

NOTICE
Decision filed 03/03/17. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2017 IL App (5th) 160139-U

NO. 5-16-0139

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

ST. ELIZABETH'S HOSPITAL OF THE HOSPITAL)	Appeal from the
SISTERS OF THE THIRD ORDER OF SAINT)	Circuit Court of
FRANCIS, Operators of ST. ELIZABETH'S)	St. Clair County.
HOSPITAL, and PROTESTANT MEMORIAL)	
MEDICAL CENTER, INC., Operators of)	Nos. 16-SC-10
BELLEVILLE MEMORIAL HOSPITAL,)	16-SC-101
)	16-SC-103
Plaintiffs-Appellants,)	16-SC-12
)	16-SC-13
v.)	16-SC-16
)	16-SC-17
JAMES T. MITGETT, DONALD A. HOFFMAN,)	16-SC-18
DEBRA ROFFLER, DONALD STEVENS, CAROL)	16-SC-19
D. SMITH, MISTY R. MASON, LISA M. WISE,)	16-SC-29
LEE A. DEKEN, KAREN R. PEARCE, ERICA L.)	16-SC-3
KOONCE, GERALYNN BERVILLER, YOLANDA)	16-SC-37
LOPEZ, IZETTA INGRAM, IDA D. SANFORD,)	16-SC-39
STEPHANIE R. CARRAWAY, ERICA S. PICKENS,)	16-SC-41
MICHAEL G. STEELMAN, JANET L. BARRETT,)	16-SC-9
ROBBIE F. CONNER, ERIC N. FREEMAN,)	16-SC-90
BERNADETTE C. GLASPER, ALBERT J. BENAK,)	16-SC-92
JR., KEVIN JAMES LEVALL, and BETTY JEAN)	16-SC-94
LYONS,)	16-SC-98
)	16-SC-99
Defendants)	
)	
(James T. Mitgett, Debra Roffler, Donald Stevens,)	
Carol D. Smith, Misty R. Mason, Lisa M. Wise,)	
Lee A. Deken, Karen R. Pearce, Erica L. Koonce,)	
Yolanda Lopez, Ida D. Sanford, Stephanie R.)	
Carraway, Erica S. Pickens, Janet L. Barrett,)	

Robbie F. Conner, Eric N. Freeman, Bernadette C.) Honorable
Glasper, Albert J. Benak, Jr., Kevin James Levall,) Patricia Kievlan,
and Betty Jean Lyons, Defendants-Appellees).) Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Welch and Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's order denying plaintiffs' petition for substitution of judge for cause must be vacated where the trial court failed to determine whether the petition satisfied the threshold requirements under the substitution of judge statute, and improperly decided the petition on the merits. Plaintiffs and their counsel were entitled to an evidentiary hearing before the trial court entered an order, *sua sponte*, dismissing plaintiffs' cases as a sanction for the conduct of plaintiffs' counsel, and the order of dismissal must be vacated.

¶ 2 The plaintiffs, St. Elizabeth's Hospital of the Hospital Sisters of the Third Order of Saint Francis, operators of St. Elizabeth's Hospital, and Protestant Memorial Medical Center, Inc., operators of Belleville Memorial Hospital, appeal from orders of the circuit court of St. Clair County dismissing with prejudice 20 small claims actions. We ordered the appeals consolidated for purposes of briefing, review, and disposition. For reasons that follow, we reverse and remand with directions.

¶ 3 PROCEDURAL HISTORY

¶ 4 The record on appeal consists of 20 individual court files, each containing the same few motions and orders. There is no report of any proceeding in the trial court and no bystander's report. The facts and procedural history have been derived from the pleadings and orders contained in the record.

¶ 5 Accordingly, the plaintiffs filed a group of cases in the small claims division of the circuit court of St. Clair County, seeking to obtain judgments for unpaid hospital charges allegedly owed by the defendants. The cases were docketed together, and set for an initial hearing on the morning of February 8, 2016. An order entered on February 8, 2016, indicates that the cases were called for hearing that day, that the defendants appeared, that the plaintiffs did not appear, and that the trial court dismissed each case without prejudice.

