2019 IL App (1st) 182267-U

No. 1-18-2267

Fourth Division
June 27, 2019

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 DISTRICT

In re MARRIAGE OF	)	
	)	Appeal from the Circuit Court
MARTHA PADILLA,	)	of Cook County.
	)	
Petitioner and Counterrespondent-Appellee,	)	No. 14 D 6997
	)	
and	)	The Honorable
	)	Mark A. Lopez,
ROBERT KOWALSKI,	)	Judge Presiding.
	)	
Respondent and Counterpetitioner-Appellant.	)	
	)	

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice McBride and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held:* The October 17, 2018, order from which respondent appeals is not an interlocutory order granting an injunction, as respondent claims. Consequently, we lack jurisdiction to consider respondent's claim and his appeal is dismissed for lack of jurisdiction.

¶ 2 The instant appeal arises from a petition for substitution of judge for cause filed by respondent Robert Kowalski in connection with a marital dissolution action. Respondent filed the petition on the same day as a previously-scheduled hearing, and the trial court

refused to consider the petition at the hearing and opposing counsel had not been served with a copy of the petition. Respondent appeals and, for the reasons that follow, we dismiss the appeal for lack of jurisdiction.

¶ 3 BACKGROUND

¶ 4 The instant appeal represents the third time the parties have appeared before this court in connection with the dissolution of their marriage. See *In re Marriage of Padilla*, 2017 IL App (1st) 170215; *In re Marriage of Padilla*, 2018 IL App (1st) 173064-U. Since the record on appeal is sparse, we fill in background details from our prior decisions.

¶ 5 The parties are a married couple who have been engaged in an action for dissolution of their marriage, commencing on September 29, 2014, that has resulted in extensive litigation. On September 7, 2016, petitioner filed a petition for an order of protection pursuant to the Illinois Domestic Violence Act of 1986 (Domestic Violence Act) (750 ILCS 60/101 *et seq.* (West 2014)) against respondent, her husband. On the same day, the trial court entered an emergency *ex parte* order of protection against respondent, which prohibited respondent from entering petitioner's home, granted petitioner physical care and possession of the parties' then-12-year-old child, and denied respondent visitation or any contact with the child. The order was to be in effect until September 28, 2016, at which point the matter was set for a hearing. On September 16, 2016, respondent filed a motion for rehearing on the *ex parte* order and requested the trial court to vacate the emergency order of protection.

¶ 6 Respondent's motion for rehearing was continued several times, as was the emergency order of protection. At the same time, there were a number of other motions before the court, including petitioner's motion to disqualify respondent's counsel and respondent's motion to remove the guardian *ad litem*. Some of the specific chronology of the extensions and

continuances are set forth in detail in our prior opinion (*Padilla*, 2017 IL App (1st) 170215, ¶¶ 3-10); the latest extension in the record set the subject matters for hearing on March 7, 2017. In our prior decision, we considered respondent's interlocutory appeal concerning the delay on hearing respondent's motion for vacating the order of protection.

¶ 7 While the first appeal was pending, on March 13, 2017, respondent filed a petition for substitution of Judge William Boyd for cause pursuant to section 2-1001(a)(3) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1001(a)(3) (West 2016)), claiming that the judge was not fair and impartial.[1] The petition was assigned to another judge and, after a hearing, was denied.

¶ 8 On June 23, 2017, we issued our opinion in respondent's interlocutory appeal concerning the lack of a hearing on respondent's motion to vacate the emergency order of protection. On appeal, we found that the Domestic Violence Act mandated a hearing on the motion for rehearing of the emergency order of protection within 14 days and that the delay in conducting such a hearing violated the express terms of the statute. *Padilla*, 2017 IL App (1st) 170215, ¶ 29. Accordingly, we ordered the trial court to conduct a hearing on respondent's motion for rehearing within 10 days of the entry of our June 23, 2017, opinion. *Padilla*, 2017 IL App (1st) 170215, ¶ 29.

¶ 9 On June 26, 2017, the trial court entered a disposition order extending the emergency order of protection until July 3, 2017, and setting the matter for hearing on that day. The order noted that "[t]his order is entered per the mandate of the Appellate Court issued June

[1] As we noted in one of our prior decisions, between May 27, 2016, and March 15, 2017, respondent filed no fewer than eight petitions for substitution of judge (one as of right and seven for cause), two motions to reconsider the denials of such petitions, one petition to vacate the denial of a petition for substitution of judge, and one motion to transfer venue; during that same time, two judges also recused themselves from the case. *Padilla*, 2018 IL App (1st) 173064-U, ¶ 5.

