

**Petition for Writ of Mandamus Conditionally Granted; Appeal Dismissed;
and Memorandum Opinion filed August 18, 2022.**



In The

Fourteenth Court of Appeals

NO. 14-21-00645-CV

**IN RE NICKSON YOUNG AND SUNFLOWER VEGETABLE OIL, INC.,
Relators**

**ORIGINAL PROCEEDING
WRIT OF MANDAMUS
151st District Court
Harris County, Texas
Trial Court Cause No. 2020-75991**

NO. 14-21-00648-CV

**NICKSON YOUNG AND SUNFLOWER VEGETABLE OIL, INC.,
Appellants
V.
TY TRIEU, Appellee**

**On Appeal from the 151st District Court
Harris County, Texas
Trial Court Cause No. 2020-75991**

MEMORANDUM OPINION

On Monday, November 8, 2021, relators Nickson Young and Sunflower Vegetable Oil, Inc. filed a petition for writ of mandamus in this Court. *See* Tex. Gov't Code Ann. § 22.221; *see also* Tex. R. App. P. 52. In the petition, relator asks this Court to compel the Honorable Mike Engelhart, presiding judge of the 151st District Court of Harris County, to vacate his Order on Motion for Clarification signed October 9, 2021. Relators also filed an appeal from the October 9, 2021 order, making the same claim, currently pending in case number 14-21-00648-CV. For the reasons stated below, we conditionally grant the writ of mandamus and dismiss the appeal.

BACKGROUND

On November 18, 2020, the judge of Division 6 of the Circuit Court of Jackson County, Missouri, at Kansas City signed an order and commission authorizing the deposition and subpoena duces tecum of an out-of-state witness, American First National Bank in *Ty Trieu v. Nickson v. Young, et al.*, pending in that court. Six days later, Ty Trieu filed, in the 151st District Court, a petition to compel the deposition of, and production of documents by, American First National Bank. On November 30, 2020, the trial court granted Trieu's petition as follows:

It is therefore ORDERED that the plaintiff's attorney issue subpoenas and subpoenas duces tecum for the deposition(s) of American First National Bank to compel its testimony and document production pursuant to the attached Notice of Videotaped Deposition Duces Tecum of Corporate Representative(s) of American First National Bank.

On December 4, 2020, relators filed a motion for protection and to quash Trieu's subpoena for deposition and subpoena duces tecum of the corporate representative of American First. On December 21, 2020, the trial court denied relator's motion for protection and to quash. The order is set forth below and reflects the trial court's striking of two sentences:

Pending before this Court is Third-Party Respondents' Motion for Protection and to Quash Petitioner's Subpoena for Deposition Duces Tecum of Corporate Representative of American First National Bank (the "Subpoena"). Having considered the Motion and other papers on file in this matter, the Court finds that the Motion is without merit and must be DENIED.

The Court finds that the Subpoena was authorized by a Missouri state court. ~~Respondents' argument that the same Missouri state court did not intend to issue its Commission and Order because of the discovery deadline in that Missouri lawsuit is flawed.~~ The subpoena is authorized by Texas law and timely under Texas law. The Court therefore overrules Respondents' objections to the Subpoena and HEREBY ORDERS that American First National Bank shall comply with the document request. ~~The Court also finds that Petitioner may conduct the deposition of American First National Bank once the document production is completed.~~

On August 20, 2021, Trieu filed a motion for clarification of the December 21, 2020 order because relators asserted the above order prohibits the deposition of American First's corporate representative. In their response to the motion for clarification, relators asserted the trial court's plenary power had expired. *See* Tex. R. Civ. P. 329b(d).

On October 9, 2021, the trial court signed an order granting the motion for clarification as follows:

On this the _____ day of _____ 2021, this Court considered Petitioner’s Motion for Clarifications [sic] against Third-Party Respondents, and this Court, after considering same, along with briefing and argument of counsel, if any, is of the opinion that said Motions [sic] should be GRANTED.

ORDERED that Petitioner is not prohibited from noticing and taking the deposition of the corporate representative of American First National Bank.

Relators then filed this petition for mandamus claiming the order is void for want of jurisdiction. Trieu filed a response, as requested, and relators have filed a reply. Relators’ brief in the appeal also claims the order is void. Trieu’s brief asserts the appeal should be dismissed for want of jurisdiction.

ANALYSIS

Was the December 2020 order final?

The December 21, 2020 order is final and appealable. The only issues before the trial court were those raised by Trieu’s petition which prayed for “. . . the issuance of a subpoena duces tecum, to provide testimony and to produce the documents requested in the attached Notice of Videotaped Deposition and issue the necessary subpoena.” Because the trial court had previously entered an order on November 30, 2020 authorizing the deposition, when the trial court entered its December 21, 2020 order related to production, it determined all those issues. Therefore, the order was final and appealable on all issues in the Texas matter. *See Centennial Psychiatric Assocs., LLC v. Cantrell*, Nos. 14-17-00391-CV & 14-17-00380-CV, 2017 WL 6544283, at * (Tex. App.—Houston [14th Dist.] Dec. 21, 2017, no pet.) (mem. op.) (holding a Tennessee court’s order and commission that

determined all the issues raised in a motion to quash and for protection was final and appealable) (citing *Hinde v. Hinde*, 701 S.W.2d 637, 639 (Tex. 1985)). See also *Warford v. Childers*, 642 S.W.2d 63, 65–66 (Tex. App.—Amarillo 1982, no writ) (concluding that a Texas trial court's order denying discovery sought pursuant to a Hawaii commission was a final, appealable order).

Is the October 2021 order void?

The motion for clarification requested the trial court to confirm that its December 2020 order did not bar the deposition of American First's corporate representative. The motion did not seek any further relief, only recognition of the relief already received – the denial of the motion to quash the deposition of American First's corporate representative. Accordingly, the trial court's plenary power was not extended and expired on January 20, 2021, thirty days after the order was signed. See *Penny v. Shell Oil Products Co., L.L.C.*, 363 S.W.3d 694, 699 (Tex. App.—Houston [1st Dist.] 2011, no pet.); Tex. R. Civ. P. 329(d) (the trial court has plenary power to modify, correct or reform the judgment for thirty days); Tex. R. Civ. P. 329(a) (a motion to modify, correct or reform the judgment shall be filed within thirty days).

Therefore, the order signed October 9, 2021, is void. See *In re S.W. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding) (per curiam); *Penny*, 363 S.W.3d at 699 (Tex. App.—Houston [1st Dist.] 2011, no pet.). For that reason, relators need not show they lack an adequate remedy by appeal and mandamus relief is appropriate. See *In re S.W. Bell Tel. Co.*, 35 S.W.3d at 605; *In re Brookshire Grocery Co.*, 250 S.W.3d 66, 70 (Tex. 2008) (stating that mandamus relief is appropriate when trial court issues order after expiration of plenary

power). Accordingly, we conditionally grant the writ of mandamus and the order the trial court to vacate the October 9, 2021 order.¹

Does this court have jurisdiction over the appeal?

Because the December 2020 order was final and appealable, the notice of appeal filed November 8, 2021, was not timely filed. Accordingly, we dismiss the appeal. *See* Tex. R. App. P. 26.1 (The notice of appeal must be filed within 30 days after the judgment is signed when appellant has not filed a timely post-judgment motion.).

PER CURIAM

Panel consists of Chief Justice Christopher and Justices Zimmerman and Wilson.

¹ The writ will issue only if the trial court fails to act in accordance with this opinion.