rule 307(a)(1).

¶ 20 The courts of this state interpret the term “injunction” in Rule 307(a)(1) “broadly.” *Skolnick v. Alzheimer & Gray*, 191 Ill. 2d 214, 221 (2000). And, in determining whether an order is an injunction, a court will consider its substance rather than its form. *Id.* Thus, “[a]ctions of the circuit court having the force and effect of injunctions are still appealable even if called something else.” *In re A Minor*, 127 Ill. 2d 247, 260 (1989).

¶ 21 An order of injunction is a “ ‘judicial process operating in personam and requiring [a] person to whom it is directed to do or refrain from doing a particular thing.’ ” *Skolnick*, 191 Ill. 2d at 221 (quoting *A Minor*, 127 Ill. 2d at 261). The authority to grant or deny injunctive relief is traditionally reserved to courts of equity that affects the relationship of the parties in their everyday activities apart from the litigation. *Zitella v. Mike’s Transportation, LLC*, 2018 IL App (2d) 160702, ¶ 14. By contrast, orders such as “subpoenas, discovery orders, and orders relating to the control of the court’s own docket” are ministerial or administrative (*Short Brothers Construction, Inc. v. Korte & Luitjohan Contractors, Inc.*, 356 Ill. App 3d 958, 960 (2005)). These types of orders are considered noninjunctive because they “do not form a part of the power traditionally reserved to courts of equity; rather, they a part of the inherent power possessed by any court to compel the appearance of witnesses, to regulate their testimony, and to control the court’s own docket.’ ” *Zitella*, 2018 IL App (2d) 160702, ¶ 14.

¶ 22 The order denying Mr. Kirsh’s motion for substitution of judge did not direct him or any other person to take or refrain from taking any action. Even when interpreted broadly, the order cannot be viewed as having the force and effect of an injunction.

¶ 23 In his statement of jurisdiction, Mr. Kirsh contends that we have “jurisdiction of this matter pursuant to Illinois Supreme Court Rule 307(a), as held in *Williams by Williams v. Leonard*, 2017 IL App (1st) 172045.” In *Williams*, the defendant, in a refiled suit, moved for substitution of judge as of right. *Id.* ¶ 4. The plaintiff had voluntarily dismissed the original suit and the refiled case was assigned to the same judge who had presided over and had made substantive rulings in the original action. *Id.* ¶¶ 3-4. The defendant filed a notice of appeal pursuant to Rule 307(a)(1) from the order denying the motion for substitution of judge and the trial court stayed the proceedings. *Id.* ¶ 5. The defendant filed a motion in the appellate court seeking a finding that it had jurisdiction and the motion was granted. *Id.* The opinion in the case does not contain the reasoning or analysis as to how the jurisdiction question was decided. Therefore, we are not persuaded that we have jurisdiction based on Mr. Kirsh’s citation to this case.

¶ 24 In his reply brief, Mr. Kirsh relies on *Sarah Bush Lincoln Health Center v. Berlin*, 268 Ill. App. 3d 184 (1994), and *Partipilo v. Partipilo*, 331 Ill. App. 3d 394 (2002), to argue that appellate jurisdiction exists to review his appeal. In *Berlin*, the defendant filed a motion for substitution of judge as a matter of right. *Berlin*, 268 Ill. App. 3d at 185-86. The court denied the motion and later granted the plaintiff’s motion for a preliminary injunction. *Id.* at 186. The defendant appealed the injunctive order under Rule 307(a)(1). *Id.* at 185. The defendant’s challenge to the injunction was that it was entered by a judge for whom another judge should have been substituted. *Id.* at 186. In other words, the defendant was using his appeal of the

injunctive order to challenge the court's denial of the substitution motion. The *Berlin* court held that "the proper scope of the review under Rule 307 is to review any prior error that bears directly upon the question of whether the order on appeal was proper," including whether the substitution motion should have been granted. *Id.* at 187.

¶ 25 As support for its decision to reach the substitution issue, the *Berlin* court noted:

"[T]he rationale of the procedure for substitution of judge is that the party seeking substitution perceives that the determination of the judge who hears the matter is likely to 'affect' the outcome of the matter before the judge. The importance of a proper ruling on a motion for substitution of judge is so great that some courts have held that the wrongful refusal of a proper request for substitution of judge renders all subsequent orders by that judge entered in the case void." *Id.*

¶ 26 In *Partipilo*, the plaintiff appealed under Rule 307, challenging the denial of her petition for injunctive relief and the trial court's prior denial of her motion for substitution of judge as of right. *Partipilo*, 331 Ill. App. 3d at 398. The appellate court held that, pursuant to *Berlin*, it could consider the plaintiff's "claim of error in substitution of judge by way of her appeal seeking injunctive relief." *Id.*

¶ 27 In summary, *Berlin* and *Partipilo* allow for interlocutory review of the denial of a motion for substitution of judge as of right under Rule 307(a)(1) where: (1) the same judge who denied the substitution motion subsequently rules on the motion for injunctive relief; (2) the denial of the substitution motion bears directly on whether the injunctive order was proper, *i.e.*, the denial of the substitution motion affected the outcome of the injunction motion; and (3) the appellant appeals from the injunctive order.

¶ 28 *Berlin* and *Partipilo* are inapposite here. The motion for injunctive relief in this case was made in count II of Mr. Delgado's emergency motion, which was dismissed on August 24, 2018³, *prior* to Mr. Kirsh's August 31 motion for substitution of judge. The denial of the substitution motion on August 31 did not have any direct bearing on the court's earlier August 24 order dismissing count II's claim for injunctive relief. Furthermore, unlike *Berlin* and *Partipilo*, Mr. Kirsh has not appealed from the August 24, 2018, order dismissing the claim for injunctive relief but, instead, he appealed solely from the order denying his motion for substitution of judge. However, the order denying Mr. Kirsh's motion for substitution of judge was not appealable under Rule 307(a)(1), as it was not an order granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction.

¶ 29 For these reasons, we find that this court lacks appellate jurisdiction over Mr. Kirsh's appeal from the denial of his motion for substitution of judge as a matter of right. We, therefore, must dismiss his appeal.

¶ 30 Appeal dismissed.

³ The other portion of the court's August 24, 2018, order requiring the production of any documents received under the FOIA requests appears to have been made under the court's authority to control discovery. As we have stated, discovery orders are not considered injunctive relief which are appealable under Rule 307(a)(1). *Short Brothers*, 356 Ill. App. 3d at 960; *Zitella*, 2018 IL App (2d) 160702, ¶ 14.