



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-16-00279-CV

IN RE FROST BANK, FORMERLY
THE FROST NATIONAL BANK

RELATOR

ORIGINAL PROCEEDING
TRIAL COURT NO. CV06-12-940

AND

NO. 02-16-00298-CV

IN RE BIANKA WOOTEN

RELATOR

ORIGINAL PROCEEDING
TRIAL COURT NO. 017-284478-16

MEMORANDUM OPINION¹

In these two original proceedings, Frost Bank and Bianka Wooten seek to have this court resolve whether County Court at Law Number Two of Wise County (the Wise County Court) or the 17th District Court of Tarrant County (the Tarrant County District Court) has dominant jurisdiction of a dispute over which party's lien secured by business personal property is superior. Because we conclude that the subject matter of each proceeding is inherently interrelated and that the Tarrant County District Court suit was filed first, we deny relief in cause number 02-16-00298-CV filed by Bianka. We also dismiss the petition in cause number 02-16-00279-CV filed by Frost Bank as moot.

Background

Bianka and Jerry Wooten were divorced in 2009 by the 271st District Court of Wise County. The divorce decree stated that "the nature of the properties making up the estate" prevented the division of community property in a just and right manner. Thus, the trial court awarded sole ownership of a corporation, TLC Accessories & Performance, Inc., to Jerry, but it also awarded Bianka an equitable lien on "the stock and assets of TLC . . . in the nature of a purchase-money lien." The decree further ordered Jerry to sign a vendor's lien note for

¹See Tex. R. App. P. 47.4.

\$200,000 payable to Bianka and to make monthly payments of \$1,515 on the note beginning in February 2009.

In 2011, unbeknownst to Bianka, TLC obtained a loan from Frost Bank and gave Frost Bank a security interest in “[a]ll [i]nventory and [a]ccounts.” Jerry signed the loan documents as TLC’s President. Frost Bank filed a UCC-1 financing statement with the Texas Secretary of State describing the collateral as “[a]ll [i]nventory and [a]ccounts; whether any of the foregoing is owned now or acquired later; all accessions, additions, replacements, and substitutions relating to any of the foregoing; all records of any kind relating to any of the foregoing; [and] all proceeds relating to any of the foregoing (including insurance, general intangibles and other accounts proceeds).”

On October 31, 2013, Bianka filed a Motion for Enforcement and Order to Appear in the Wise County Court² alleging that Jerry had failed to execute a vendor’s lien note and to make three of the monthly payments owed as well as various other payments due under the decree. The Wise County Court signed an agreed order stating that within ten days Jerry’s attorney would prepare a promissory note and lien to secure the \$200,000 owed to Bianka and that Jerry would pay Bianka \$6,060 for the arrearage on or before February 15, 2014.

²Although our mandamus record does not contain a contemporaneous order, a letter from the Wise County District Clerk dated May 2, 2016 indicates that “due to a conflict of interest,” the divorce and custody proceeding was reassigned to the Wise County Court.

On February 7, 2014, and again on May 19, 2015, TLC—with Jerry again signing as President—obtained additional loans from Frost Bank. Frost Bank filed an amended UCC-1 financing statement with the Texas Secretary of State adding as collateral “[a]ll [e]quipment; whether any of the foregoing is owned now or acquired later; all accessions, additions, replacements, and substitutions relating to any of the foregoing; [and] all records of any kind relating to any of the foregoing.”

On May 22, 2015, Bianka filed a Petition for Enforcement of Property Division by Contempt and, on June 8, 2015, a First Amended Petition for Enforcement of Property Division by Contempt. Bianka alleged that Jerry had failed to comply with the 2009 divorce decree and December 2013 agreed order on her first motion to enforce by, among other things, failing to make 16 of the monthly \$1,515 payments and failing to deliver a promissory note and security agreement. She sought to have Jerry held in contempt, jailed, and fined, and she also sought a money judgment for \$32,936.33. Additionally, Bianka alleged that she believed Jerry was in the process of selling TLC’s stock and assets and sought a restraining order and temporary injunction preventing him from doing so.

On June 26, 2015, Jerry finally signed a Note, Security Agreement, and Verification consisting of a note in the principal amount of \$200,000, secured by “a vendor[']s lien and security interest in all the stock and assets of TLC . . . includ[ing] all stock, inventory, accounts receivables, bank accounts, vehicles,

tangible and intangible assets of TLC.” The document also states that it “is given to evidence the indebtedness imposed on [Jerry] by the . . . [d]ecree.”

