2013 IL App (1st) 120111-U

SIXTH DIVISION
November 15, 2013

No. 1-12-0111

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ONEWEST BANK, FSB, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County.
v.	)	No. 07 L 29130
CARL M. WALSH and DIANE WALSH, Defendants-Appellants.	)	Honorable Mathias W. Delort, Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Reyes concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial judge did not have a statutory or constitutional duty to recuse himself after reporting a defendant to the Illinois Attorney Registration and Disciplinary Commission because attorney disciplinary proceedings are conducted separately from the judicial proceedings in which the attorney misconduct was alleged to have occurred and the judge had an ethical duty to report attorney misconduct.

¶ 2 Defendants Carl and Diane Walsh (defendants)[1] appeal from the trial court's order denying a motion to vacate a judicial sale in a foreclosure action. On appeal, defendants contend

[1]The complaint also named Wells Fargo Bank, N.A., Unknown Owners, and Non-record Claimants as defendants, however, only Carl and Diane are parties to this appeal.

that the judge had a statutory and constitutional duty to recuse himself from the case after reporting Carl to the Illinois Attorney Registration and Disciplinary Commission (ARDC). We affirm.

¶ 3 In March 2008, plaintiff Indymac Bank, FSB.[2] obtained a default judgment of foreclosure and sale against defendants. Subsequently, a judicial sale of the property at 8 Calle View Drive in LaGrange was scheduled for June 17, 2008. Attorney Kelly Keating then filed an appearance on behalf of defendants and filed an emergency motion for a stay of judicial sale. The court granted the motion, and stayed the sale until July. The court later denied a second emergency motion for a stay. Defendants then filed an emergency motion and an amended emergency motion to vacate the judgment due to a lack of jurisdiction alleging, *inter alia*, that they had not been served in the instant action and that attorney Keating was not their attorney. Although an evidentiary hearing was held on September 22, 2009, the record does not contain a transcript of the hearing.

¶ 4 The court issued a memorandum opinion and order on September 28, 2009, granting Diane's motion to quash, granting plaintiff leave to serve the complaint on Diane, and vacating the previous order of foreclosure and sale as to Diane. Although a copy of this order is not included in the record, it is included in the appellant's brief and the parties agree that the order indicated that the order would be forwarded to the ARDC, pursuant to *In re Himmel*, 125 Ill. 2d 531 (1988), due to Carl's status as an attorney registered in Illinois and his alleged admission during the evidentiary hearing that he had forged Diane's signature on a document submitted to the court.

[2]The record indicates that during the pendency of the litigation the trial court granted OneWest Bank, FSB leave to substitute as plaintiff.

¶ 5 Plaintiff subsequently served Diane, and in March 2011, the trial court entered a judgment of foreclosure and sale. Ultimately, the property was sold and the trial court entered an order approving the sale. Carl then filed a motion to vacate the order approving the sale.

¶ 6 At the hearing on the motion, defendants' new counsel argued, *inter alia,* that plaintiff's counsel had not responded to a settlement offer. The court responded that this:

> "entire line of argument is almost hilariously unreasonable because the history of this case is that your own client *** falsified his signature, his wife's signature on documents and admitted to [the court] on the witness stand under oath that they were both *** licensed, were attorneys. Okay. So I have very little sympathy for their plight."

¶ 7 Counsel replied that he took offense to the term "hilariously presented" as the motion to vacate the sale was a valid motion. The court replied that it did not characterize the motion as such. Counsel responded that the motion was

> "not hilariously ridiculous ***. It's valid, and will be granted or will be appealed and reversed on appeal, but I also want to point out that [the court] did file an ARDC complaint against my client, and I was going to suggest to you that that would be grounds for recusal, and I was going to ask you to recuse yourself from this case.
>
> You've indicated yourself that you do not have sympathy towards this client. *** I would suggest to you and I have all the respect for you in the world. *** [B]ut I think in this case you need to recuse yourself your Honor."

