2017 IL App (2d) 170029-U
No. 2-17-0029
Order filed September 1, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

GARY P. FLEMING,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 13-L-422
	)	
JOSHUA P. OAKHURST and	)	
KRISTINE C. OAKHURST,	)	Honorable
	)	Brian R. McKillip,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Burke and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred when it denied plaintiff's motion to access a sealed record of an *ex parte* communication and erred when it *sua sponte* issued a protective order without any apparent justification.

¶ 2 Plaintiff, Gary P. Fleming, appeals from two orders of the circuit court of Du Page County. The first order denied as moot Fleming's motion to compel the clerk of the court to release an *ex parte* e-mail sent by opposing counsel to the chief judge, and the second order directed opposing counsel to provide Fleming with a copy of said e-mail, but *sua sponte*

restricted Fleming to show it to anyone other than his counsel (should he retain counsel, he is currently *pro se*) until further order of court. We reverse and remand.

¶ 3 In August 2013, Fleming sued defendants—Joshua and Kristine Oakhurst—for breach of an oral agreement to provide caretaking services for defendants' minor child. According to the complaint, Fleming cared for the child (his grandson) for over two years. Fleming sought reimbursement for the costs incurred in the child's care and compensation for the reasonable value of his services.

¶ 4 In September 2016, Fleming filed a "Motion for Order Directing Clerk of the Circuit Court of Du Page County to Release Document Filed under Seal to Plaintiff" (release motion). According to the motion, on August 23, 2016, defense counsel, Raymond Lang, sent an *ex parte* e-mail to Judge Kathryn E. Creswell, the chief judge of the Du Page County circuit court. Chief Judge Creswell replied to the e-mail by letter on August 30, 2016, and she sent a copy of her reply to plaintiff. The reply provided, in pertinent part, as follows:

> "Mr. Lang:
>
> I am writing to acknowledge receipt of your e-mail, dated August 23, 2016, regarding the above-captioned case. Your request for the 'video footage' of proceedings in courtroom 2010 on June 2, 2016 is denied. ***
>
> ***
>
> Finally, your request to meet with me to discuss the above-captioned pending case is also denied. Supreme Court Rule 63 prohibits a judge from engaging in *ex parte* communications, except in very limited circumstances, regardless of whether the judge is presiding over the case. No action will be taken as a result of your e-mail which will be filed under seal with the Clerk of the Circuit Court."

Fleming's release motion sought an order from the trial court (Judge McKillip) directing the clerk of the circuit court to release (to Fleming) Lang's sealed *ex parte* e-mail to Judge Creswell. In addition, Fleming filed a "Motion for Turnover Order Against Raymond Lang/Rifkind Patrick LLC for *Ex Parte* E-mails/Communications with Court" (turnover motion), asking the court to order defense counsel to provide Fleming with a copy of the *ex parte* e-mail, along with any other *ex parte* communications.

¶ 5 A hearing took place on December 13, 2016. The court then addressed Fleming's turnover motion as follows:

"THE COURT: I am going to order Mr. Lang to provide a copy of that email to [plaintiff]. It will be subject, however, to a protective order. It's not to be shown to anyone, other than your attorney[,] if you hire one.

[FLEMING]: Yes.

THE COURT: And—

[FLEMING]: I would—

THE COURT: Yeah. Okay. That's it. Yeah.

[FLEMING]: I would—

MR. LANG: Regarding the language in the protective order, I mean, I don't have any problem. When I wrote it, I assumed it would—I didn't think it was ever going to be filed under seal. I have no—there is nothing in there. I can just give it to him. That's fine.

THE COURT: Subject to my protective order, it's not to be shown to anyone other than [plaintiff's] attorney until further order of court.

MR. LANG: All right. The terms of which for his eyes only [or] for no purpose?

THE COURT: For his eyes only. I am not saying for no purpose. But for his eyes only at this point. Okay.

[FLEMING:] I'd like to also receive a copy from the clerk to match them up to make sure they are the same.

THE COURT: No. That motion is moot."

¶ 6 On January 13, 2017, Fleming filed a "Notice of Interlocutory Appeal," appealing from the trial court's denial of his Release Motion and from the trial court's *sua sponte* protective order prohibiting Fleming from showing the e-mail to anyone. We have jurisdiction under Illinois Supreme Court Rule 307(a)(1) (eff. Nov. 1, 2016), because the court's interlocutory order circumscribes the publication of information. See *In re A Minor*, 127 Ill. 2d 247, 263 (1989).

