2020 IL App (1st) 190393-U

SIXTH DIVISION
February 28, 2020

No. 1-19-0393

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CITY OF CHICAGO, a municipal corporation, Plaintiff-Appellee, v. JAY SHACHTER a/k/a JAY F. SHACHTER, and UNKNOWN OWNERS and NON-RECORD CLAIMANTS, Defendants (Jay Shachter a/k/a Jay F. Shachter, Defendant-Appellant).	)	Appeal from the Circuit Court of Cook County. No. 17 M1 400536 Honorable Patrice Ball-Reed, Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Motion for substitution of judge as of right should have been granted; subsequent orders vacated in part and cause remanded with directions.

¶ 2 Defendant, Jay Shachter, appeals *pro se* from an order that entered judgment for plaintiff, the City of Chicago, related to violations of the Chicago Municipal Code. On appeal, defendant contends

that the trial court improperly denied his motion for substitution of judge as of right. We agree, and so we vacate the orders entered after defendant filed his motion for substitution of judge as of right and remand with directions to grant the motion.

¶ 3 As background, on March 9, 2017, the City filed a complaint stating that conditions detrimental to the health and safety of the public existed at 6424 North Whipple Street in Chicago, which was a property owned by defendant. As relief, the City in part sought civil penalties against defendant, a finding that the property was a statutory public nuisance, authorization to clean up the property, and a lien on the property for the corresponding costs.

¶ 4 On April 28, 2017, the City filed an affidavit of service that indicated that defendant was served via substitute service at 6424 North Whipple on April 6, 2017. The recipient was "[a] male member of household who identified himself as Brian for Jay Shachter." On May 19, 2017, the City filed a motion to default defendant because defendant had not filed an appearance, answer, or otherwise pled. On June 1, 2017, the court entered an order authorizing the City to enter the property and remove all junk, debris, and/or other material that was hazardous or a nuisance and remove all foliage that was a safety hazard or nuisance.

¶ 5 On June 21, 2017, defendant, acting *pro se*, made his first filing, which was a motion to quash service. Defendant stated that no one in his household matched the description of the person who received substitute service, but there was "an elderly schizophrenic" in the community named Brian Black. According to defendant, Black was not capable of being informed of the contents of the summons and so could not receive substitute service. Defendant also stated that he had been unable to appear in court for religious reasons on June 1, when the default order was entered. Still, defendant declined to file a motion to vacate the default judgment because he believed he would subject himself to the court's jurisdiction if he requested anything other than to quash service. The

City asserted in response that defendant's statements about Black were cursory and self-serving. On July 6, 2017, the court denied defendant's motion to quash service of process and included a finding that the ruling was appealable under Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016). The matter was also continued for trial.

¶ 6 Defendant filed a notice of appeal (the 2017 appeal) and a motion to stay the trial court proceedings. Defendant was concerned that he would waive his objection to service if he answered the complaint or participated in a trial. Yet, if defendant pursued his appeal "by refraining from doing the things that would render it moot," then the trial court would "surely enter a default judgment against me." Defendant added that the trial judge "has already shown that she has an appetite for entering default [judgments] against me," having entered a default order against defendant in *ex parte* proceedings on June 1, 2017. In response, the City asserted that defendant could not appeal the denial of his motion to quash despite the Rule 304(a) language in the court's order. The court ultimately denied defendant's motion to stay and found that it should not have added Rule 304(a) language. This court dismissed the 2017 appeal for want of prosecution on April 9, 2018.

¶ 7 On August 3, 2017, defendant filed a motion to reconsider his motion to quash service, stating that witness testimony was now available. Defendant attached affidavits from two people: Rabbi Shlomo Tenenbaum, who worked for a social service organization and had known Black for over 30 years, and Bob Lee, who had known Black for 18 months and interacted with him daily.

¶ 8 On August 10, 2017, the court entered an order that addressed various administrative matters and included the following paragraph:

> "Judge's commentary: Her decision in the July 6, 2017, hearing, denying Defendant's motion to quash service of process, was because she did not find Defendant credible [and] his evidence was self-serving."