The court responded that defendants had not requested a recusal during the prior three years and that it was obligated, pursuant to ARDC rules, to report Carl. Ultimately, the court denied the motion to vacate.

¶ 8 On appeal, defendants contend that the trial judge had a statutory and constitutional obligation to recuse himself from the case after reporting Carl to the ARDC because the judge became a "material complaining witness" and a party in an ancillary proceeding by forwarding a copy of the court's September 2009 order to the ARDC. Specifically, defendants contend that the court erred when it denied their request for recusal, because the trial judge became a party to the action when he reported Carl to the ARDC. Defendants contend that section 2-1001(a)(1) (735 ILCS 5/2-1001(a)(1) (West 2010)) required the recusal.[3] Although defendants also argue that the trial judge should have been removed for cause, they admit that they never filed such a petition. See 735 ILCS 5/2-1001(a)(3) (West 2010). Defendants finally contend that they were denied due process because the trial judge's act of reporting Carl to the ARDC evidenced the judge's bias against them.

¶ 9 Plaintiff responds that defendants have waived these arguments on appeal because they failed to raise them before the trial court. See *Haudrich v. Howmedica, Inc.,* 169 Ill. 2d 525, 536 (1996) (issues not raised before the trial court may not be raised for the first time on appeal). Plaintiff further argues although defendants raised the issue of recusal before the trial court, defendants never specifically moved either that the judge recuse himself or petition for substitution of judge.

¶ 10 Here, a careful review of the record reveals that although defendants never actually petitioned the court for a substitution of judge defendants' counsel did raise the issue of recusal by stating that he was "going to suggest" to the court that filing a complaint with the ARDC

[3]This section actually applies to substitution of judge motions.

would be grounds for recusal, that he was "going to ask" the judge to recuse himself, and that counsel thought that the judge needed to recuse himself. Because counsel did raise the issue of recusal, albeit as a suggestion rather than a request, this court rejects plaintiff's argument that defendants waived the issue of recusal on appeal and will address the merits of defendants' arguments.

¶ 11 The substitution of a judge in a civil case is governed solely by statute. See 735 ILCS 5/2-1001(a) (West 2010). Section 2-1001(a)(1) of the Code outlines the situations where a substitution of judge may be awarded by the court with or without the application of either party based upon the "involvement" of a judge in a proceeding. 735 ILCS 5/2-1001(a)(1) (West 2010). These specific circumstances include when "the judge is a party or interested in the action, or his or her testimony is material to either of the parties to the action, or he or she is related to or has been counsel for any party in regard to the matter in controversy." 735 ILCS 5/2-1001(a)(1) (West 2010).

¶ 12 Here, defendants argue that the fact that the trial judge reported Carl to the ARDC rendered the judge a party to the instant action and required his recusal pursuant to section 2-1001(a)(1) of the Code. We disagree.

¶ 13 Although a trial judge, as an attorney, has an independent responsibility to report attorney misconduct to the ARDC (*In re Himmel,* 125 Ill. 2d at 541), disciplinary proceedings and sanctions for unprofessional conduct rest exclusively within the province of our supreme court (*In re Harris,* 93 Ill. 2d 285, 291 (1982)). The ARDC acts as our supreme court's agent in administering the disciplinary functions that have been delegated to it. *In re Harris,* 93 Ill. 2d at 291-92. Attorney disciplinary proceedings are conducted by the ARDC completely separate and apart from the judicial proceedings in which the attorney misconduct was alleged to have occurred. *Reed Yates Farms, Inc. v. Yates*, 172 Ill. App. 3d 519, 530 (1980). Because any

proceeding by the ARDC regarding Carl would be separate from the instant proceeding, the trial judge was not rendered a party or interested in the instant proceeding as outlined in section 2-1001(a)(1) simply because he followed his ethical duty to report attorney misconduct to the ARDC. See 735 ILCS 5/2-1001(a)(1) (West 2010). Accordingly, defendants' argument that section 5/2-1001(a) required recusal must fail.

