

SIXTH DIVISION  
September 25, 2015

No. 1-15-0713

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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CALVARY PORTFOLIO SERVICES, LLC,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 12 M1 130357
	)	
YVONNE A. OWUSUMENSAH, a/k/a Yvonne King,	)	Honorable
	)	Israel A. Desierto,
Defendant-Appellee.	)	Judge Presiding.

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

**ORDER**

¶ 1 *Held:* The denial of appellant's motion for substitution of judge as of right, and the denial of its posttrial motion to reconsider that decision, are both affirmed where: (1) appellant failed to provide a report of proceedings for the trial court's original ruling on the substitution motion or the subsequent trial proceedings; and (2) the trial court's rulings were premised upon credibility determinations.

¶ 2 Plaintiff-appellant, Calvary Portfolio Services, LLC, filed the instant suit against defendant-appellee, Yvonne A. Owusumensah, a/k/a Yvonne King, seeking to recover for defendant's alleged breach of contract. Prior to trial, the trial court denied plaintiff's motion for substitution of judge as of right. Following a bench trial, judgment was entered in favor of defendant and plaintiff filed a posttrial motion to reconsider the denial of its motion for substitution of judge. That motion was denied, and plaintiff has now appealed from the denial of

its motion for substitution of judge as of right and the denial of its posttrial motion to reconsider that decision. For the reasons that follow, we affirm.

¶ 3

### I. BACKGROUND

¶ 4 Plaintiff filed its complaint in this matter on May 18, 2012. Therein, plaintiff alleged that defendant had opened a "credit card or line of credit account" in 2007. Defendant, thereafter, defaulted on that account, the account was sold, and it was ultimately assigned to plaintiff. Plaintiff's complaint sought to recover \$13,978.06 from defendant, plus court costs, for her alleged breach of contract. No jury demand was filed.

¶ 5 This matter then proceeded through a number of pretrial proceedings. These included the entry of a default judgment against defendant, the granting of defendant's motion to vacate that default judgment, the voluntary dismissal of this suit, and the granting of plaintiff's motion to vacate that dismissal. The matter was ultimately scheduled for trial on November 18, 2014.

¶ 6 On the day of trial, plaintiff presented a written motion for substitution of judge as of right, filed pursuant to section 2-1001(a)(2) of the Code of Civil Procedure (Code). 735 ILCS 5/2-1001(a)(2) (West 2014). The motion was presented before Judge Israel A. Desierto, who was assigned to preside over the trial, but had not previously been involved in this matter, or ruled on any of the pretrial issues. The record does not include a report of proceedings for November 18, 2014.

¶ 7 However, a written order entered that same day reflects that the motion for substitution of judge was denied. It is also clear from that order that both defendant and Judge Desierto questioned plaintiff's motives in filing this motion on the day the matter was scheduled for trial. According to the written order denying plaintiff's motion, defendant complained she had not received proper notice of the motion, noted that plaintiff's counsel had filed a motion to

substitute a judge in another matter the day before, indicated that she was ready for trial, and asked that plaintiff's motion be denied in fairness to her. That same written order further reflects that the trial court found the arguments of plaintiff's counsel in support of its motion were "incredible," noted that plaintiff's counsel had three week's advance notice that Judge Desierto would be presiding over the trial, and concluded that plaintiff was abusing its right to request a substitution of judge as of right.

¶ 8 Plaintiff's motion having been denied, the matter proceeded immediately to a bench trial. The record does not include a report of proceedings for the trial, but the record reflects that a judgment was entered in favor of defendant.

¶ 9 On December 4, 2014, plaintiff filed a posttrial motion to reconsider the denial of its motion for substitution of judge. Therein, plaintiff contended that its motion for substitution of judge as of right had been improperly denied where: (1) it was presented prior to trial and before Judge Desierto had ruled on any issue in the case; (2) plaintiff did not know Judge Desierto would be presiding over the trial until the day trial was to begin; (3) plaintiff was prepared for trial on that day, as evidenced by the fact that a witness had flown in from New York and plaintiff's counsel had brought nearly 4,000 documents and 35 pre-marked exhibits to court on the day of trial; and (4) the motion for substitution was not brought in order to delay or avoid trial. An affidavit attesting to these assertions was completed by plaintiff's counsel and was attached to the motion to reconsider.