In January 2016, while her First Amended Petition for Enforcement of Property Division by Contempt was still pending, Bianka filed a Motion for Sequestration in the Wise County Court stating that she believed Jerry was selling TLC and that the collateral securing her equitable lien was in immediate danger of being concealed and wasted. She requested that the trial court sequester the collateral within its jurisdiction in Decatur or Bridgeport.

The trial court heard the motion on February 9, 2016. Jerry’s counsel told the court that Jerry was shutting down TLC and had no problem with turning over everything to Bianka. Both Bianka’s and Jerry’s attorneys were aware of Frost Bank’s UCC-1 filings, and Jerry’s counsel stated that he had attempted to contact Frost Bank but had gotten no response. According to Bianka’s counsel,

[W]e want to take all this equipment and we want to bring it up here and put it in a secured facility in Decatur in the jurisdiction of this Court and the control of this Court, not down in Tarrant County where there’s a possibility that once the other creditors find out that this business is going out of business, there could be other creditors out there who may have some kind of claim on the assets which already belong to [Bianka]. We want to take possession immediately.

The trial court did not rule on the motion because the parties came to an agreement that they dictated into the record. See Tex. R. Civ. P. 11. Bianka’s counsel stated the agreement as follows:

At 10 a.m. tomorrow morning sharp we are going to show up at this place of business with the proper equipment and personnel to pick

up and remove all of this equipment, including the vehicles with the exception of one. We are going to bring these up here to Wise County and put them in storage up here in Wise County in the jurisdiction of this Court pending a motion for enforcement that's going to be heard next week by this court.

. . . .

. . . [W]e have asked for keys, titles, any instrumentality that may be necessary for this equipment, including office equipment.

Bianka took possession of the agreed-upon items, but the trial court did not issue a writ of sequestration or other order.³

Afterward, also in February 2016, the Wise County Court held a hearing on Bianka's still-pending First Amended Petition for Enforcement of Property Division by Contempt. On February 24, 2016, the trial court rendered an agreed order on that motion, awarding Bianka a lump sum of \$46,130.27 and attorney's fees of \$2,119.24 to Bianka's counsel. Bianka filed an abstract of judgment in the Wise County and Tarrant County property records.

On March 3, 2016, Frost Bank filed a Prior Perfected Secured Party's Objection and Response to Motion for Sequestration in the Wise County Court. Frost Bank denied making a general appearance. It asserted that its security interest was superior to Bianka's and that she had converted the TLC property by taking possession of it. Frost Bank asked the Wise County Court to deny Bianka's Motion for Sequestration and to order Bianka "to immediately relinquish

³Bianka's filings characterize this Rule 11 agreement as an agreed order of the trial court, but nothing in the mandamus record provided to us shows that the trial court memorialized the terms of this agreement in an order.

possession of, and turnover and surrender” the property to Frost Bank. Nothing in the record shows that the Wise County Court ruled on this objection.

On March 22, 2016, Frost Bank filed an original petition in the Tarrant County District Court alleging that Bianka had wrongfully taken possession of, converted, and misappropriated its collateral. Frost Bank also brought unjust enrichment and declaratory judgment claims as well as a claim for exemplary damages.

Two days later, in the Wise County Court, Bianka sued Jerry, individually and as President of TLC for conversion, fraud, and violations of the Uniform Fraudulent Transfer Act. She sought to have Jerry jailed and asked for a temporary injunction “enjoining [Jerry] from selling, transferring the stock, assets and or intellectual property of TLC Performance & Accessories, Inc. and TLC Repairs, LLC. and any asset of any kind anywhere covered by this Court’s order and lien created by this Court on May 26, 2009 in the Final Decree of Divorce.”

On April 1, 2016, Frost Bank filed its own sequestration motion in the Tarrant County District Court, seeking to obtain the property in Bianka’s possession. Bianka filed an objection claiming that Jerry’s security interest to Frost Bank is void or voidable under the Uniform Fraudulent Transfer Act. Nevertheless, visiting retired judge Fred Davis granted the motion, and Frost Bank obtained most of the TLC property from Bianka as a result.

