Petition for Writ of Mandamus Denied and Memorandum Opinion filed September 20, 2010.

In The

Fourteenth Court of Appeals

NO. 14-10-00473-CV

IN RE AKER KVAERNER|IHI, Relator

ORIGINAL PROCEEDING
WRIT OF MANDAMUS

MEMORANDUM OPINION

On May 27, 2010, relator, Aker Kvaerner|IHI, filed a petition for writ of mandamus in this Court. *See* Tex. Gov't Code Ann. §22.221 (Vernon 2004); *see also* Tex. R. App. P. 52. In the petition, relator asks this Court to compel the Honorable Dion Ramos, presiding judge of the 55th District Court of Harris County, to set aside his January 14, 2010 order denying relator's motion to disqualify counsel. We deny the petition.

BACKGROUND

Relator and real party in interest, Bay Ltd., entered into a subcontract related to the construction of a processing facility in Cameron Parish, Louisiana, on which relator was the contractor. After a dispute arose between relator and Bay, Bay's attorney, Stanley W.

Curry, Jr., filed a demand for arbitration against relator on June 26, 2007 (the "Texas arbitration"). By late 2008, relator and Bay had resolved all but certain claims related to the emission of hexavalent fume in connection with welding operations.

From 2000 to 2008, CBY provided legal services to Aker Solutions U.S. or its affiliates.[1] Curry, who still represented Bay, joined CBY on January 1, 2009. Curry wrote relator's counsel on February 12, 2009, that he had joined CBY. The potential attorney conflict issue was first raised in early May 2009, when relator's counsel called Curry to discuss the issue. Curry responded that he did not believe a conflict existed. At a May 20, 2009 meeting, relator again raised the conflict issue again with Curry, but did not demand that he discontinue his representation of Bay.

On June 2, 2009, relator and Bay executed the settlement agreement and dismissed the Texas arbitration with prejudice. Under the settlement agreement, the parties agreed that the hexavalent chromium claims would be heard in an arbitration proceeding pending in San Diego, California between relator and the owner of the construction project, Cameron LNG, LLC (the "California arbitration"). The California arbitration was put on hold while relator and Cameron mediated their dispute. Relator's claims against Cameron were resolved at mediation, and Cameron was dismissed from the California arbitration on August 31, 2009. However, the hexavalent chromium claims were not settled.

Relator demanded in writing on September 8, 2009, that CBY withdraw from its representation of Bay. CBY responded that no conflicted existed that would warrant its disqualification.[2] Relator and Bay entered into a Rule 11 agreement on October 19, 2009,

[1] Aker Solutions U.S. is engaged in engineering, procurement, and construction of processing plants. IHI is Aker Solutions U.S.'s partner on the underlying construction project.

[2] On October 2, 2009, relator wrote the AAA that it objected to CBY's representation of Bay in the California arbitration and further informed the AAA that it had filed a lawsuit in San Diego County, California, seeking to enjoin CBY from representing Bay in the California arbitration.

addressing the disqualification issue. Relator agreed to file a motion to disqualify counsel or other pleading in the trial court on or before November 5, 2009.

Relator filed its counterclaim and third party action against CBY on November 4, 2009, requesting that the trial court enjoin CBY from representing Bay with regard to claims relating to the construction project. On December 2, 2009, relator filed its motion to disqualify CBY from representation of Bay. The trial court held a two-day hearing on the motion to disqualify and, on January 14, 2010, signed the order denying relator's motion, finding that that CBY had not represented relator on the same matter; that CBY had not represented relator on matters with a substantial relationship to the case at bar; and that relator had waived its complaint of any attorney conflict by the actions of its principals, employees, and attorneys. Relator filed this original proceeding seeking to set aside the trial court's January 14, 2010 order.

STANDARD OF REVIEW

To be entitled to the extraordinary relief of a writ of mandamus, the relator must show that the trial court abused its discretion, and there is no adequate remedy by appeal. *In re Laibe Corp.*, 307 S.W.3d 314, 316 (Tex. 2010) (orig. proceeding) (per curiam). With respect to the resolution of factual issues committed to the trial court's discretion, the reviewing court may not substitute its judgment for that of the trial court. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). Instead, the relator must establish must establish that the trial court could have reasonably reached only one decision. *In re Dillard Dep't Stores, Inc.*, 198 S.W.3d 778, 780 (Tex. 2006) (orig. proceeding) (per curiam). Even if the reviewing court would have decided the issue differently, it may not disturb the trial court's decision unless that decision is shown to be arbitrary and unreasonable. *Walker*, 827 S.W.2d at 840.

On the other hand, a trial court has no discretion in determining what the law is or applying the law to the facts. *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 781 (Tex. 2006) (orig. proceeding). A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to constitute a clear and prejudicial error of law, or if it clearly fails to correctly analyze or apply the law. *In re Columbia Med. Ctr. of Las Colinas*, 306 S.W.3d 246, 248 (Tex. 2010) (orig. proceeding) (per curiam); *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (per curiam).

There is no adequate remedy by appeal of a trial court's ruling on a motion to disqualify. *Nat'l Med. Enters., Inc. v. Godbey*, 924 S.W.2d 123, 133 (Tex. 1996) (orig. proceeding).