¶ 6 On February 24, 2016, the plaintiffs' attorney, Gary Apoian, filed a motion to reinstate each case that had been dismissed. In support of the motions, Mr. Apoian asserted that on the morning of February 8, 2016, he was on an early flight from New York City to St. Louis, intending to appear for the small claims docket, but that his flight was delayed in New York due to heavy air traffic, and that upon arrival in St. Louis, the plane was held on the tarmac, awaiting an open gate. Mr. Apoian stated that he called his paralegal as soon as passengers were permitted to use their cell phones, and explained the reason he was not in court. Mr. Apoian's paralegal was in the courthouse to assist with the docket. Mr. Apoian also asked to speak with the presiding judge. Mr. Apoian averred that he informed the court that the soonest he could appear was 11:30 a.m. Evidently, the court rejected this proposed delay, as it was further asserted that the court dismissed, without prejudice, the cases of those *pro se* defendants who had appeared and objected to further delay.

¶ 7 In the motions to reinstate, counsel further alleged that the plaintiffs had meritorious claims against the defendants, and that the events resulting in counsel's

failure to appear were unusual, and not anticipated. Counsel concluded that the denial of these motions would be prejudicial and unjust.

¶ 8 According to the pleadings, Mr. Apoian indicated that he served a copy of the motion to reinstate on each defendant, along with a notice stating that the motion would be heard on March 14, 2016. The notice of hearing, however, is not included in the record on appeal.

¶ 9 On March 1, 2016, prior to the date set for the hearing on the plaintiffs' motions to reinstate, the trial court, *sua sponte*, entered an order in which it acknowledged the filing of the plaintiffs' motions, and, for reasons not apparent from the record required the following:

"On or before March 11, 2016 Plaintiff's [*sic*] attorney is to provide the Court with a copy of his receipt/verification of airline travel from New York to St. Louis/Lambert for the morning of February 8, 2016. Upon receipt by the Clerk's Office, said document is to be delivered to the Court and is not to be placed in court files."

¶ 10 Before court convened on March 14, 2016, Mr. Apoian filed a pleading in each of the dismissed cases with the clerk of the court, titled, "MOTION TO RECUSE." Therein, Mr. Apoian indicated that the plaintiffs' cases were dismissed, without prejudice, because he had been unable to appear on February 8, 2016; that he had filed timely motions to reinstate the dismissed cases; and that shortly after the motions to reinstate were filed, the trial court issued an order directing him to produce a copy of a receipt for his airline travel to verify the reason for his absence from court on February 8, 2016. Mr. Apoian further indicated that he would not submit his travel documents because "the court has intruded upon the privacy and confidentiality of counsel, without any

explanation of why the court doubts the truthfulness of counsel's account." Mr. Apoian noted he had learned that prior to entering the orders of dismissal, the court had rejected another attorney's offer to substitute as counsel, with the assistance of Apoian's experienced paralegal, so that the proceedings could continue. Mr. Apoian stated that he was aware of the local practice in St. Clair County, in which legal representatives of high-volume filers attend the first appearance docket, and then asserted that he could find no rule authorizing the "draconian act of dismissal" when an attorney failed to attend a first appearance docket, particularly when counsel had a "sound explanation." Mr. Apoian requested that the court recuse itself before ruling on any of the motions before it because he "verily believes that the trial court harbors an animus toward counsel." Mr. Apoian also proposed that if the court decided not to recuse itself, then any future proceedings should be held in open court before a court reporter. The certificate of service states that the motion to recuse was hand-served on the defendants on March 14, 2016, the same date it was hand-filed.

¶ 11 On March 14, 2016, the trial court entered orders on plaintiffs' motions to reinstate. In each case, the court found that the motion to reinstate was timely filed, and the court ordered that the case be reinstated.

¶ 12 The court also entered a lengthy order addressing the motion to recuse. Based on the record, it appears that the trial court prepared an order for each case on March 14, 2016, and that the orders were date-stamped and filed on March 15, 2016. These orders were identical in content. Initially, in each order, the court set forth its findings regarding the procedural history of the case, and then issued its orders.

¶ 13 As to the procedural history, the trial court noted that plaintiffs' counsel, Mr. Apoian, failed to appear when the plaintiffs' cases were called for the initial hearing on the morning of February 8, 2016; that Mr. Apoian's paralegal was in the courtroom that morning; that the court instructed counsel's paralegal to call counsel to find out why he was not in court; and that the paralegal was able to reach Mr. Apoian by phone. The court stated that during the telephone conversation between Mr. Apoian and the court, Mr. Apoian stated that he was in an airplane, stuck on the tarmac, and that he requested that his paralegal be allowed to talk with the defendants, and prepare orders for the court. The court stated that it declined to allow the paralegal "to practice law" in the courtroom, and that it advised counsel that his cases would be dismissed. The court pointed out that it was the court, not the paralegal, who prepared orders for any defendants who wished to enter a consent judgment that day.

