Third District Court of Appeal

State of Florida

Opinion filed December 11, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1570
Lower Tribunal No. 18-30982

American Medical Systems, LLC, etc., et al.,
Petitioners,

vs.

MSP Recovery Claims, Series LLC, et al.,
Respondents.

On Petition for Writ of Certiorari from the Circuit Court for Miami-Dade County, David C. Miller, Judge.

Reed Smith LLP, and Edward M. Mullins, Lisa M. Baird, David J. de Jesus and Christina Olivos, for petitioners.

MSP Recovery Law Firm, and John H. Ruiz, Michael O. Mena, Gino Moreno and Christine M. Lugo, for respondents.

Squire Patton Boggs (US) LLP, Andrew R. Kruppa and Amanda E. Preston; Rumberger, Kirk & Caldwell, P.A., and Joshua D. Lerner, for Ethicon, Inc. and Boston Scientific Corporation, as amici curiae.

Lewis Brisbois Bisgaard & Smith LLP, and Kathryn L. Ender, Joelle C. Sharman and Brian S. Goldenberg, for ALN International, Inc. and ALN Implants Chirurgicaux, as amici curiae.

Before EMAS, C.J., and LOGUE and SCALES, JJ.

PER CURIAM.

American Medical Systems, LLC, f/k/a American Medical Systems, Inc., American Medical Systems Holdings, Inc., Endo Pharmaceuticals, Inc., and Endo Health Solutions, Inc. f/k/a Endo Pharmaceuticals Holdings, Inc. (collectively "Petitioners"), the defendants below, seek a writ of certiorari to quash the trial court's non-final order denying their motion to dismiss the amended complaint for a pure bill of discovery filed by the plaintiffs below, MSP Recovery Claims, Series, LLC, MSPA Claims 1, LLC, and Series PMPI, a Designated Series of MAO-MSO Recovery II, LLC (collectively "Respondents"). Because Petitioners have failed to demonstrate the requisite irreparable harm, we lack jurisdiction to hear, and therefore dismiss, the instant petition. See Villella v. Ansin, 263 So. 3d 823, 825 (Fla. 3d DCA 2019) ("On this record, where the trial court has not finally resolved whether [the petitioner] may obtain the discovery he seeks . . . we conclude that [the petitioner] has failed to demonstrate the requisite irreparable harm that is required for us to have jurisdiction over this petition."); Lee v. Condell, 208 So. 3d 253, 256 (Fla. 3d DCA 2016) ("[I]rreparable harm is a condition precedent to invoking certiorari jurisdiction that should be considered first." (quoting Lacaretta Rest. v.

Zepeda, 115 So. 3d 1091, 1092 (Fla. 1st DCA 2013))); CQB, 2010, LLC v. Bank of N. Y. Mellon, 177 So. 3d 644, 645 (Fla. 1st DCA 2015) ("The requirement of material, irreparable harm is jurisdictional. We must dismiss the petition if it is not met.").

I. Relevant Background

On January 22, 2019, Respondents filed an amended complaint for a pure bill of discovery against Petitioners, seeking to compel Petitioners to identify whether certain Medicare beneficiaries were implanted with pelvic mesh products sold by Petitioners, and whose healthcare costs were subsequently paid by a Medicare Advantage Organization. On May 3, 2019, Petitioners moved to dismiss the amended complaint, arguing that Respondents had failed to state a valid claim for a pure bill of discovery and that Respondents lacked standing to bring such a claim.[1]

On July 9, 2019, the trial court held a hearing on Petitioners' motion to dismiss the amended complaint and stated that it was denying Petitioners' motion to dismiss. The hearing transcript reflects that the trial court, in denying the motion, confirmed with the parties that the next step in the proceeding was for Petitioners to answer to the amended complaint; but, at Petitioners' request, the trial court agreed to stay the lower proceeding should Petitioners decide to seek appellate review of its order

[1] In the amended complaint, Respondents allege that they obtained assignments entitling them to recover reimbursement or payment from Petitioners. We express no opinion on either the validity or legal effect of the assignments.

denying the motion to dismiss. The next day, July 10, 2019, the trial court entered the challenged order denying Petitioners' motion to dismiss. While the order requires Petitioners to answer to Respondents' amended complaint within thirty days, the order does not require Petitioners to produce any discovery material. The order also provides that the case shall be stayed pending resolution of any timely appeal or petition.