Bianka filed a plea in abatement in the Tarrant County District Court, which she amended twice. She supported her Second Amended Plea in Abatement

with her affidavit, as well as (1) a copy of the 2009 divorce decree, (2) the December 2, 2013 agreed order on the 2013 motion to enforce, (3) the June 25, 2015 Note, Security Agreement, and Verification that Jerry signed, (4) the reporter's record from the February 2009 hearing on her Motion for Writ of Sequestration in the Wise County Court, and (5) the Wise County Court's February 24, 2016 agreed order on her First Amended Petition for Enforcement of Property Division by Contempt. Judge Davis also signed an order denying the plea in abatement on August 3, 2016.

On August 5, 2016, the Tarrant County District Court ordered Bianka in writing to provide Frost Bank with the location of and access to the TLC property she had taken possession of. The order also directed the Tarrant County Clerk to "issue a Notice to show Cause directing and requiring . . . Bianka . . . to appear at the time and place and for the purposes above stated, and that the Notice to Show Cause shall be accompanied by a copy of Plaintiff's Motion to Hold Defendant in Civil Contempt and this Order to Show Cause."

That same day, in the Wise County Court, Bianka filed a First Amended Petition for Declaratory Relief and Verified Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction in which she added Frost Bank as a party. As to Frost Bank, she sought a series of declaratory judgments and an antisuit injunction seeking to enjoin Frost Bank from continuing its suit in the Tarrant County District Court. The Wise County Court judge signed a temporary restraining order (TRO) prohibiting Frost Bank and its counsel from

- a. Filing a separate lawsuit in Texas, which lawsuit arises under or pertains to Frost Bank's alleged claims in and to the TLC Assets;
- b. Pursuing a lawsuit in Texas, which lawsuit arises under or pertains to Frost Bank's alleged claims in and to the TLC Assets;
- c. Filing or pursuing a lawsuit in Texas for any claim that would be a compulsory counterclaim to the proceedings before this Court;
- d. Filing or pursuing a lawsuit in Texas, which arises from the transactions and/or occurrences made the basis of Plaintiff's claims for relief and causes of action asserted herein;
- e. Further prosecuting and pursuing the Tarrant County Lawsuit against Plaintiff, in any manner;
- f. Serving or seeking further discovery from Plaintiff as a party to and in connection with the Tarrant County Lawsuit;
- g. Filing any motions or seeking any rulings affecting Plaintiff as a party to and in connection with the Tarrant County Lawsuit;
- h. Seeking any judgment against Plaintiff in connection with the Tarrant County Lawsuit;
- i. Corresponding with the court in the Tarrant County Lawsuit, including any presiding or visiting judge in said court, in any way or manner, as might be related to Plaintiff being a party to the Tarrant County Lawsuit;
- j. Proceeding to trial against Plaintiff as a party to the Tarrant County Lawsuit;
- k. Taking any other actions in any way associated with, related to, or in any way occurring as a direct or indirect consequence of, the Tarrant County Lawsuit; and
- l. [S]elling, transferring, assigning, or otherwise disposing of any of the TLC Assets acquired in Frost Bank's Writ of Sequestration, and pursuant to the order granting same, ordered by the court in the Tarrant County Lawsuit until final judgment regarding the rights and interests of the parties has been determined by this Court.

The expiration date in the order was August 19, 2016 “unless extended” by the court.

Frost Bank filed the first original proceeding in this court, seeking an emergency stay of the Wise County Court’s order. We granted the stay pending resolution of that original proceeding. A short time later, Wooten filed an original proceeding and sought an emergency stay of all proceedings in the Tarrant County District Court pending resolution of her original proceeding. We granted her requested relief as well. Thus, all TLC-related proceedings involving Bianka and Frost Bank in the Wise County Court and the Tarrant County District Court are currently stayed.

Standard of Review

Mandamus relief is proper only to correct a clear abuse of discretion when there is no adequate remedy by appeal. *In re Olshan Found. Repair Co.*, 328 S.W.3d 883, 888 (Tex. 2010) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). We give deference to a trial court’s factual determinations that are supported by evidence, but we review the trial court’s legal determinations de novo. *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009) (orig. proceeding).