¶ 10 The matter was set for hearing on December 16, 2014, at which time the trial court allowed the parties time to file briefs with respect to plaintiff's posttrial motion and the matter was continued for hearing on February 10, 2015. At the conclusion of that hearing, plaintiff's motion to reconsider was denied. In both the transcript of that hearing, which is included in the

record, and a written order entered the same day, the trial court reiterated its opinion that the motion for substitution of judge was brought in order to delay or avoid trial. The trial court further indicated that this conclusion was bolstered by the actions of plaintiff's counsel at trial, which included: (1) the fact that plaintiff's counsel improperly communicated with and suggested answers to witnesses, even after being admonished not to do so; (2) plaintiff's counsel communicated with a witness during a recess; and (3) plaintiff's counsel was ill-prepared to lay a foundation for certain evidence at trial. Following the denial of its motion to reconsider, plaintiff filed a timely appeal.

¶ 11

## II. ANALYSIS

¶ 12 On appeal, plaintiff contends that the trial court improperly denied both its motion for substitution of judge and its posttrial motion to reconsider that decision. We disagree.

¶ 13 Plaintiff's motion was brought pursuant to section 2-1001(a)(2) of the Code, which provides:

"(a) A substitution of judge in any civil action may be had in the following situations:

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(2) Substitution as of right. When a party timely exercises his or her right to a substitution without cause as provided in this paragraph (2).

(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." 735 ILCS 5/2-1001(a)(2) (West 2014).

¶ 14 Thus, "[u]nder section 2-1001(a)(2) of the Code, a litigant is allowed one substitution of judge without cause as of right. [Citation.] The right to substitution of judge is absolute when properly made, and the circuit court has no discretion to deny the motion." *Cincinnati Insurance Co. v. Chapman*, 2012 IL App (1st) 111792, ¶ 23. Furthermore, " '[t]he statute's provisions are to be liberally construed in order to effect rather than defeat the right of substitution' " *Chapman*, 2012 IL App (1st) 111792, ¶ 23 (quoting *Beahringer v. Hardee's Food Systems, Inc.*, 282 Ill. App. 3d 600, 601 (1996)). Any orders entered after a motion for a substitution of judge is wrongfully denied are void. *In re Marriage of Paclik*, 371 Ill. App. 3d 890, 896 (2007). In light of the trial court's lack of discretion to deny a properly-made motion for substitution of judge, our review of a trial court's ruling on a motion to substitute is typically *de novo*. *Gay v. Frey*, 388 Ill. App. 3d 827, 833 (2009).

¶ 15 However, it is also well-recognized that "[a] court may deny a motion for substitution of judge where the motion was made solely to delay or avoid trial." *Chicago Transparent Products, Inc. v. American National Bank & Trust Co. of Chicago*, 337 Ill. App. 3d 931, 943 (2002); *Nasrallah v. Davilla*, 326 Ill. App. 3d 1036, 1040 (2001) (recognizing that "an exception to [the] absolute right to a substitution of judge has been recognized where it is shown that the motion was made simply to delay or avoid trial"). Thus, "[w]here an attempt to delay is made clear by motions for continuances or other conduct, the trial court may inquire into the good faith of the movant. [Citations.] If, after the inquiry, it is apparent that the motion was made only to delay or avoid trial, the trial court may deny the motion. [Citations.]" *Chicago Transparent Products, Inc.*, 337 Ill. App. 3d at 944.

¶ 16 Numerous decisions have also recognized—at least implicitly—that the decision to deny a motion for substitution of judge because it was made to delay or avoid trial lies within the trial court's discretion. See *Sahoury v. Moses*, 308 Ill. App. 3d 413, 414 (1999) (noting that "the trial court has no discretion to deny the request unless it is shown that the motion was made simply to delay or avoid trial"); *Illinois Licensed Beverage Ass'n, Inc. v. Advanta Leasing Services*, 333 Ill. App. 3d 927, 932 (2002) (same); *In re Estate of Gagliardo*, 391 Ill. App. 3d 343, 346-47 (2009) (same); *Schnepf v. Schnepf*, 2013 IL App (4th) 121142, ¶ 27 (same). An abuse of discretion will be found where the trial court's decision is arbitrary, unreasonable, or where no reasonable person would adopt the court's view. *Carman-Crothers v. Brynda*, 2014 IL App (1st) 130280, ¶ 12.