On August 9, 2019, Petitioners timely filed the instant petition in this Court seeking certiorari review of the trial court's order denying Petitioners' motion to dismiss. Respondents responded to the petition and, in the same filing, moved to dismiss the petition. Specifically, noting both that the trial court merely ordered Petitioners to answer the amended complaint, and that Petitioners have not yet been ordered to produce any discovery sought therein, Respondents argue that Petitioners cannot demonstrate the requisite irreparable harm that would vest this Court with the jurisdiction to determine whether there has been a departure from the essential requirements of the law.

II. Analysis

A. Introduction

We agree that Petitioners have not established that the challenged order – merely denying their motion to dismiss – results in the requisite irreparable harm to vest us with jurisdiction, and therefore dismiss the instant petition. See Parkway

Bank v. Fort Myers Armature Works, Inc., 658 So. 2d 646, 649 (Fla. 2d DCA 1995) ("[A] petitioner must establish that an interlocutory order creates material harm irreparable by postjudgment appeal before this court has power to determine whether the order departs from the essential requirements of the law.").

We acknowledge that, in limited instances, Florida's appellate courts have exercised jurisdiction and have engaged in certiorari review of non-final orders issued in actions for a pure bill of discovery. Given the dearth of written opinions discussing this Court's jurisdiction to consider non-final orders entered in such cases, we write to distinguish those cases from this case, and to further explain our reasoning for dismissing the instant petition.

B. Non-final orders denying dismissal of the pure bill of discovery action and requiring production

In several instances, Florida's appellate courts have engaged in certiorari review – and have made the merits determination of whether the orders depart from the essential requirements of law – where the trial court entered non-final orders *both* denying the petitioner's motion to dismiss *and* directing the petitioner to provide the very discovery sought in the underlying complaint for a pure bill of discovery. See Gilbert v. I.W., 105 So. 3d 665, 666 (Fla. 4th DCA 2013) ("[W]e quash the order denying Petitioners' motion to dismiss and the related discovery order."); Lewis v. Weaver, 969 So. 2d 586, 588 (Fla. 4th DCA 2007) (denying certiorari as to an order denying petitioner's motion to dismiss and directing

petitioner to provide the discovery sought in a pure bill of discovery); Kirlin v. Green, 955 So. 2d 28, 30 (Fla. 3d DCA 2007) (granting the certiorari petition to quash lower court orders in a pure bill of discovery case, concluding that "the trial court departed from the essential requirements of law by denying Petitioners' motion to dismiss and allowing [Respondent] to proceed with discovery . . . ."); Adventist Health System/Sunbelt, Inc. v. Hegwood, 569 So. 2d 1295, 1296 (Fla. 5th DCA 1990) (denying certiorari petition challenging an order that both denied petitioner's motion to dismiss a pure bill of discovery complaint and granted respondent's discovery writ).

Similarly, Florida's appellate courts have exercised certiorari jurisdiction, and reached the merits of the petition, when the challenged non-final orders in pure bill of discovery cases ordered the petitioning party to produce discovery. See Mendez v. Cochran, 700 So. 2d 46, 47 (Fla. 4th DCA 1997) (granting certiorari and quashing the lower court's order in a pure bill of discovery case that denied petitioner's motion for a protective order); Publix Supermarkets, Inc. v. Frazier, 696 So. 2d 1369, 1370 (Fla. 4th DCA 1997) (granting certiorari and vacating an order requiring petitioner to provide the discovery sought in a "Verified Ex Parte Emergency Petition to Preserve Evidence" that respondent characterized as a pure bill of discovery).

C. Distinguishing the cases cited herein from this case

As we see it, though, the lower court's non-final orders issued in all these pure bill of discovery actions are akin to the proverbial "cat out of the bag" discovery orders that this Court has found can cause the requisite irreparable harm warranting the exercise of this Court's certiorari jurisdiction. See J.B. v. State, 250 So. 3d 829, 834 (Fla. 3d DCA 2018); Mana v. Cho, 147 So. 3d 1098, 1100 (Fla. 3d DCA 2014); Rousso v. Hannon, 146 So. 3d 66, 71 (Fla. 3d DCA 2014). In such instances, should this Court then conclude that the discovery order departs from the essential requirements of the law, this Court will grant the petition and quash the order. See J.B., 250 So. 3d at 834-35; Mana, 147 So. 3d at 1100; Rousso, 146 So. 3d at 72.