Absent extraordinary circumstances, mandamus will not issue unless the relator lacks an adequate remedy by appeal. *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 210–11 (Tex. 2004) (orig. proceeding) (citing *Walker*, 827

S.W.2d at 839). This requirement depends on a careful analysis of the costs and benefits of interlocutory review. *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 464 (Tex. 2008) (orig. proceeding). As this balance depends heavily on circumstances, it must be guided by analysis of principles rather than simple rules that treat cases as categories. *Id.*

An appellate remedy is adequate when any benefits to mandamus review are outweighed by the detriments. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding). When the benefits outweigh the detriments, we must conduct further analysis. *Id.* An appeal is inadequate for mandamus purposes when parties are in danger of permanently losing substantial rights, such as when the appellate court would not be able to cure the error, the party's ability to present a viable claim or defense is vitiated, or the error cannot be made part of the appellate record. *Van Waters & Rogers, Inc.*, 145 S.W.3d at 210–11; *Walker*, 827 S.W.2d at 843–44. An appellate court should also consider whether mandamus will allow the court “to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments” and “whether mandamus will spare litigants and the public ‘the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.’” *In re Team Rocket, L.P.*, 256 S.W.3d 257, 262 (Tex. 2008) (orig. proceeding) (quoting *Prudential*, 148 S.W.3d at 136).

Issues Are Inherently Interrelated

To determine if there is a conflict between these two courts, we must first “ask whether there is an inherent interrelation between the subject matter of the two pending lawsuits that triggers a dominant-jurisdiction question.” *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287, 292 (Tex. 2016) (orig. proceeding). “In determining whether an inherent interrelationship exists, courts should be guided by the rule governing persons to be joined if feasible and the compulsory counterclaim rule.” *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 247 (Tex. 1988) (citing Tex. R. Civ. P. 39, 97(a)), *disagreed with on other grounds by In re J.B. Hunt Transp.*, 492 S.W.3d at 292–93. Rule 97(a) provides that a pleading must state as a counterclaim

any claim within the jurisdiction of the court, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Tex. R. Civ. P. 97(a). “[A] counterclaim is compulsory if, in addition to Rule 97(a)’s other requirements, it was not the subject of a pending action when the original suit was commenced.” *In re J.B. Hunt Transp.*, 492 S.W.3d at 293. Rule 39(a) regarding parties provides that

[a] person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of

the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

Tex. R. Civ. P. 39(a).

When Frost Bank filed its suit in the Tarrant County District Court on March 22, 2016, the Wise County Court had already issued its February 24, 2016 agreed order on the amended petition for enforcement that Bianka had filed in 2015. Because that order disposed of all parties and issues, it was final and appealable. See *Thomas v. Thomas*, No. 14-02-01286-CV, 2003 WL 1088220, at *1 (Tex. App.—Houston [14th Dist.] Mar. 13, 2003, no pet.) (mem. op.); *Reynolds v. Reynolds*, 860 S.W.2d 568, 570 (Tex. App.—Dallas 1993, writ denied). Moreover, that order foreclosed the issuance of a sequestration order. See Tex. Civ. Prac. & Rem. Code Ann. § 62.002 (West 2008) (providing that sequestration order may be issued at any time before final judgment). Thus, when Frost Bank filed its suit in the Tarrant County District Court, there was no pending suit involving the same subject matter in the Wise County Court.⁴ Consequently, for purposes of determining whether the subject matter of the Tarrant County District Court suit and Wise County Court suit are interrelated, the

⁴Although the Wise County Court retained plenary power over its judgment until March 25, 2016, and Frost Bank had filed an objection to sequestration, there were no other pending postjudgment motions, and Frost Bank's pleading was moot. See Tex. R. Civ. P. 329b. Additionally, Bianka's March 24, 2016 filing in the Wise County Court purported to be a new suit rather than a motion for additional or different relief as to the February 24, 2016 final order on her First Amended Petition for Enforcement of Property Division by Contempt.

Tarrant County District Court suit is first in time. We must therefore determine whether Bianka's later-filed claims against Frost Bank in the Wise County Court are compulsory counterclaims in the Tarrant County District Court.

The Tarrant County District Court has jurisdiction to consider declaratory judgment claims regarding which lien is superior (Bianka's or Frost Bank's), such as the ones raised in Bianka's petition in the Wise County Court. See *Red Rock Props. 2005, Ltd. v. Chase Home Fin., L.L.C.*, No. 14-08-00352-CV, 2009 WL 1795037, at *6 (Tex. App.—Houston [14th Dist.] June 25, 2009, no pet.) (mem. op.); see also Tex. Civ. Prac. & Rem. Code Ann. § 37.002(b), 37.004(a) (West 2015). Those claims are directly related to the issue of the propriety of Bianka's actions in regard to TLC's personal property and to the issue of which party is entitled to retain TLC's property in satisfaction of that party's lien. In other words, Bianka's declaratory judgment claims as to the status of the liens are directly responsive to Frost Bank's allegations of lien superiority in its Tarrant County District Court petition. Additionally, Bianka's claims for a money judgment against Jerry for conversion and violation of the Uniform Fraudulent Transfer Act—as a result of TLC's granting a security interest in its personal property to Frost Bank despite the granting of an equitable lien in the divorce decree—and her request to hold him in contempt for violations of the decree are not necessary to the resolution of the lien-superiority dispute between her and Frost Bank in the

