IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

VILLAGE OF MELROSE PARK,

Plaintiff,

v.

PIPELINE HEALTH SYSTEM LLC, a Delaware limited liability company, SRC HOSPITAL INVESTMENTS II LLC, a Delaware limited liability company, PIPELINE-WESTLAKE HOSPITAL LLC, a Delaware limited liability company, TWG PARTNERS LLC, an Illinois limited liability company, NICHOLAS ORZANO, an individual, ERIC WHITAKER, an individual, and JAMES EDWARDS, an individual,

Defendants,

and

TENET HEALTHCARE CORPORATION, a Nevada corporation,

Respondent in Discovery.

Case No. 2019-CH-3041

Honorable Eve M. Reilly

DEFENDANT JAMES EDWARDS' REPLY IN SUPPORT OF HIS MOTION FOR SUBSTITUTION OF JUDGE AS OF RIGHT

Plaintiff Village of Melrose Park's (the "Village") Opposition to Defendant James Edwards' Motion for Substitution of Judge ("Opposition") conveniently omits the last three words of the motion's title: "as of right." Try as it might, the Village cannot escape the fact that substitution is a statutory right afforded to "[e]ach party," 735 ILCS 5/2-1001(a)(2)(i), and if the motion is "timely filed and in proper form, it must be granted and any order entered after its presentation is a nullity." *In re Dominique F.*, 145 Ill.2d 311, 324 (1991); *see also Williams by Williams v. Leonard*, 2017 IL App (1st) 172045, ¶ 9 ("[W]hen properly made, a motion for substitution of judge as a matter of right is absolute, and the circuit court has no discretion to deny the motion.") (internal quotation marks omitted). Moreover, the provisions of section 2-1001 are to be "liberally

construed … to effect rather than defeat the right of substitution." *In re Gagliardo*, 391 Ill. App. 3d 343, 346–47 (1st Dist. 2009); *see also Leonard*, 2017 IL App (1st) 172045, ¶ 9 ("[O]ur review should lean toward favoring, rather than defeating, a substitution of judge.").

The Village decided, presumably for some perceived strategic advantage, that it wanted to assert claims against Edwards as an individual party-defendant in this action. It accordingly filed a motion for leave to amend its original complaint in order to "add" Edwards as "an additional party-defendant." Pl.'s Mot. for Leave to Amend Compl. at 1; *see also id.*, ¶ 10 ("Plaintiff respectfully requests leave to file an amended complaint that names Jim Edwards as an *additional party-defendant* to this lawsuit …") (emphasis added).) After its motion for leave to amend was granted, the Village filed its amended complaint and then served Edwards with the amended complaint and summons pursuant to Section 2-213 of the Illinois Code of Civil Procedure. *See* Notice and Acknowledgement of Receipt of Summons and Compl., filed Feb. 5, 2020. As this Court well knows, "[s]erving a copy of a summons and complaint on a party-defendant is an essential part of the litigation process and allows a court to obtain personal jurisdiction over *that defendant*." *Urban Partnership Bank v. Ragdale*, 2017 IL App (1st) 160773, ¶ 18 (emphasis added). Thereafter, on February 20, 2020, Edwards filed his appearance as a defendant in this action, and four days later, he filed the instant motion.

As set forth below, the Village's arguments for denial are wholly without merit. There is no basis in either the statute or the case law to deny a motion for substitution under the circumstances presented by this case. Edwards' motion must be granted.

I. The Village's Position Contravenes the Plain Language of the Statute.

The plain language of the statute clearly entitles Edwards, as a newly added party-defendant, to a substitution of judge as of right. The statute expressly provides:

> If any party has not entered an appearance in the case and has not been found in default, rulings in the case by the judge on any substantial issue before the party's appearance shall not be grounds for denying an otherwise timely application for substitution of judge as of right by the party.

735 ILCS 5/2-1001(a)(2)(iii). Edwards had not appeared, and was not in default, at the time of any rulings by the Court on any substantial issue. Thus, by the clear terms of the statute, rulings by the Court before Edwards' appearance "shall not be grounds for denying" his otherwise timely application for substitution of judge as of right. The Village's unsupported argument to the contrary must be rejected.