¶ 17 Here, plaintiff filed its motion for substitution of judge on November 18, 2014, the day this matter was set for trial. It is clear from the record that the motion was presented prior to trial and before Judge Desierto—who had only recently been assigned to the matter—had ruled on any substantive issues. As such, the general statutory requirements of section 2-100(a)(2) were met.

¶ 18 As noted above, however, in denying plaintiff's motion for substitution the trial court determined that plaintiff was attempting to delay or avoid trial. That determination was one within the trial court's discretion, and this court's role is solely to determine if that discretion was abused. However, our ability to make this determination is hampered by the fact that the record does not contain a report of proceedings for November 18, 2014, or a bystander's report or agreed statements of facts filed pursuant to Illinois Supreme Court Rule 323(c). Ill. S. Ct. R. 323(c) (eff. December 13, 2005). Without such a record, we are not aware of the exact nature of any evidence or arguments presented to the trial court, and are therefore unable to determine if

its decision was arbitrary, unreasonable, or such that no reasonable person would adopt the court's view. *Brynda*, 2014 IL App (1st) 130280, ¶ 12.

¶ 19 Plaintiff, as the appellant, "has the burden of presenting a sufficiently complete record of the proceedings at trial to support a claim of error." *Midstate Siding & Window Co., Inc. v. Rogers*, 204 Ill. 2d 314, 319 (2003) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). In the absence of a complete record, a reviewing court presumes that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 392. "In fact, when the record on appeal is incomplete, a reviewing court should actually 'indulge in every reasonable presumption favorable to the judgment from which the appeal is taken, including that the trial court ruled or acted correctly.' " *Smolinski v. Vojta*, 363 Ill. App. 3d 752, 757-58 (2006) (quoting *People v. Majer*, 131 Ill. App. 3d 80, 84 (1985)). Due to the incomplete record before us, we must presume that the trial court properly denied the motion for substitution.

¶ 20 Moreover, even if we did have a report of the proceedings for November 18, 2014, we would not likely be in a significantly better position to overturn the trial court's decision. One thing that *is clear* from the record is that the trial court's ruling was based in large part upon its assessment of the credibility of plaintiff's counsel. "Credibility assessments lie within the province of the trial court" (*In re Faith B.*, 349 Ill. App. 3d 930, 934 (2004)), and "[w]here factual findings are based upon credibility determinations, a reviewing court will generally defer to the trial court." *In re Commitment of Sandry*, 367 Ill. App. 3d 949, 980 (2006).

¶ 21 Finally, while plaintiff also contends that the trial court improperly denied its posttrial motion to reconsider the denial of its motion for substitution of judge, we must also reject this argument in light of the incomplete record on appeal.

¶ 22 The "purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the court's previous application of existing law." *Pence v. Northeast Illinois Regional Commuter R.R. Corp.*, 398 Ill. App. 3d 13, 16 (2010). Because plaintiff argued in its motion to reconsider that the trial court erred in its application of existing law, we review *de novo* the order denying the motion to reconsider. *Kyles v. Maryville Academy*, 359 Ill. App. 3d 423, 433 (2005).

¶ 23 Here, the trial court's comments at the hearing on the motion to reconsider and its written order denying that motion reiterate exactly what we outlined above: *i.e.*, that the trial court had originally denied the motion for substitution on the grounds that it was "a means of delaying or avoiding trial," a decision that was based upon the trial court's consideration of "arguments of both counsel; review of the common law record; and credibility." The trial court went on to conclude that, thereafter, "Plaintiff counsel's conduct at trial supported the Court's finding that the motion for substitution of judge as of right was \*\*\* made as a means of delaying or avoiding trial." The trial court then specifically highlighted several examples of this conduct.

¶ 24 While a report of proceedings for the hearing on the motion to reconsider is contained in the record, the record on appeal does not contain a transcript of the trial in this matter. Without such a transcript, we have no ability to evaluate the conduct of plaintiff's counsel at trial to determine whether not it "supported the Court's finding that the motion for substitution of judge as of right was \*\*\* made as a means of delaying or avoiding trial." In the absence of that transcript, we must presume that it did so and that the trial court properly denied plaintiff's motion to reconsider. *Foutch*, 99 Ill. 2d at 392; *Smolinski*, 363 Ill. App. 3d at 757-58.

¶ 25 III. CONCLUSION

¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court.



No. 1-15-0713

¶ 27 Affirmed.