¶ 9 Defendant attempted to subpoena the process server. The City was granted leave to file a motion to quash that subpoena, but the City's motion is not in the record. Defendant filed a response, which indicated that the City had noted that the copy of the subpoena that defendant gave to opposing counsel was not signed. Defendant explained that the subpoena was not signed because he had not yet served a copy of the subpoena on the witness. Defendant added, "This will come as a great surprise to the Honorable Court, who has told me that my testimony is not credible, but I do not sign things unless they are true, and I do not sign things *until* they are true." (Emphasis in original.)

¶ 10 Defendant also filed a reply in support of his motion to reconsider, although the City's response to the motion to reconsider is not in the record. Nonetheless, in his reply, defendant responded to an argument about why his witnesses were unavailable to testify for his initial motion to quash, stating, "We could say that I had no reasonable expectation that the Court was going to call me a liar and say that my own testimony was insufficient, even when there was zero evidence offered in opposition to it." Defendant also stated that he had to quickly file his motion to quash service, before the City carried out the June 1 default order and caused irreparable damage to his land. Defendant asserted that the court's June 1 order, which authorized the City to enter his property, indicated that the court was "disposed to enter Orders that give the City even more relief than is justified by the allegations in the City's Complaint." Defendant further noted that he was not provided with a photograph of Black until the hearing on the motion to quash and he could not obtain affidavits from witnesses until he had the photograph. Although defendant was fairly certain

of Black's identity, because "the Court thinks that *I* am a liar", defendant had to be able to show the photograph to his witnesses so they could confirm Black's identity. (Emphasis in original.)

¶ 11 At the hearing on defendant's motion to reconsider, Rabbi Shlomo Tenenbaum used a photograph to identify the person served as Black, whom, again, Rabbi Tenenbaum had known for over 30 years. Rabbi Tenenbaum stated that Black lived in the lower unit of defendant's building, was not able to manage his own affairs well, and had a full-time caretaker. Rabbi Tenenbaum described Black as "sort of simplistic," and he did not think that Black had sufficient capacity to understand the nature of a summons and complaint. Defendant's second witness, Bob Lee, lived in the lower unit of defendant's building. Lee had never asked Black to do any more complex tasks than close a door because he "[figured] it just was *** not going to happen."

¶ 12 The court granted defendant's motion to reconsider, stating in an oral ruling that per the testimony, Black had "some mental issues that may question whether he had the ability to understand the summons and complaint." The court quashed the service on defendant and the underlying orders were vacated. Defendant was served personally on September 11, 2017.

¶ 13 On September 18, 2017, defendant filed a motion for substitution of judge as of right. The City asserted in response that the trial court had made substantial rulings and defendant had "tested the waters" and formed an opinion about the court's disposition toward him. The City highlighted statements that defendant had made in various filings. In reply, defendant asserted that no decisions had been made that had to do with matters to be determined at trial. Defendant further contended that he filed his motion for substitution of judge at the earliest possible moment—as soon as he was served. Defendant stated that he could not have filed the motion earlier without losing his motion to quash service. According to defendant, the applicable statute provided that a motion to quash service had to be filed before any other motion, other than a motion for extension of time to

answer or otherwise appear. Defendant also maintained that he had a right to one substitution of judge without cause even if he had an opinion about the current judge. Defendant stated that he could have formed that opinion during the adjudication of his motion to quash service, or from a 2010 case that the trial judge presided over, in which she improperly allowed service by publication without an affidavit or sworn testimony.

¶ 14 At the hearing on defendant's motion, an attorney appeared for defendant, who was himself unable to attend. The attorney reported that defendant asked to stand on the briefs and requested that the attorney tender a portion of a transcript from unrelated 2010 proceedings that occurred before the trial judge. After the City's argument, the trial court denied defendant's motion for substitution of judge. In an oral ruling, the trial court stated that defendant had "tested the waters" by making several statements about his feelings toward the trial judge and the case. Defendant had also questioned the trial judge's legal acumen and integrity. Further, the trial court had admonished defendant to refrain from making personal comments in his pleadings. The trial court did not recall the 2010 case that defendant referred to, but bringing up that case indicated that defendant "[had] a standing commentary about what I had done or not done."

¶ 15 Pursuant to a rule to show cause, on May 9, 2018, defendant was held in indirect civil contempt and ordered to pay a fine until he completed an inspection of the property. On May 16, 2018, defendant filed a notice of appeal (the 2018 appeal), stating that he was appealing the denial of his motion for substitution of judge and the finding of indirect civil contempt and fine. The trial court later vacated the contempt finding. Pursuant to a motion filed by the City, this court dismissed the 2018 appeal on November 19, 2018.