23, 2017 to set the hearing date on the emergency order of protection within 10 days from the date of entry of the Appellate Court opinion. July 3, 2017 is 10 days from the date of entry of the opinion."

¶ 10 On June 30, 2017, respondent filed another petition for substitution of Judge Boyd for cause, which was assigned to another judge and denied after a hearing. Respondent filed a motion to reconsider, which was also denied.

¶ 11 On July 27, 2017, the parties came before the trial court for a hearing on the order of protection. The hearing was continued and the emergency order of protection was extended pending the resolution of the hearing.

¶ 12 On September 21, 2017, respondent filed a petition to vacate the March 15, 2017, order denying his petition for substitution of Judge Boyd pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2016)), which was denied on October 13, 2017.

¶ 13 The hearing on the order of protection concluded on December 1, 2017, and on the same day, Judge Boyd entered a plenary order of protection, to be in effect until December 1, 2019, which granted petitioner 100% allocation of parental responsibilities and provided that respondent's parenting time "shall occur only in a therapeutic setting." On December 8, 2017, respondent filed a notice of interlocutory appeal, claiming that his petition for substitution of Judge Boyd for cause should have been granted and that the entry of the plenary order of protection was improper. On June 28, 2018, we affirmed the denial of both respondent's petition for substitution of judge and the entry of the plenary order of protection. *Padilla*, 2018 IL App (1st) 173064-U, ¶ 100.

¶ 14 The case remained with Judge Boyd, with the exception of several matters that Judge Boyd transferred to Judge Mark Lopez for hearing. We note that, in his brief on appeal,

respondent complains of a number of court proceedings and orders that were issued. However, the supporting record filed by respondent contains only those orders attached to respondent's petition for substitution of Judge Lopez. Accordingly, we consider only those orders supported by the record on appeal.

¶ 15 One such order was a March 29, 2018, order entered by Judge Boyd, which provided, in relevant part:

> "[Petitioner's] petition for child support and motion for interim fees for the pending appeal concerning the minor child is set at 12:00 noon on April 21, 2018. All parties must appear."

Immediately after this order is an order dated April 4, 2018, by Judge Lopez, which provides, in full:

> "This matter coming before the Court to correct [the] court date identified in the March 29, 2018, [order], no objection noted by any counsel and the Court being advised,
>
> IT IS HEREBY ORDERED:
>
> The Order dated March 29, 2018 is hereby corrected and amended to set all matters reflected in the order for hearing on April 20, 2018 at 12:00 p.m. as the April 21, 2018 date was a scrivener's error and said date is a Saturday. This order does not modify any other terms of the March 29, 2018 order."

¶ 16 On June 22, 2018, Judge Boyd entered an order, which set a status on "transfer to Judge Lopez" for June 27, 2018, at 12 p.m. On June 27, 2018, Judge Boyd entered an order transferring the cause to Judge Lopez for hearing. An order dated that same day by Judge Lopez provides:

"This matter coming on to assign for hearing on SOJ for cause at noon, and the court finds:

(1) That it's 12:15 and no one has appeared

(2) Accordingly this motion is dismissed with prejudice.

Wherefore it is hereby ordered

That [respondent's] motion for SOJ for cause is dismissed with prejudice."[2]

¶ 17 On October 9, 2018,[3] Judge Lopez entered an agreed order concerning two motions to quash subpoenas that had been filed by nonparties. The order provided that both motions to quash were "revived" and set them for status on October 29, 2018, before Judge Lopez; the order also provided that counsel for the nonparties was not required to be present at an October 17 hearing date.

¶ 18 On October 17, 2018, respondent filed an "Amended Petition for Substitution of Judge Mark Lopez for Cause" pursuant to section 2-1001(a)(3) of the Code (735 ILCS 5/2-1001(a)(3) (West 2016)). Respondent claimed that Judge Lopez was prejudiced against respondent in several ways. First, respondent claimed that Judge Lopez had entered a series of *ex parte* orders against him. In support, respondent cited the April 4, 2018, order in which a hearing date was corrected from Saturday, April 21, 2018, to Friday, April 20, 2018. Respondent also cited a number of orders entered by Judge Lopez in an unrelated case in which Jan Kowalski, respondent's sister and appellate counsel, represented one of the parties. With respect to that case, respondent attached a letter filed by Judge Lopez to the Attorney

[2] The record does not indicate when this petition for substitution of judge was filed or the basis for the petition.

[3] The order does not appear to be clearly stamped by the trial court, with the judge's name and the date being difficult to read. However, the number on the stamp matches Judge Lopez's judge number, as evident from prior orders.

Registration and Disciplinary Commission (ARDC) regarding the conduct of Jan Kowalski in relation to that case. The petition also included two appellate briefs filed by Jan Kowalski in connection with that case.