¶ 7 We note that defendants have not filed a brief in this court. In *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976), our supreme court explained the options a reviewing court may exercise when an appellee fails to file a brief. Specifically, we may (1) serve as an advocate for the appellee and decide the case when justice so requires; (2) decide the merits of the case if the record is simple and the issues can be easily decided without the aid of the appellee's brief; or (3) reverse the trial court when the appellant's brief demonstrates *prima facie* reversible error that is supported by the record. *Id.*

¶ 8 We cannot conclude that this case falls within either of the first two categories. Thus, we are left to decide whether Fleming has demonstrated *prima facie* reversible error. We determine that he has. Fleming contends that the trial court erred when it stated that the release motion became "moot" because the turnover motion had been granted, and that the trial court abused its discretion in *sua sponte* restricting his use of the e-mail. We agree with Fleming.

¶ 9 The statutory right to review judicial records is contained in section 16(6) of the Clerks of Courts Act (705 ILCS 105/16(6) (West 2016)), which provides:

> "All records, dockets and books required by law to be kept by such clerks shall be deemed public records, and shall at all times be open to inspection without fee or reward, and all persons shall have free access for inspection and examination to such records, docket[s] and books, and also to all papers on file in the different clerks' offices and shall have the right to take memoranda and abstracts thereto."

¶ 10 The right of access to public records is not absolute of course, but there is a presumption in favor of public access to records. See *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 231 (2000). " '[E]very court has supervisory power over its own records and files, and access [may be] denied where court files might[ ] become a vehicle for improper purposes. [Citation.] Thus, whether court records in a particular case are opened to public scrutiny rests with the trial court's discretion, which must take into consideration all facts and circumstances unique to that case.' " *Id.* (quoting *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978)). "In order to overcome the presumption of access, the moving party bears the burden of establishing a compelling interest why access should be restricted and that the protective order is drafted 'in the manner least restrictive of the public's interest.' [Citation.]" *In re Marriage of Johnson*, 232 Ill. App. 3d 1068, 1072-73 (1992). Appellate review of the trial court's determination as to access is limited to "whether the trial judge considered relevant factors in making the determination and whether he gave those factors appropriate weight." *Id.* at 1073.

¶ 11 Here, upon granting Fleming's turnover motion and ordering defense counsel to provide plaintiff with a copy of the *ex parte* e-mail, the trial court found that Fleming's release motion was "moot." An issue is moot, *inter alia*, if events have occurred that make it impossible for the

reviewing court to grant the complaining party effectual relief. See *In re Marriage of Peters-Farrell*, 216 Ill. 2d 287, 291 (2005). But Fleming's release motion plainly was not moot. It sought a copy of the *ex parte* e-mail that was *on file with the court*, not a copy from counsel. In other words, the two different motions sought two different documents (regardless of their content) from two different sources. As Fleming stated, he wanted to verify that the e-mail provided by defense counsel under the turnover order was the same e-mail sent to Chief Judge Creswell and filed under seal by comparing the two. Nothing in that statement suggests an improper purpose behind Fleming's request. See *Skolnick*, 191 Ill. 2d at 231-33. Thus, the trial court erred when it denied the release motion as moot.

¶ 12 In addition, to the extent Fleming sought access to the *ex parte* e-mail that was filed under seal[1] he also sought the unrestricted use of it. Although the trial court gave Fleming access to the e-mail in defense counsel's possession, the court *sua sponte* restricted Fleming's use of it. In doing so, the trial court made no findings regarding the facts and circumstances that supported its restrictive ruling. There is also no indication that the trial court examined either the e-mail in the court file or in counsel's possession. Moreover, even defense counsel seemed to indicate that a protective order was not necessary because the e-mail (and the alleged in-court incident counsel believed was captured by the recordings) concerned a separate matter largely "[unrelated] to this case." We see no reason, compelling or otherwise, that would justify the trial court's *sua sponte* issuance of a protective order under these circumstances. *Cf. id.*

¶ 13 We therefore reverse the trial court's denial of Fleming's release motion, and vacate its protective order restricting Fleming's use of the e-mail.

[1] We note that what seems to be a copy of the *ex parte* e-mail appears in the record, not under seal.

¶ 14 Reversed in part and vacated in part; remanded.