The Village also disregards the statute's express instructions that "*[e]ach party* shall be entitled to one substitution of judge without cause as a matter of right." 735 ILCS 5/2-1001(a)(2)(i) (emphasis added). Courts have consistently applied Section 2-1001 as written to allow each party to exercise its right to substitution independently of the right of any other party. For example, in *Powell v. Dean Foods Co.*, the court observed that the two defendant-companies were related entities with the same owners and officers, the same counsel, and even the same insurance policies. 938 N.E.2d 170, 177–178 (1st Dist. 2010), *rev'd on standing grounds*, 2012 IL 111714 (2012). The court nonetheless held that, because "[t]he instant lawsuit was brought against both [companies] individually [,] … each was entitled to a substitution of judge as a matter of right under section 2-1001(a)(2) of the Code." *Id.* at 179; *see also Aussieker v. City of Bloomington*, 355 Ill. App. 3d 498, 502 (4th Dist. 2005) ("[E]ach plaintiff in a multiple-plaintiff civil case is entitled to one motion for substitution of judge as of right."); *Beahringer v. Hardee's Food Systems, Inc.*, 282 Ill. App. 3d 600, 601 (5th Dist. 1996) ("[E]ach individual defendant in a multidefendant action is deemed to be a separate party and each such party has an independent right to one substitution of judge.").

In the same way, Edwards' right to substitution is unaffected by the other defendants' decision not to "substitute Your Honor when this case was initially filed." Opp. at 5. The fact that he shares the same counsel as some of the other defendants is irrelevant. *See Powell*, 938 N.E.2d at 177-79; *see also Beahringer*, 282 Ill. App. 3d at 601 ("Nothing in our decision suggests that the right of each party to one substitution is altered in any way when the same counsel represents more than one plaintiff or defendant. More importantly, nothing in the plain language of the statute suggests that all defendants represented by the same counsel are entitled to only one change of judge as a group.").

The Village cannot avoid the plain language of the statute by conflating Edwards with Defendant Pipeline Health Systems LLC ("Pipeline Health"), which has been a party to the case since its inception. *See* Opp. at 3-4. Edwards does not deny that he has been present in court or otherwise participated in this action. But his participation was not as an individual, party-defendant but in his capacity as CEO of Pipeline Health, which as a limited liability corporation "can only act through [its] agents." *Alpha School Bus Co., Inc. v. Wagner*, 391 Ill. App. 3d 722, 737 (1st Dist. 2009). It is black letter law in Illinois that "[a] corporation is a legal entity *separate and distinct* from its shareholders, directors, and officers." *In re Rehabilitation of Centaur Insurance Co.*, 158 Ill. 2d 166, 172 (1994) (emphasis added); *Perfection Carpet, Inc. v. State Farm Fire & Casualty Co.*, 259 Ill. App. 3d 21, 32 (1st Dist. 1994) ("A corporation … must sue or be sued in its own name."). Contrary to the Village's assertions, having a "front-row seat to the proceedings" does not transform Edwards into a defendant in this case. Opp. at 5. The Village clearly understands this distinction, as its decision to amend its complaint to *add* Edwards as an individual party-defendant demonstrates.

II. The "Test the Waters" Doctrine Is Inapplicable.

The Village asks the Court to deny Edwards his right to substitution, despite the clear mandate of the statute, based on its theory that Edwards "tested the waters" through the Court's ruling on the Village's motion for a temporary restraining order, months before the Village added Edwards as a party-defendant. Opp. at 3-4. Even assuming that the "test the waters" doctrine remains viable, however, it plainly has no application where, as here, the person against whom it is sought to be deployed *was not a party* at the time the "waters" were purportedly "tested."