¶ 19 Second, respondent claimed that Judge Lopez "synchronized with Judge William Boyd the contemporaneous jailing of" respondent and respondent's sister. Respondent claimed that on February 23, 2018, respondent and his sister were present in Judge Boyd's courtroom when sheriff's deputies placed them both in custody—respondent for contempt and a body attachment order for respondent's sister that had been entered by Judge Lopez in the unrelated case.

¶ 20 Third, respondent claimed that Judge Lopez erroneously denied a prior petition for substitution of judge for cause. Respondent claimed that Judge Lopez denied the petition even though the parties had been in Judge Boyd's courtroom at the time awaiting a transfer order. Upon the entry of the transfer order, the parties proceeded to Judge Lopez's courtroom to find that the petition for substitution of judge had already been dismissed.

¶ 21 Finally, respondent claimed that Judge Lopez had entered a series of orders against respondent prior to the case being transferred to him. In support, respondent pointed to the October 9, 2018, agreed order, to which respondent claimed he had not actually agreed. Respondent attached an unexecuted copy of the same order to his petition; the only difference between the two orders is that the unexecuted one set the status date as October 17, not October 29, and the unexecuted order provides that the October 17 hearing date was stricken. Respondent also claimed that there were court proceedings on October 11, 2018, at which respondent's counsel was not permitted to speak; the record does not indicate the nature of these proceedings and no report of proceedings was filed by respondent as to these

proceedings. Finally, respondent claimed that there were several other orders entered by Judge Lopez, but the record does not contain copies of these orders.

¶ 22 The parties came before Judge Lopez for a hearing on October 17, 2018, the same day as the filing of the petition for substitution of judge; the report of proceedings indicates that there were two motions set for hearing that day: a motion by petitioner to modify a previous order concerning child-related expenses and a motion by petitioner for sanctions against respondent for filing an inaccurate and misleading financial affidavit. Respondent had also filed a motion to dismiss petitioner's motions, which was also before the court. During the discussion of these motions, respondent's counsel stated that he had filed a petition for substitution of judge. Petitioner's counsel objected, stating that this petition was unnoticed and that they were in the middle of a hearing on a different issue. After respondent's counsel argued further, the trial court stated:

> "Let's suffice to say it's not properly before this court today. It's not motioned up. It's not noticed to the parties. So it's a nonissue as far as I'm concerned. If you want to motion it up in the ordinary course of business with notice to the parties, then maybe I'll take a look at it. It's not before me right now. Here, you can have this back. I'm not interested in it."

¶ 23 The written order entered that day was similar to the trial court's oral comments and provided that the petition for substitution of judge, "purportedly electronically filed on this date, was not properly before the Court and therefore not heard." This appeal follows. We note that petitioner did not file an appellate brief, so we take the appeal on respondent's brief and the record alone. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 24 ANALYSIS

¶ 25 On appeal, respondent argues that the trial court erred by "enjoining hearing" on respondent's petition for substitution of judge for cause while proceeding to hearing on other matters. Respondent's characterization of the October 17, 2018, order as an "injunction" is deliberate—as respondent recognizes, as an interlocutory order, we have appellate jurisdiction to review such an order only in certain circumstances. The question of whether we have jurisdiction over the instant appeal presents a question of law, which we review *de novo*. *In re Marriage of Demaret*, 2012 IL App (1st) 111916, ¶ 25; *In re Marriage of Gutman*, 232 Ill. 2d 145, 150 (2008). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 26 Generally, we have jurisdiction to consider only final judgments. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). There are exceptions to this rule; however, our supreme court has made clear that "[t]he law is well established that unless specifically authorized by the rules of this court, the appellate court has no jurisdiction to review judgments, orders or decrees which are not final." *Department of Central Management Services v. American Federation of State, County & Municipal Employees*, 182 Ill. 2d 234, 238 (1998). An order denying substitution of judge is not a final order and, accordingly, it is not generally immediately appealable. *In re Marriage of Nettleton*, 348 Ill. App. 3d 961, 969 (2004). However, respondent attempts to bypass this result by trying to fit the October 17, 2018, order into the framework of an injunction.

¶ 27 In the case at bar, respondent filed an interlocutory appeal pursuant to Illinois Supreme Court Rule 307(a)(1) (eff. Nov. 1, 2017), which provides for appeal of an interlocutory order

"granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction." This is the second appeal involving a petition for substitution of judge for cause that respondent has filed pursuant to Rule 307(a)(1). As we noted in our prior decision, an 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.' " *In re A Minor*, 127 Ill. 2d 247, 261 (1989) (quoting Black's Law Dictionary 705 (5th ed. 1979)). "To determine what constitutes an appealable injunctive order under Rule 307(a)(1) we look to the substance of the action, not its form. *** Actions 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 at 260.