¶ 14 The court then quoted from the plaintiffs' motion to reinstate, taking issue with Mr. Apoian's assertions in paragraph 5, that he telephoned his paralegal from the tarmac as soon as permitted, explained the reason for his non-appearance, and asked to speak to the presiding judge; and his assertions in paragraph 6, that it was decided that those who wished to consent to judgment could do so, with the assistance of Mr. Apoian's experienced paralegal. The court found counsel's statements "inaccurate and/or untrue." The court also noted that it had entered an order on March 1, 2016, requiring Mr. Apoian to provide verification of his travels; and that Mr. Apoian failed to abide by that order.

¶ 15 The court denied the motion to recuse, and offered the following reasons for its decision:

"First and foremost, Mr. Apoian failed to appear on 3/14/16 to argue his motion and further failed to set his motion for a hearing in the future. This was after Mr. Apoian had sent notice to Defendant's [*sic*] to appear in court on that day. Next, the Court denies that it has intruded on the [*sic*] Mr. Apoian's privacy and confidentiality of counsel when it requested information on Mr. Apoian's travel on February 8, 2016. The Court finds that Mr. Apoian volunteered that information to the Court both on February 8, 2016 during a telephone conversation and again February 24, 2016 in the Joint Motion to Reinstate. Additionally, to safeguard any concerns about confidentiality that may have existed the Court in its Order of March 1, 2016 specifically ordered that any documents presented were to be given to the Court directly and not filed in the Court file. Those documents, had they been received, would have been withdrawn Court [*sic*] by court order or sealed, whichever Mr. Apoian would have desired. Mr. Apoian then argues that this Court rejected another attorney's offer to substitute as counsel. The Court had absolutely no way of knowing if Mr. Apoian, and more importantly, his clients, desired a substitution by another attorney. This Court believes that allowing another attorney to voluntarily appear on behalf of Mr. Apoian would subject this other attorney to discipline by the ARDC for appearing in a matter which he/she had not entered an appearance. This Court declined to place that attorney in such a situation."

The court went on to state that on March 14, 2016, another attorney informed the court that Mr. Apoian was not going to appear for the docket, and that the attorney had been retained by the plaintiffs to handle all of their cases, except those that had been dismissed on February 8, 2016. The court expressed concern that Mr. Apoian had sent a notice of hearing to the *pro se* defendants regarding his motions to reinstate, knowing that he was not going to appear in court on March 14, 2016, to address the pending motions. The court stated that the defendants appeared for the hearing on March 14, 2016, and showed proof to the court that they had received copies of the plaintiffs' motions, and the notice of hearing.

¶ 16 The court then found, based on the actions of plaintiffs' counsel, that the newly reinstated cases should be dismissed with prejudice. Specifically, the court found that in

paragraphs 5 and 6 of the motion to reinstate, Mr. Apoian misrepresented what had occurred in open court on February 8, 2016. The court noted that there were people in the courtroom, including litigants, attorneys, and court staff, who had witnessed what had occurred on that date. The court also found that counsel failed to produce the travel documents as ordered, and that counsel failed to appear on March 14, 2016, after sending notices of hearing to the defendants. The court stated that the defendants had been summoned to appear in court on two occasions, and that they faced having to appear a third time because of counsel's failures to appear. The court concluded that the defendants had been prejudiced by counsel's actions and inactions, and it dismissed each case, with prejudice.

¶ 17 In the final paragraph of the order, the court stated that there were serious questions regarding how counsel's actions reflected on the legal system and the integrity of the legal profession. The court requested the circuit clerk to forward a copy of its order to the Illinois Attorney Registration and Disciplinary Commission for investigation.

¶ 18 DISCUSSION

¶ 19 On appeal, the plaintiffs contend that the trial court erred in dismissing, with prejudice, their cases, *sua sponte*, after the motion for recusal was filed. The plaintiffs claim that under section 2-1001(a)(3) of the Code of Civil Procedure (735 ILCS 5/2-1001(a)(3) (West 2014)), once the motion to recuse was filed, the trial court was left with two options: (a) allow an automatic substitution of judge, or (b) pass the case to allow for another judge to make an independent adjudication of the allegations of actual prejudice set forth in the petition.

