Conditionally GRANT in part, DENY in part; and Opinion Filed September 14, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00930-CV

IN RE TUNAD ENTERPRISES, INC., Relator

Original Proceeding from the 417th Judicial District Court
Collin County, Texas
Trial Court Cause No. 417-00618-2016

MEMORANDUM OPINION

Before Justices Lang, Myers, and Boatright
Opinion by Justice Lang

In this original proceeding, relator Tunad Enterprises, Inc. complains of the trial court's order compelling post-judgment discovery and the trial court's refusal to hear relator's motion to set supersedeas bond. We stayed the underlying proceedings, including efforts to execute on the underlying judgment, and requested responses from the real party in interest and respondent. We conditionally grant the petition in part and deny the petition in part.

Background

The trial court signed a no-answer default judgment against relator on December 15, 2016. Relator's appeal is pending in this Court. The real party in interest, Martin Palma d/b/a Liz Pizza ("Palma") served relator with a notice of deposition and duces tecum in aid of execution of judgment on March 24, 2017. Relator filed a motion for protection from that discovery, but did not set the motion for hearing. Palma filed a motion to compel the discovery. At the hearing on the motion to compel, the trial court ordered relator to file a supersedeas bond

by May 16, 2017 and stated that the trial court would award attorney's fees to Palma and compel discovery if a bond was not timely filed.

Relator attempted to file a $0.00 supersedeas bond with an affidavit of negative net worth on May 11, 2017 and again on May 18, 2017, but the clerk rejected the filings. The clerk rejected the first filing because the bond did not equal the compensatory damages awarded in the judgment, interest for the duration of the appeal, and court costs. The clerk rejected the second filing at the trial court's instructions to the clerk that the bond was insufficient. On May 18, 2017, the clerk notified relator's counsel that the trial court had instructed relator to file a motion to set supersedeas bond and to set it for hearing. Relator filed the requested motion to set supersedeas bond, but the trial court clerk refused to set the motion for hearing because the matter is on appeal and "cannot be scheduled for hearings."

Then, on July 5, 2017, the trial court signed an order compelling the post-judgment discovery and awarding Palma $2,400.00 in attorney's fees incurred filing and prosecuting the motion to compel. The trial court ordered relator to provide responses to the duces tecum by 4:00 p.m. on July 20, 2017 and to present a corporate representative for deposition on August 25, 2017. The trial court also awarded Palma $5,400.00 in attorney's fees "if this Order is appealed." Finally, the trial court ordered that relator's answer to the lawsuit "shall be deemed stricken" if relator "fails to timely comply with all aspects of this Order." In four issues, relator now seeks a writ ordering the trial court to hear and rule on relator's motion to set supersedeas bond and to vacate the award of unconditional appellate attorney's fees, vacate the $2,400 fees award, and vacate the order to strike relator's answer if relator failed to comply with the order granting the motion to compel.

Refusal to Hear Motion to Set Supersedeas Bond

Relator complains that the trial court refused to hear and rule on relator's motion to set supersedeas bond. A trial court is required to consider and rule upon a motion within a reasonable time. *Safety–Kleen Corp. v. Garcia*, 945 S.W.2d 268, 269 (Tex. App.—San Antonio 1997, orig. proceeding). When a motion is properly filed and pending before a trial court, the act of giving consideration to and ruling upon that motion is a ministerial act, and mandamus may issue to compel the trial judge to act. *Id.* No litigant is entitled to a hearing at whatever time he may choose, however. *In re Chavez*, 62 S.W.3d 225, 229 (Tex. App.—Amarillo 2001, orig. proceeding). A trial court has a reasonable time within which to consider a motion and to rule. *In re Craig*, 426 S.W.3d 106, 107 (Tex. App.—Houston [1st Dist.] 2012, orig. proceeding); *In re Sarkissian*, 243 S.W.3d 860, 861 (Tex. App.—Waco 2008, orig. proceeding); *In re Blakeney*, 254 S.W.3d 659, 661 (Tex. App.—Texarkana 2008, orig. proceeding).

Although a trial court has a duty to rule within a reasonable time, the relator seeking a writ of mandamus compelling the trial court to rule must establish that she took action to alert the trial court that it had not yet considered his motion. *In re Buholtz*, No. 05-16-01312-CV, 2017 WL 462361, at *1 (Tex. App.—Dallas Jan. 31, 2017, orig. proceeding); *Crouch v. Shields*, 385 S.W.2d 580, 582 (Tex. App.—Dallas 1964, writ ref'd n.r.e.); *In re Dong Sheng Huang*, 491 S.W.3d 383, 385–86 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding) (internal citations omitted). It is relator's burden to provide the court with a record sufficient to establish his right to relief. *Walker v. Packer*, 827 S.W.2d 833, 837 (Tex. 1992); TEX. R. APP. P. 52.3(k), 52.7(a).

Here, the trial court has refused to hear the motion to set supersedeas bond despite relator's two attempts at filing a bond and relator's filing of the motion to set supersedeas bond as requested by the trial court. That is an abuse of discretion for which relator lacks an adequate

remedy at law because the trial court has a ministerial duty to rule on the motion. Accordingly, we conditionally granting the writ on this issue.