¶ 16 On February 20, 2019, the court entered a written order that entered judgment for the City in the amount of $13,700. Defendant was enjoined and restrained from renting, using, leasing and

occupying the property's basement until he complied with the Chicago Municipal Code. The court noted that defendant had failed to appear after having notice. We now review the merits of defendant's appeal from that order.

¶ 17 On appeal, defendant contends that the trial court should have granted his motion for substitution of judge as of right. Defendant argues that the "test the waters" doctrine is no longer valid. Regardless, defendant maintains that he did not "test the waters" because he did not intentionally elicit any opinions from the trial judge about a matter relating to the merits of the case or any other matter, except for matters necessary to adjudicate his motion to quash service. Defendant further asserts that he filed his motion as soon as the trial judge acquired *in personam* jurisdiction over him, rather than waiting for her to express an opinion about how she was likely to rule. Defendant also notes that the trial judge ultimately ruled in his favor on the motion to quash service, and so did not indicate that she would eventually rule against him.

¶ 18 A party in a civil action has a right to one substitution of judge without cause. 735 ILCS 5/2-1001(a)(2) (West 2016). A party's exercise of this right must be timely (*id*.)—a requirement intended "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 filed (1) at the earliest practical moment before commencement of trial or hearing and (2) before the trial judge considering the motion rules on any 'substantial issue' in the case. *Id*. A ruling is substantial if it directly relates to the merits of the case. *Williams by Williams v. Leonard*, 2017 IL App (1st) 172045, ¶ 11. Even if the judge did not make a substantial ruling, a motion for substitution of judge may be denied if the litigant "had an opportunity to test the waters and form an opinion as to the court's disposition of an issue." (Internal quotation marks

omitted.) *Ramos v. Kewanee Hospital*, 2013 IL App (3d) 120001, ¶ 88. We review *de novo* the denial of a motion for substitution of judge as of right, and our review should lean toward favoring, rather than defeating, a substitution of judge. *Williams by Williams*, 2017 IL App (1st) 172045, ¶ 9.

¶ 19 The City does not maintain on appeal that the trial judge issued a substantial ruling before defendant filed his motion for substitution of judge. Thus, our analysis is limited to whether defendant "tested the waters" and whether defendant filed his motion at the earliest practical moment before the start of trial or hearing.

¶ 20 Initially, we reject defendant's assertion that the "testing the waters" doctrine is invalid. The doctrine remains valid in the First District. See *In re Petition to Annex Certain Territory to Village of Lemont*, 2017 IL App (1st) 170941, ¶ 13; *Colagrossi v. Royal Bank of Scotland*, 2016 IL App (1st) 142216, ¶ 36. The Fourth District has found otherwise (*Schnepf v. Schnepf*, 2013 IL App (4th) 121142), but we are "not bound to follow the decision of another district when the district has made a determination of its own contrary to that of another district or there is a split of authority among districts" (*Deutsche Bank National Trust Co. v. Iordanov*, 2016 IL App (1st) 152656, ¶ 44).

¶ 21 As for whether defendant actually "tested the waters" below, defendant made several pointed comments in his filings. See *In re Estate of Hoellen*, 367 Ill. App. 3d 240, 247 (2006) (counsel's statement that the court "showed a predisposition to ruling in favor of the Public Guardian's Office" when the court granted a motion compelling production of documents showed that counsel had tested the waters). These comments included that the trial judge had "shown that she has an appetite for entering default [judgments] against me," recalling that the judge told defendant he was not credible, stating that the court called him a liar, and asserting that the trial

court was "disposed to enter Orders that give the City even more relief than is justified by the allegations in the City's Complaint."

