

Petition for Writ of Mandamus Denied and Memorandum Opinion filed October 5, 2010.



In The

Fourteenth Court of Appeals

NO. 14-10-00933-CV

IN RE RINO PUNNOOSE KALATHIL, Relator

**ORIGINAL PROCEEDING
WRIT OF MANDAMUS**

MEMORANDUM OPINION

On October 1, 2010, relator Rino Punnoose Kalathil 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 Robert J. Kern, presiding judge of the 387th District Court of Fort Bend County to vacate his order signed September 21, 2010, ordering relator to produce discovery and to appear at a hearing on October 6, 2010 to determine whether relator's pleadings in the underlying litigation should be struck. Relator further asks this court to compel the respondent to vacate his order denying relator's motion for summary judgment.

Factual and Procedural Background

Relator and the real party in interest, Susan Kalathil, entered into a mediated settlement agreement regarding their divorce on May 4, 2009. On May 29, 2009, the

final decree of divorce was signed. On August 31, 2009, Susan filed a “Petition for PostDivorce Division of Undisclosed Property” in which she alleged that Rino hid community assets including undisclosed commissions earned from November 24, 2008 through May 4, 2009. Because he hid those assets, Kalathil alleged that the mediated settlement agreement did not include the commissions in the division of property. Rino subsequently filed a motion for summary judgment in which he alleged that the trial court’s plenary power had expired, res judicata barred Susan’s claims, and the court no longer had authority to modify its previous judgment. On February 12, 2010, the trial court denied the motion for summary judgment.

In connection with her petition, Susan sought discovery of certain documents from Rino, which Rino refused to produce. Susan filed at least three motions to compel. The trial court’s order on the third motion is the order complained of in this original proceeding. In that order, signed September 21, 2010, the trial court ordered Rino to “remove all general and specific objections and produce and/or specifically identify which documents are responsive” to certain of Susan’s requests for production. The trial court further ordered Rino to pay attorney’s fees to Susan’s attorney and to appear on October 6, 2010 for a hearing on a motion to strike his pleadings.

Mandamus Review

Mandamus relief is available if the trial court abuses its discretion, either in resolving factual issues or in determining legal principles, when there is no other adequate remedy by law. *See Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex.1992). A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law, or if it clearly fails to analyze or apply the law correctly. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005).

Analysis

Relator seeks a writ of mandamus declaring any orders issued following the divorce void because the court's plenary power expired 30 days after the final divorce decree was signed. Relator further seeks a writ of mandamus because the trial court denied his motion for summary judgment.

Plenary Power

Relator raises the issue whether the trial court has jurisdiction over Susan's petition for post-divorce division of previously undisclosed assets. If the court has jurisdiction, Susan is entitled to pursue discovery. Section 9.006 of the Family Code provides that the trial court "may render further orders to enforce the division of property made in the decree of divorce or annulment to assist in the implementation of or to clarify the prior order." Tex. Fam. Code Ann. § 9.006(a). Under the Family Code, Susan is entitled to file a separate suit seeking assistance in the implementation of the divorce decree to which she agreed. Under Texas Family Code section 9.002, the court rendering the decree of divorce retains the power to enforce the property division. Tex. Fam. Code Ann. § 9.002; *Marshall v. Priess*, 99 S.W.3d 150, 156 (Tex. App.—Houston [14th Dist.] 2002, no pet.). The court also may render further orders to assist in the implementation of or to clarify the prior order. Tex. Fam. Code Ann. § 9.006(a); *Marshall*, 99 S.W.3d at 156. Therefore, to the extent Susan is not attempting to alter the substantive division of property in the final divorce decree the trial court has continuing jurisdiction to consider Susan's petition as a post-divorce enforcement of the division of property. *See Marshall*, 99 S.W.3d at 156. Susan's petition is not a motion for new trial or attempt to have the trial court overturn the final decree of divorce. It is a separate action filed to enforce the division of property agreed to in the original mediated settlement agreement. Susan does not seek to change the divorce decree, but to enforce it which is permitted under the Family Code.

Therefore, relator has failed to establish entitlement to writ of mandamus because the trial court has jurisdiction over the new suit filed.

Motion for Summary Judgment

Mandamus is generally unavailable when a trial court denies summary judgment, no matter how meritorious the motion, because “trying a case in which summary judgment would have been appropriate does not mean the case will have to be tried twice.” *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 465–66 (Tex. 2008). Although the supreme court recently found mandamus was appropriate to correct the erroneous denial of a motion for summary judgment, the court noted that extraordinary circumstances merited extraordinary relief. *See In re USAA*, 307 S.W.3d 299, 314 (Tex. 2010). This case does not present such extraordinary circumstances. Under the facts of this case, petitioner has an adequate remedy by appeal.

Relator has not established entitlement to the extraordinary relief of a writ of mandamus on the ground that the trial court improperly denied summary judgment. Accordingly, we deny relator’s petition for writ of mandamus.

PER CURIAM

Panel consists of Chief Justice Hedges and Justices Yates and Anderson.