As an initial matter, it should be noted that the Illinois Supreme Court has *not* adopted the "test the waters" doctrine, and the appellate court districts are split, with the Fourth District in particular rejecting the doctrine as "needlessly obscur[ing] an otherwise bright line." *Schnepf v. Schnepf*, 2013 IL App (4th) 121142, ¶¶ 30, 54 (holding that the test the waters doctrine "is no longer an appropriate judicial supplement to the substitution-of-judge analysis"); *see also Bowman v. Ottney*, 2015 IL App (5th) 140215, ¶ 24 (J. Stewart, dissenting) ("In my view, the 'test the waters' doctrine was thoroughly discredited and properly rejected by the Fourth District in its comprehensive and thoughtful opinion in *Schnepf v. Schnepf*. There is a clear disagreement among the appellate districts on this issue, which should be determined by the supreme court.") (internal citation omitted); *In re Estate of Gay*, 353 Ill. App. 3d 341, 345 (3d Dist. 2004) (J. McDade, concurring) (criticizing the test the waters doctrine).

But even putting that issue aside, none of the cases cited by the Village supports its position that the doctrine can be utilized to deny a motion for substitution as of right under the circumstances presented here. In *Bowman v. Ottney*, the Supreme Court declined to address the doctrine, finding it "inapplicable" to the case before it. 2015 IL 119000, ¶ 27. Further, the facts that led the Court in *Bowman* to find that the plaintiff's motion for substitution of judge had properly been denied bear no resemblance to the situation presented here. The plaintiff in *Bowman*

had filed a 2009 malpractice lawsuit, during the course of which the judge made numerous substantial rulings. *Id.*, ¶ 3. After those rulings, but before trial, the plaintiff voluntarily dismissed the 2009 case and then refiled the suit, which was assigned to the same judge who had presided over the 2009 case. *Id.* The plaintiff then moved for substitution of judge without cause, arguing that under a literal reading of the statute, there had been no substantial rulings in the new case and thus she should be able to exercise her substitution. *Id.*, ¶¶ 3, 11, 19.

The Supreme Court disagreed, holding that Bowman only had one right to substitution in "all proceedings between the parties in which the judge to whom the motion [to substitute] was presented has made substantial rulings with respect to the cause of action before the court." *Id.*, ¶ 21. As the Court explained:

> In this case, Bowman had the opportunity to present a motion for substitution of judge as of right during the proceedings on her 2009 complaint. For whatever reason, she declined to exercise that right before Judge Overstreet ruled on substantial issues in those proceedings. After he did so, Bowman lost her right to seek a substitution of Judge Overstreet as a matter of right. The fact that she voluntarily dismissed her complaint and refiled her claim against Ottney four months later does not change that fact.

Id. ¶ 25. Here, in contrast, Edwards had no opportunity, prior to being added as a party-defendant through the Village's amendment of its complaint, "to present a motion for substitution of judge as of right," because he *was not a party to this action*. *See* 735 ILCS 5/2-1001(a)(2)(i) ("Each *party* shall be entitled to one substitution of judge without cause as a matter of right.") (emphasis added); *In re Estate of Gagliardo*, 391 Ill. App. 3d at 347 (granting substitution of judge requested by new party after his appearance even though judge had previously ruled on substantial issues in the case because "[t]he court had made no substantive rulings as to [that party]" and to hold otherwise "would serve to defeat rather than effect the rights of [the appearing party] under the SOJ statute").

Similarly, in *Colagrossi v. Royal Bank of Scotland*, the plaintiff had filed two lawsuits—one in 2008, the other in 2011—involving the same parties and based on the same set of operative facts. 2016 IL App (1st) 142216, ¶¶ 1, 10, 18. Both cases were randomly assigned to the same judge. *Id.* ¶¶ 1, 14, 19. In June of 2013, the judge granted summary judgment to defendants in the 2008 case. *Id.* ¶ 16. Nine days later, the plaintiff moved for substitution of judge as of right in the 2011 case. *Id.* ¶ 21. The trial court denied the motion, and the appellate court affirmed, relying in significant part on the Supreme Court's analysis in *Bowman*. *Id.* ¶¶ 32-35. The appellate court also emphasized the untimeliness of the plaintiff's motion, noting that, "a motion for substitution of judge as of right must be filed at the earliest practical moment before commencement of trial or hearing and before the trial judge considering the motion rules upon a substantial issue in the case." *Id.* ¶ 38 (internal quotation marks omitted). In the case before it, the plaintiff had not moved for substitution in the 2011 case "at the earliest practical moment," but instead moved "the 'moment' he learned what fate held in store" as a result of the trial court's grant of summary judgment in the 2008 case. *Id.* ¶ 39. Here, in contrast, Edwards *has* moved at "the earliest practical moment"—just four days after his appearance in the case, and less than six weeks after the filing of the amended complaint that first named him as a defendant, during which time no rulings were made by the Court on any substantial issue.