¶ 22 Yet, context leads us to a different outcome than could be suggested by the statements standing alone. Courts may recognize the circumstances surrounding a motion for substitution of judge and "inquire into the good faith of the motion." *In re Estate of Wilson*, 238 Ill. 2d 519, 557 (2010). Defendant suggests that before he was properly under the court's jurisdiction, he determined that he wanted a substitution of judge. The record indicates that defendant was not testing the waters, but was instead operating under the belief that, until his motion to quash was resolved, he could not file a motion for substitution of judge. Defendant prioritized the service of process issue and treaded carefully to maintain his objection. When he challenged service, he was careful not to forfeit proper service by submitting to the jurisdiction of the court. As early as his first filing, defendant stated his belief that he would subject himself to the court's jurisdiction if he requested anything other than to quash service. In a motion to stay, defendant raised the concern that he would waive his objection to service if he answered the complaint or participated in a trial. After he won his motion to quash and a week after he was personally served, defendant filed his substitution of judge as of right. Defendant explained that under his reading of the governing statute, a motion to quash had to be filed before any other motion.

¶ 23 The applicable statute allows, but does not require, a motion to quash service to be filed simultaneously with a motion for substitution of judge. Objections to a court's personal jurisdiction over a party are made under section 2-301 of the Code of Civil Procedure (Code) (735 ILCS 5/2-301 (West 2016)). Section 2-301(a) of the Code states that a party may object to the court's jurisdiction over the party's person on the grounds of insufficient service of process by filing a motion to quash service of process. 735 ILCS 5/2-301(a) (West 2016). That is precisely what

defendant did. As for why he filed that motion first, defendant cited section 2-301(a-5) of the Code, which stated, "[i]f the objecting party files a responsive pleading or a motion (other than a motion for an extension of time to answer or otherwise appear) prior to the filing of a motion in compliance with subsection (a), that party waives all objections to the court's jurisdiction over the party's person." 735 ILCS 5/2-301(a-5) (West 2016).[1] Defendant was apparently not aware that section 2-301(a) nonetheless allows a party to file a motion to quash simultaneously with some other motion without forfeiting the jurisdictional challenge. 735 ILCS 5/2-301(a) (West 2016) (motion to quash service "may be made singly or included with others in a combined motion"); *OneWest Bank, FSB v. Topor*, 2013 IL App (1st) 120010, ¶ 11; *Ryburn v. People*, 349 Ill. App. 3d 990, 993 (2004). That a motion to quash service could be combined with a motion for substitution of judge is not explicitly spelled out. Defendant's filings indicate that he wanted to file the motion for substitution of judge earlier, but he thought he could not. And, he eventually filed his motion for substitution of judge only a week after he was served, consistent with his stated belief that he had to resolve the service of process issue before he could do anything else. We note that the trial court quashed service on defendant on August 17, 2017, and he was properly served on September 11, 2017. Thereafter, on September 18, 2017, he filed his motion for substitution of judge. Defendant's course of action was not prohibited by the Code—a motion to quash service "may" be combined with another motion. See *In re Estate of Ahmed*, 322 Ill. App. 3d 741, 746 (2001) (as a rule of statutory construction, the word "may" is permissive, as opposed to mandatory).

¶ 24 Defendant's comments about the judge were ill-advised and we caution defendant to refrain from making such inflammatory remarks in the future. Still, we will not penalize defendant for trying to follow what he thought was the only correct procedure. The rule against judge

[1] Section 2-301 has since been amended (Pub. Act. 100-291 (eff. Jan. 1, 2018)), but we use the version that was in force during the proceedings below.

shopping restrains litigants from seeking substitution after discovering the judge's view on a contested issue in their case. *Colagrossi,* 2016 IL App (1st) 142216, ¶ 39. Defendant did not seek a new judge because he learned how the judge would rule in his case. The record indicates that defendant would have sought a new judge earlier if he had known that was possible. Defendant filed his motion for substitution of judge at what he believed was the earliest practicable time. Under these unique circumstances, we find that defendant's motion for substitution of judge as of right should have been granted.

¶ 25 Any order entered after a motion for substitution of judge should have been granted is void. *Rodisch v. Commacho-Esparza*, 309 Ill. App. 3d 346, 351-52 (1999) (citing *In re Dominque F.*, 145 Ill. 2d 311, 324 (1991)). Thus, all orders entered in this case after defendant filed his motion for substitution of judge, including the judgment against defendant, are void, and we vacate those orders accordingly and remand with directions to grant defendant's motion for substitution of judge as of right under section 2-1001(a)(2) of the Code. 735 ILCS 5/2-1001(a)(2) (West 2016).

¶ 26 Vacated in part and remanded with directions.