¶ 14 Defendants also argue, relying on *Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868 (2009), that the failure of the trial judge to recuse himself denied them due process when the trial judge showed his bias and hostility toward Carl by reporting Carl to the ARDC and continuing to refer to Carl's alleged forgery throughout the proceedings.

¶ 15 Due process requires a fair and impartial hearing before a fair and impartial tribunal. *In re Murchison,* 349 U.S. 133, 136 (1955). However, the conduct or remarks of a trial judge during the course of a trial that are critical or disapproving do not ordinarily support a claim for bias. *In re Marriage of O'Brien,* 2011 IL 109039, ¶ 31. A claim for recusal based on constitutional bias uses an objective test to determine whether the average judge in the challenged judge's position is likely to be neutral or whether there is an unconstitutional potential for bias. *Caperton,* 556 U.S. at 881. The Supreme Court has noted that the recusal of a judge pursuant to the Constitution is limited to an extraordinary situation where the probability of actual bias reaches an unconstitutional level. *Caperton,* 556 U.S. at 886-88.

¶ 16 A trial judge is presumed to be impartial and the party asserting bias bears the burden of overcoming that presumption by presenting evidence of a personal bias stemming from an extrajudicial source and evidence of prejudicial trial conduct. *In re Estate of Hoellen,* 367 Ill. App. 3d 240, 248 (2006). A trial judge's previous rulings are almost never a valid basis for a claim of judicial bias. *In re Estate of Wilson,* 238 Ill. 2d 519, 554 (2010). Our supreme court has held that opinions formed by a judge on the basis of the facts introduced or events occurring

during the course of the proceedings, or of prior proceedings, do not constitute a basis for a bias motion. *In re Estate of Wilson,* 238 Ill. 2d at 554. Judicial remarks that are critical, disapproving of, or even hostile to, counsel, the parties, or their cases, do not ordinarily support a bias or partiality challenge unless they evidence an opinion that derives from an extrajudicial source or reveal such a high degree of favoritism or antagonism that a fair judgment is rendered impossible. *In re Estate of Wilson,* 238 Ill. 2d at 554. A party's contention that his due process rights were violated raises a question of law which this court reviews *de novo*. *In re Todd K.*, 371 Ill. App. 3d 539, 541 (2007).

¶ 17 The parties agree that the September 2009 order stated that Carl had forged Diane's signature on a document submitted to the court and that the court planned to forward a copy of the order to the ARDC. The record also reveals that the trial court referred to this finding later in the proceedings.

¶ 18 This court rejects defendants' argument that the trial judge exhibited bias and hostility when he reported Carl to the ARDC and referred to the alleged forgery at a later point in the proceedings as the trial judge had an independent duty to report attorney misconduct to the ARDC (*In re Himmel,* 125 Ill. 2d at 541), and the judge's conclusion that Carl forged Diane's signature was based upon facts introduced during the course of the proceedings (*In re Estate of Wilson*, 238 Ill. 2d at 554). Although the trial judge's comments regarding Carl were critical, they cannot support a claim for bias (*In re Marriage of O'Brien*, 2011 IL 109039, ¶ 31), because they were based upon facts introduced at the evidentiary hearing (*In re Estate of Wilson*, 238 Ill. 2d at 554). Ultimately, defendants have failed to overcome the presumption of impartiality (*In re Estate of Hoellen*, 367 Ill. App. 3d at 248), because the trial judge acted based upon his ethical duty to report attorney misconduct and facts discovered during the course of the proceeding, and, consequently, their claim that they were denied an impartial hearing before an impartial tribunal

must fail (*In re Murchison,* 349 U.S. at 136). See also *Caperton,* 556 U.S. at 886-87 (noting that the probability of actual bias rises to an unconstitutional level only in extraordinary situations with "extreme facts," such as a temporal relationship between a party's campaign contributions to a justice, that justice's election, and the pendency of a case involving that party).

¶ 19 Accordingly, for the reasons stated above, the order of the circuit court of Cook County is affirmed.

¶ 20 Affirmed.