¶ 20 In Illinois, a request for substitution of a judge in a civil case is governed by statute. 735 ILCS 5/2-1001 (West 2014). Section 2-1001(a) of the Code of Civil Procedure identifies the various situations in which a substitution of judge may be sought. 735 ILCS 5/2-1001(a) (West 2014). One such situation is a substitution of judge for cause. 735 ILCS 5/2-1001(a)(3) (West 2014). Under paragraph 2-1001(a)(3)(ii), every application for substitution of judge for cause must be made by a petition, setting forth the specific cause for substitution, and the petition must be verified by the affidavit of the applicant. 735 ILCS 5/2-1001(a)(3)(ii) (West 2014). Paragraph 2-1001(a)(3)(iii) provides that upon filing a petition for substitution for cause, a hearing to determine whether cause exists shall be conducted as soon as possible by a judge other than the judge named in the petition. 735 ILCS 5/2-1001(a)(3)(iii) (West 2014). However, a party's right to have a petition for substitution heard by another judge is not automatic. *In re Estate of Wilson*, 238 Ill. 2d 519, 553, 939 N.E.2d 426, 446 (2010). In order to trigger the right to a hearing before another judge, the request for substitution for cause must satisfy the threshold requirements in paragraph 2-1001(a)(3)(ii). *Estate of Wilson*, 238 Ill. 2d at 553, 939 N.E.2d at 446-47. Thus, a trial court may deny a petition for substitution for cause, without referring it to another judge, if the petition fails to set forth the specific cause for substitution, or is not verified by an affidavit. *Estate of Wilson*, 238 Ill. 2d at 553, 939 N.E.2d at 447.

¶ 21 To meet the statutory "cause" requirement, ordinarily the petition must allege a bias or prejudice stemming from an extrajudicial source. *Estate of Wilson*, 238 Ill. 2d at 554, 939 N.E.2d at 447. But, an opinion or comment of the trial judge, which is based

upon facts introduced or events that occurred in the case at bar, may constitute a basis for bias if the opinion or comment demonstrates a high degree of favoritism or antagonism that would make fair judgment impossible. *Estate of Wilson*, 238 Ill. 2d at 554, 939 N.E.2d at 447.

¶ 22 Additionally, the trial court may consider the circumstances surrounding a petition for substitution of judge for cause, and where it is apparent that the request was not made in good faith, but for purposes of delay, the denial of the petition does not constitute error. *Estate of Wilson*, 238 Ill. 2d at 557, 939 N.E.2d at 449. In this case, there is no indication that the petition for substitution for cause was made for purposes of delay.

¶ 23 As we begin our discussion, we note that plaintiffs' counsel has acknowledged that his application for substitution of judge for cause was incorrectly labeled as a motion for recusal. This is no small point as section 2-1001 contemplates the use of a motion when making application for substitution as of right (735 ILCS 5/2-1001(a)(2)(ii) (West 2014)) and the use of a petition when seeking a substitution for cause (735 ILCS 5/2-1001(a)(3)(ii) (West 2014)). Not long ago, our supreme court recognized that the misidentification of an application for substitution of judge has resulted in confusion about the relief sought, and the court asked both bench and bar to exercise care in labeling applications for substitution of judge under the applicable subsection in the statute. *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 28, 958 N.E.2d 647.

¶ 24 In this case, the mislabeled pleading, in substance, requested a substitution of judge for cause. Thus, the first question was whether the motion to recuse satisfied the threshold requirements of paragraph 2-1001(a)(3)(ii). On this record, there is no

indication that the trial court paused to consider this question. According to the order, date-stamped March 15, 2016, the trial court denied the motion based on counsel's failure to appear in court on March 14, 2016, to argue his motion for recusal. By this date, the court had already granted the plaintiffs' motions to reinstate those cases it had previously dismissed. Next, the court directly addressed counsel's allegations of bias and impartiality, and proceeded to refute them. As such, it appears that the court determined that the motion to recuse had not been made in bad faith. The court proceeded to address the merits of the motion, but it did so without giving Mr. Apoian notice or an opportunity to be heard. This was error.

¶ 25 A trial court must first review a petition for substitution for cause to determine whether it satisfies the threshold requirements of the statute. If the petition satisfies the threshold requirements, then the matter is assigned to a different judge for a hearing to determine whether the cause existed. 735 ILCS 5/2-1001(a)(3)(iii) (West 2014). At that point, the judge named in the petition need not testify, but may submit an affidavit, if he or she wishes to do so. 735 ILCS 5/2-1001(a)(3)(iii) (West 2014). In this case, the trial court initially failed to consider whether the petition met the threshold requirements of the statute, and then made substantive decisions on the allegations of bias, instead of submitting the matter for assignment to and adjudication by another judge. Given these errors, we must vacate the trial court's order denying the petition for substitution for cause in its entirety, including its findings and reasoning, and remand the cases for further proceedings. Upon remand, it would behoove counsel to notify the trial court, without

delay, whether he intends to withdraw, present, or amend his application for substitution. Should counsel file a timely motion to amend his pleading, leave should be granted.