Post-Judgment Discovery Order

The post-judgment discovery order is not subject to direct appeal and may be reviewed through mandamus, *See In re Lowery*, No. 05-14-01509-CV, 2014 WL 8060585, at *2 (Tex. App.—Dallas Dec. 18, 2014, no pet.) (objections to post-judgment discovery reviewed through mandamus); *see also Bielamowicz v. Cedar Hill Indep. Sch. Dist.*, 136 S.W.3d 718, 723 (Tex. App.—Dallas 2004, pet. denied) ("Mandamus is appropriate to obtain judicial review of a trial court's post-judgment discovery order."). As such, the general mandamus standard applies. To be entitled to mandamus relief, a relator must show both that the trial court has clearly abused its discretion and that relator has no adequate appellate remedy. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding).

A. Fees award as sanction

Relator first complains that in rendering the post-judgment discovery order, the trial court abused its discretion by awarding Palma $2,400.00 in fees for filing the motion to compel. It is relator's burden to provide the Court with a sufficient mandamus record to establish his right to mandamus relief. *In re Thomason*, No. 05-17-00373-CV, 2017 WL 1427697, at *1 (Tex. App.—Dallas Apr. 18, 2017, orig. proceeding) (citing cases). Palma argued in the motion to compel that Palma was forced to file the motion to compel because relator failed to set the motion for protection for hearing and refused to file a supersedeas bond. At the hearing, Palma's counsel asked the court to award $2,400.00 in fees for bringing and presenting the motion to compel post-judgment discovery. In support, Palma's counsel offered a billing statement showing 6.09 hours billed in relation to the motion to compel and hearing for a total of $2,417.91 in fees. The amount of fees awarded is supported by the record and is not unreasonable or

excessive. The record also supports a determination by the trial court that relator's failure to set its motion for protection for hearing and failure to seek and file a supersedeas bond when served with post-judgment discovery forced Palma to seek relief from the trial court. On this record, the trial court did not abuse its discretion by awarding Palma $2,400.00 in fees. Accordingly, we deny the petition on this issue.

B. Unconditional appellate fees

Relator also complains that the award of fees for appeal of the discovery order was improper because the fees are not conditioned Palma prevailing on appeal. An unconditional award of appellate attorney's fees is improper. *Cessna Aircraft Co. v. Aircraft Network, LLC*, 345 S.W.3d 139, 147–48 (Tex. App.—Dallas 2011, no pet.); *Siegler v. Williams*, 658 S.W.2d 236, 241 (Tex. App.—Houston [1st Dist.] 1983, no writ). The trial court must condition fees to appellee on appellant's unsuccessful appeal. *Cessna Aircraft Co.*, 345 S.W.3d at 147–48; *Jones v. American Airlines, Inc.*, 131 S.W.3d 261, 271 (Tex. App.—Fort Worth 2004, no pet.). Here, the trial court's award of appellate fees is not conditioned on Palma prevailing on appeal. The trial court abused its discretion in awarding the appellate fees. *See, e.g., Reeves Cty., Tex. v. Pecos River Livestock, Inc.*, No. 08-99-00007-CV, 2000 WL 1433870, at *10–11 (Tex. App.—El Paso Sept. 28, 2000, no pet.) (trial court abused its discretion by awarding unconditional appellate fees).

Further, relator lacks an adequate remedy on appeal. *See In re Ford Motor Co.*, 988 S.W.2d 714, 723 (Tex. 1998) ("appeal is not an adequate remedy when a court imposes a monetary penalty on a party's prospective exercise of its legal rights."); *Pecos River Livestock, Inc.*, 2000 WL 1433870, at *10–11 ("A trial court may not penalize a party for taking a successful appeal by taxing it with attorney's fees."). In *Ford Motor Company*, the Texas Supreme Court granted mandamus relief where the trial court ordered relator to pay appellate

attorney's fees "if this issue is taken up on appeal or by Application for Writ of Mandamus." 988 S.W.2d at 720, 723. The court held that such an order was improper because it was not conditioned on relator pursuing an unsuccessful appeal or original proceeding. *Id.* The order at issue here is worded similarly to the order in *Ford Motor Company* and should similarly be vacated or reformed. Accordingly, we conditionally grant the writ as to the unconditional appellate fees.

C. Death penalty sanctions

Finally, relator challenges the trial court's order that relator's answer be deemed stricken if relator does not comply with the order compelling post-judgment discovery. Although striking an answer is a death penalty sanction, relator's challenge to it is premature because the trial court has not struck the answer. *See In re Kristensen*, No. 14-14-00448-CV, 2014 WL 3778903, at *8 (Tex. App.—Houston [14th Dist.] July 31, 2014, orig. proceeding) (petition premature to challenge a possible future imposition of sanctions by the trial court). Accordingly, we deny the petition on this issue.

Conclusion

The trial court abused its discretion by refusing to hear and rule on relator's motion to set supersedeas bond. The trial court also abused its discretion by awarding unconditional appellate fees. Relator lacks an adequate remedy on appeal to cure these errors. Accordingly, we conditionally grant the writ in part. We order the trial court, within fifteen (15) days of the date of this opinion, to (i) hold a hearing on relator's motion to set the amount of supersedeas bond, (ii) make written rulings setting the amount of supersedeas bond and providing relator with twenty days from the date of the order setting bond to post the bond, and (iii) make written rulings reforming the July 5, 2017 order compelling post-judgment discovery by either removing the unconditional award of appellate attorney's fees or conditioning the appellate fees award on

Palma prevailing on an appeal of the order compelling post-judgment discovery. We deny the petition on the two remaining issues. A writ will issue only if the trial court fails to comply with this opinion and the order of this date.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

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