WAIVER

Bay argues that relator waived any right to seek disqualification by failure to timely file its motion to disqualify. A party that fails to seek disqualification timely waives the complaint. *Grant v. Thirteenth Court of Appeals*, 888 S.W.2d 466, 468 (Tex. 1994) (orig. proceeding) (per curiam) (op. on reh'g); *Vaughan v. Walther*, 875 S.W.2d 690 (Tex. 1994) (orig. proceeding) (per curiam). The untimely urging of a disqualification motion lends support to any suspicion that the motion is being used as a tactical weapon. *Grant*, 888 S.W.2d at 468. "The court will consider the length of time between the moment the conflict became apparent to the aggrieved party to the time the motion for disqualification is filed in determining whether the complaint was waived." *Wasserman v. Black*, 910 S.W.2d 564, 568 (Tex. App.—Waco 1995, orig. proceeding).

Bay asserts that relator was aware of the disqualification issue, but waited until December 2, 2009, to file its motion for disqualification. Although Curry sent notice on February 12, 2009, to one of relator's attorneys that he had joined CBY, and further

wrote another attorney for relator on CBY letterhead on March 3, 2009, about the pending settlement agreement between relator and Bay, relator did not raise the conflict issue until May 2009, when relator's counsel called Curry about the issue. Shortly thereafter, relator raised the conflict issue again at a May 20, 2009 meeting regarding the negotiation of the settlement agreement.

According to Curry's testimony at the disqualification hearing, relator's representatives at the May 20, 2009 meeting did not demand that he immediately discontinue his representation of Bay or suggest that they would not negotiate with him because he had confidential information. John Seaford of Aker Solutions similarly testified that no one at that meeting suggested that Curry had secret information that could be used against relator or that negotiations could not continue with Curry. Moreover, according to Curry's affidavit, "AK/IHI's counsel raised the spectre of disqualification of CBY if Bay did not settle its construction claims with AK/IHI, and I believed that AK/IHI used the threat of disqualification to leverage such a settlement." However, John Seaford testified at the disqualification hearing that the conflict issue was not raised as a threat or to gain leverage in the settlement negotiations with Bay.

Bay asserts that relator engaged in "intense" negotiations related to the June 2, 2009 settlement agreement. Relator disputed the intensity of the May 2009 negotiations. John Seaford testified that the "significant commercial events" had been negotiated as far back as late 2007, and they had reached their final agreement on the pricing "well in advance of May [2009]." In other words, according to Seaford, the substance of the settlement had been negotiated and agreed to before Curry joined CBY, and the remaining issues centered on drafting the agreement that had been agreed to previously. Curry, on the other hand, testified that the "numbers had been reached, but that was just

the beginning of the negotiation[s]." Curry explained that "the settlement agreement was very complicated" and the negotiations were "very contentious" and "heated."

Relator argues that it satisfactorily explained the time that elapsed between the date CBY informed relator that it would not withdraw and the date relator both filed suit in California seeking to enjoin CBY from representing Bay in the California arbitration and filed its third party complaint against CBY in the trial court. *See In re Epic Holdings, Inc.*, 985 S.W.2d 41, 52 (Tex. 1998) (orig. proceeding). The California arbitration was put on hold following the June 2009 settlement of the Texas arbitration to permit mediation of relator's claims against Cameron. Therefore, there was no need to pursue the disqualification issue and, if relator had been able to settle Bay's claims with Cameron, it might never have been necessary to pursue it. The mediation process with the owner was completed on August 28, 2009. On September, 8, 2009—ten days after the completion of the stand down period—relator demanded in writing that CBY cease its representation of Bay. CBY denied the existence of a conflict in writing on September 22, 2009. Relator agreed in the October 19, 2009 Rule 11 agreement to file a motion to disqualify counsel or other pleading seeking relief related to the disqualification issue on or before November 5, 2009.

Relator further contends that there is nothing to suggest that the disqualification issue is being asserted as a dilatory tactic because it did not wait until the day of trial or final hearing to raise the issue. *See Vaughan*, 875 S.W.2d at 691 (holding party waived disqualification by waiting until day of final hearing to raise disqualification issue even though she was aware of issue six months and one half months earlier). Instead, the disqualification issue was the sole initial focus of the parties' efforts from the very beginning of the filing of the third party complaint against CBY.

Relator has not asserted that it was not aware of the disqualification issue when Curry first sent notice to relator's counsel in February 2009, or when Curry wrote relator's counsel on March 3, 2009, on CBY letterhead regarding the pending settlement. There is no dispute that relator knew of the disqualification issue in May 2009, when it raised the issue with Curry. However, relator did not demand that Curry or CBY withdraw from representation of Bay during the May 2009 negotiations after Curry informed relator that he did not believe a conflict existed. Instead, relator waited until September 2009 to demand CBY's withdrawal and until December 2009 to file its motion to disqualify. The parties disputed the significance of the May 2009 negotiations and whether relator raised the conflict issue at that time as "leverage" in the settlement.

The trial court explicitly decided these fact issues in favor of Bay. We conclude that the trial court did not abuse its discretion in finding that relator waived the disqualification issue by the actions of its principals, employees and attorneys.[3]

CONCLUSION

Relator has not established its entitlement to the extraordinary relief of a writ of mandamus. Accordingly, we deny relator's petition for writ of mandamus.

PER CURIAM

Panel consists of Justices Brown, Sullivan, and Christopher.

[3] Because of our disposition on the issue of waiver, we need not address the other issues raised in relator's petition.