Kic v. Bianucci, 2011 IL App (1st) 100622, and *Safeway Insurance Co. v. Ebijimi*, 2018 IL App (1st) 170862, are likewise inapposite. In both of those cases, motions for substitution of judge were denied because proceedings in those actions *to which the movants were parties* had allowed the movants to "test the waters" before the motions were presented. *Kic*, 2011 IL App (1st) 100622, ¶¶ 13-14 (affirming denial of plaintiff's motion for substitution that was presented after pretrial conference that allowed plaintiff to test the waters); *Safeway*, 2018 IL App (1st) 170862, ¶¶ 34-35

(affirming denial of defendants-counterplaintiffs' motion for substitution where motion was presented after the defendants-counterplaintiffs' "testing of waters during [an] hour-long hearing" on defendants-counterplaintiffs' discovery motions and rulings on those motions that both the trial court and the appellate court deemed to be "substantive"). In this case, by contrast, there have been no substantive rulings by the court, nor any proceedings that allowed Edwards to "test the waters," since Edwards became a party.

Finally, *In re J.S.*, 2020 IL App (1st) 191119, does not assist the Village. In *J.S.*, the trial court had denied the respondent-mother's motion for substitution of judge based on Section 1-5(7) of the Juvenile Court Act, not Section 2-1001. *Id.* ¶ 10. The appellate court affirmed that ruling. *Id.* ¶ 53. Having resolved that issue, the appellate court went on to discuss Section 2-1001, stating, "even if we were to find that section 1-5(7) did not apply in this case, we would nevertheless conclude that the circuit court properly denied the substitution motion under section 2-1001 of the Code." *Id.* In particular, the court found that the denial of the substitution motion was proper because "the issuance and multiple extensions of the child protection warrant," which had occurred before the presentation of the motion for substitution, "constituted rulings on a substantial issue." *Id.* ¶ 55. While the mother had not yet appeared when the court made those rulings, the court emphasized that this was a product of her decision to "evade the court and abscond with her child." *Id.* at ¶ 50. The court refused to allow the mother's "own purposeful avoidance of the court's reach [to] serve as an underpinning for her substitution motion." *Id.* at ¶ 59.

Again, that is entirely unlike the circumstance presented here. There was no attempt by Edwards to "evade the court" or engage in "purposeful avoidance of the court's reach." To the contrary, Edwards' counsel acknowledged service of the summons and amended complaint on his behalf pursuant to Section 2-213 of the Code of Civil Procedure on February 5, 2020—well within

the thirty days provided by Section 2-213—filed his appearance in the case just over two weeks later, on February 20, 2020, and filed his motion for substitution four days after that. Edwards' motion fits squarely within the provisions of Section 2-1001.

CONCLUSION

Section 2-1001 provides that a motion for substitution of judge as a matter of right "s*hall* 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." 735 ILCS 5/2-1001(a)(2)(ii) (emphasis added). Moreover, "rulings in the case by the judge on any substantial issue before the party's appearance shall not be grounds for denying an otherwise timely application for substitution of judge as of right by the party." 735 ILCS 5/2-1001(a)(2)(iii). The Village does not dispute that since Edwards' appearance on February 20, 2020, the Court has not ruled on any substantial issue in this case. Edwards' motion must be granted.

Dated: March 18, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that that on March 18, 2020, I caused a copy of the foregoing document to be filed electronically using the electronic filing system, which will generate notice of this filing to all counsel of record.

/s/ Sondra Hemeryck
Sondra Hemeryck