¶ 26 Next, we must consider the trial court's *sua sponte* order dismissing the plaintiffs' cases, with prejudice. In the order, date-stamped March 15, 2016, the trial court denied the petition for substitution, and then entered an order, *sua sponte*, dismissing the plaintiffs' cases, with prejudice. There is little doubt that the dismissals with prejudice were intended as a sanction on plaintiffs' counsel. As the bases for its dismissal, with prejudice, of these cases, the court specifically cited counsel's failure to appear in court on two occasions, counsel's failure to comply with an order to produce travel documents to verify his reason for failing to appear for the initial hearing, and the court's perception of counsel's misrepresentation of what had occurred in open court on the date set for the motions to reinstate.

¶ 27 A trial court has the inherent authority to enter sanctions for a party's failure to obey valid orders. *Smith v. City of Chicago*, 299 Ill. App. 3d 1048, 1054, 702 N.E.2d 274, 279 (1998). The court's decision to impose a sanction is entitled to deference and will not be reversed absent an abuse of discretion. *In re Estate of Baker*, 242 Ill. App. 3d 684, 687, 611 N.E.2d 59, 61 (1993). The trial court must set forth the factual basis for the sanctions in order to be afforded deferential treatment. *Estate of Baker*, 242 Ill. App. 3d at 687-88, 611 N.E.2d at 61.

¶ 28 Further, sanctions must be reasonable in light of the facts and circumstances of the case. *Smith*, 299 Ill. App. 3d at 1054, 702 N.E.2d at 279. In keeping with the longstanding public policy and the underlying spirit of our civil justice system,

controversies are to be decided on the merits. 735 ILCS 5/1-106 (West 2014); *Smith*, 299 Ill. App. 3d at 1054-55, 702 N.E.2d at 279. The dismissal of an action is a drastic sanction that should be employed after all other enforcement powers available to the court fail. *Smith*, 299 Ill. App. 3d at 1054-55, 702 N.E.2d at 279. When a sanction is imposed on a party as a consequence of the conduct of his or her counsel, the court must take care to fashion a sanction which addresses the offending conduct, while preserving, to the extent possible, the substantive rights of the party to be heard. *Smith*, 299 Ill. App. 3d at 1055, 702 N.E.2d at 279.

¶ 29 In this case, the trial court, *sua sponte*, imposed a drastic sanction by dismissing, with prejudice, 20 cases filed by the plaintiffs as a direct consequence of the court's disapproval of Mr. Apoian's conduct, without providing to Mr. Apoian and his clients proper notice and an opportunity to be heard. This was error. The plaintiffs and their counsel should have been afforded a hearing, so that they could present evidence and arguments to explain or defend counsel's conduct, before any sanction was considered by the court. See *In re Marriage of Johnson*, 2011 IL App (1st) 102826, ¶¶ 35-38, 963 N.E.2d 1045; *Estate of Baker*, 242 Ill. App. 3d at 687, 611 N.E.2d at 61. Accordingly, the orders dismissing the plaintiffs' cases with prejudice are hereby vacated.

¶ 30 In vacating the orders of the trial court, we have made no findings regarding whether sanctions are appropriate in this case. We simply find that the trial court erred in imposing sanctions without affording the plaintiffs and their counsel an opportunity to explain or defend counsel's actions. As noted above, we are remanding this case for further proceedings to allow the plaintiffs' counsel the opportunity to amend his

pleadings, and/or supplement them, if he so desires. Depending on the outcome of any procedural matters that arise as a result of those amendments, the court may then determine whether sanctions remain appropriate. If, upon remand, sanctions remain a consideration, the plaintiffs and their counsel shall be afforded an evidentiary hearing, with sufficient notice, before any sanction is imposed.

¶ 31

CONCLUSION

¶ 32 For the reasons stated, we hereby vacate the trial court's order, file-marked March 15, 2016, in its entirety, including the order denying the motion to recuse, and the orders dismissing the above cases with prejudice, and we remand this case for further proceedings consistent with this decision.

¶ 33 Order vacated; cause remanded.