Tarrant County District Court.⁵ See Tex. R. Civ. P. 39(a); *Genesis Tax Loan Servs., Inc. v. Kothmann*, 339 S.W.3d 104, 107 (Tex. 2011) (explaining pleading and proof in suit raising issues of lien superiority). Jerry has apparently abandoned any interest in TLC’s personal property in favor of whichever creditor—Bianka or Frost Bank—prevails.

For these reasons, we conclude and hold that Bianka’s claims in the Wise County Court suit are interrelated with Frost Bank’s claims in the Tarrant County District Court suit for dominant jurisdiction analysis purposes. See Tex. R. Civ. P. 97(a); *In re J.B. Hunt Transp.*, 492 S.W.3d at 292. The general rule is that the court in which the suit is first filed acquires dominant jurisdiction to the exclusion of the other coordinate courts. Thus, we conclude and hold that the Tarrant County District Court did not abuse its discretion by denying Bianka’s plea in abatement. See *In re J.B. Hunt Transp.*, 492 S.W.3d at 294. We therefore deny her petition for writ of mandamus.

Frost Bank’s Petition Is Moot

Having determined that the Tarrant County District Court has dominant jurisdiction, we must next determine whether Frost Bank is entitled to relief on its petition for writ of mandamus. The only relief Frost Bank has asked this court for

⁵And to the extent Bianka could seek to add a claim for relief as to Frost Bank or the TLC property in relation to her Uniform Fraudulent Transfer Act claims pending against Jerry, see Tex. Bus. & Com. Code Ann. § 24.008 (West 2015), those claims could be brought in the Tarrant County District Court, which would have jurisdiction over Jerry, a resident of Tarrant County, *cf. id.* § 24.005 (providing that whether transfer is fraudulent depends on debtor’s intent).

is to order the trial court to vacate the TRO. Bianka contends that Frost Bank's petition is moot because the temporary restraining order issued by the Wise County Court has expired. Frost Bank responds that an exception to the mootness doctrine applies in that the issue is capable of repetition yet evading review. According to Frost Bank, even if the TRO has expired, because Bianka's pending suit in the Wise County Court seeks an antisuit injunction, that court could reissue a TRO at any time.

The mere physical or theoretical possibility that the same party may be subjected to the same action again is not sufficient to satisfy the capable-of-repetition-yet-evading-review test. *City of Dallas v. Woodfield*, 305 S.W.3d 412, 419 (Tex. App.—Dallas 2010, no pet.). Because we stayed the proceedings in the Wise County Court upon the filing of Frost Bank's petition, there was no opportunity for Frost Bank to seek, and the Wise County Court to rule on, a plea in abatement in that court. We are confident that the Wise County Court will abide by this court's determination that the Tarrant County District Court has dominant jurisdiction over the issues and claims against Frost Bank raised in Bianka's First Amended Petition for Declaratory Relief and Verified Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction regarding which lien is superior and the validity of her conduct with respect to the TLC personal property. Thus, at this time, we dismiss Frost Bank's petition as moot. See *Gen. Land Office of State of Tex. v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex. 1990); *In re Gregory*, No. 04-16-00277-CV, 2016

WL 3312964, at *1 (Tex. App.—San Antonio June 15, 2016, orig. proceeding) (mem. op.).

Conclusion

Having determined that the Tarrant County District Court has dominant jurisdiction over the dispute between Frost Bank and Bianka as to the lien superiority and TLC collateral-related issues and that Bianka is not entitled to mandamus relief, we deny the petition in this court's cause number 02-16-00298-CV. Having determined that the TRO issued by the Wise County Court has expired and that no exception applies to the mootness doctrine, we dismiss Frost Bank's petition in this court's cause number 02-16-00279-CV. The stay orders previously issued in both causes are lifted.

/s/ Terrie Livingston

TERRIE LIVINGSTON
CHIEF JUSTICE

PANEL: LIVINGSTON, C.J.; MEIER and GABRIEL, JJ.

DELIVERED: October 21, 2016