¶ 28 Here, respondent attempts to argue that the October 17, 2018, is not a denial of his petition for substitution of judge but is, instead, an injunction preventing the *presentation* of the petition for substitution of judge.[4] We do not find this argument persuasive. First, respondent's characterization of the trial court's order is not accurate. The trial court did not enter an order preventing respondent from presenting his petition for substitution of judge. Respondent and his counsel appeared at a previously-scheduled hearing, counsel argued at that hearing and then, in the middle of the hearing, counsel for the first time indicated that respondent had filed a petition for substitution of judge that day.[5] As the petition had not been set for hearing on that day and opposing counsel had not received notice that the

[4] As we noted in our prior decision, the issue of whether the denial of a petition for substitution of judge may be considered in connection with a Rule 307 appeal of a different order is one in which our courts have reached different conclusions. See *Padilla*, 2018 IL App (1st) 173064-U, ¶ 78 (discussing split of authority). However, as the October 17, 2018, order is in no way an injunction, we have no need to consider the effect of that order on the appealability of any denial of the petition for substitution of judge.

[5] The record shows that counsel had issues e-filing, so was not confident as to whether the petition had been successfully filed the prior day. However, the petition included in the record on appeal shows that it was e-filed on October 17, the day of the hearing, at 2:16 p.m.

petition had been filed, the trial court properly noted that it would not be considering the petition at that time. See Ill. S. Ct. R. 104(b) (eff. Jan. 1, 2018) (requiring proof of service showing that all parties have been served with a copy of a motion); Cook County Cir. Ct. R. 2.3 (eff. July 1, 2976) (the movant bears the burden of calling a motion for hearing). The trial court did not prevent respondent from presenting his petition. In fact, in its comments in open court, the trial court made clear that it would consider the petition if the proper procedural steps were followed:

> "Let's suffice to say it's not properly before this court today. It's not motioned up. It's not noticed to the parties. So it's a nonissue as far as I'm concerned. If you want to motion it up in the ordinary course of business with notice to the parties, then maybe I'll take a look at it. It's not before me right now. Here, you can have this back. I'm not interested in it."

Thus, we cannot agree with respondent that the trial court's order somehow prevented respondent from presenting his petition altogether.

¶ 29 We must also note that, after the October 17 hearing, in which the trial court specifically informed respondent that he had not properly presented his petition, the record contains no indication that respondent took the next steps in having his petition considered, namely, providing opposing counsel with notice of the petition and setting it for hearing. Instead, a week later, respondent filed a notice of appeal. Respondent's failure to properly follow the steps to have his petition considered in no way transforms the trial court's October 17, 2018, order into an injunction. See *Martin Brothers Implement Co. v. Diepholz*, 109 Ill. App. 3d 283, 286 (1982) ("[The defendant] failed to take the necessary steps to bring his motions

before the court in a timely manner. He will not now be heard to complain that his motions were ignored, having slept on his rights below.").

¶ 30 We are unpersuaded by respondent's attempt to draw an analogy between his case and that of *Sarah Bush Lincoln Health Center v. Berlin*, 268 Ill. App. 3d 184 (1995). In that case, the court found that the denial of a petition for substitution of judge could be considered in connection with a Rule 307 appeal of the trial court's denial of a preliminary injunction. *Berlin*, 268 Ill. App. 3d at 185. However, in that case, the court made it clear that the appeal was not from an order denying substitution but was an appeal from the entry of the preliminary injunction. *Berlin*, 268 Ill. App. 3d at 186 ("[N]o attempt is made to appeal here from that order denying substitution. Rather, defendant maintains that the order for the second preliminary injunction was in error because the judge who heard the request for that relief should not have heard the motion."). See also *Partipilo v. Partipilo*, 331 Ill. App. 3d 394, 398 (2002) (following *Berlin* to find jurisdiction over a denial of substitution of judge in connection with a Rule 307 appeal from the denial of a preliminary injunction). In the case at bar, by contrast, there is no injunction from which respondent is appealing. Thus, *Berlin* provides no support for his argument. Accordingly, we find no basis for appellate jurisdiction over this interlocutory order and must therefore dismiss the appeal for lack of jurisdiction.

¶ 31 CONCLUSION

¶ 32 The October 17, 2018, order from which respondent appeals is not an interlocutory order granting an injunction, as respondent claims. Consequently, Rule 307 does not vest us with jurisdiction to consider respondent's claims on appeal and the appeal must be dismissed for lack of jurisdiction.

¶ 33 Appeal dismissed for lack of jurisdiction.