By comparison, because the challenged order in this case requires only that Petitioners file an answer to Respondents' amended complaint – and does not require production of any discovery – Petitioners are unable to establish the requisite irreparable harm for us to exercise certiorari jurisdiction. We, therefore, cannot reach the question of whether the subject order departs from the essential requirements of the law. See Miami-Dade Cty. v. Dade Cty. Police Benevolent Ass'n, 103 So. 3d 236, 238 (Fla. 3d DCA 2012) (recognizing that "prior to addressing whether the petitioners can demonstrate whether the hearing officer's order departs from the essential requirements of the law, [this Court] must first establish that this Court has jurisdiction," i.e., that the "party will suffer material

injury of an irreparable nature" (quoting Bd. of Trs. of Internal Improvement Tr. Fund v. Am. Educational Enters., LLC, 99 So. 3d 450, 455 (Fla. 2012))).

D. Petitioners' reliance on pure bill of discovery cases where it is unclear whether the challenged non-final orders required production of discovery

Petitioners rely principally on two cases – JM Family Enterprises, Inc. v. Freeman, 758 So. 2d 1175 (Fla. 4th DCA 2000) and Debt Settlement Administrators, LLC v. Antigua and Barbuda, 950 So. 2d 464 (Fla. 3d DCA 2007) – to support their argument that, as stated in Petitioners' reply in opposition to Respondent's motion to dismiss, "the fact that the [subject] order does not explicitly compel disclosure is immaterial to the jurisdictional calculus." Petitioners suggest that these two cases – where the appellate courts granted the petitioners' certiorari petitions and quashed orders denying dismissal of pure bill of discovery actions – provide sufficient precedent for this Court to exercise certiorari jurisdiction and to reach the merits of the challenged order. As explained below, we disagree.

In Freeman, the Fourth District reviewed a non-final order denying the petitioners' motion to dismiss a pure bill of discovery. Citing to several of the cases cited above – Mendez, Frazier, and Hegwood – our sister court granted the petition for writ of certiorari and quashed the order denying the motion to dismiss. Freeman, 758 So. 2d at 1176. Subsequently, in Debt Settlement Administrators, LLC, this Court cited to the Fourth District's Freeman decision as the basis for exercising certiorari jurisdiction over an order denying the petitioner's motion to dismiss a

complaint for a pure bill of discovery. Debt Settlement Administrators, LLC, 950 So. 2d at 464. This Court granted the petition for writ of certiorari, quashed the order denying the motion to dismiss and remanded for entry of an order dismissing the cause of action. Id. at 466.

The problem with Petitioners' reliance upon these cases is manifest. First, neither case contains any mention of irreparable harm, which, as discussed herein, is a threshold consideration for an appellate court. See Villella, 263 So. 3d at 825; Lee, 208 So. 3d at 256; CQB, 2010, LLC, 177 So. 3d at 645; Miami-Dade Cty., 103 So. 3d at 238; Parkway Bank, 658 So. 2d at 649. Moreover, because neither case sets forth the content of the underlying dismissal orders, it is unknown whether the trial court also ordered the petitioners to produce the discovery sought in the respective pure bills of discovery. Indeed, if the challenged orders in Freeman and Debt Settlement Administrators, LLC required the production of the sought discovery, those cases would be aligned with the other appellate decisions discussed herein. Finally, unlike in both Freeman and Debt Settlement Administrators, LLC, it is quite clear here that the trial court has not yet ordered Petitioners to produce anything with respect to Respondents' amended complaint for a pure bill of discovery. Rather, the trial court merely ordered Petitioners to answer Respondents' amended complaint within thirty days. See Venezia Lakes Homeowners Ass'n v.

Precious Homes at Twin Lakes Prop. Owners Ass'n, 34 So. 3d 755, 758 (Fla. 3d DCA 2010).

Undercutting Petitioners' suggestion that the instant order results in the requisite irreparable harm, we note that, should the trial court, after Petitioners answer Respondents' amended complaint, render a final judgment compelling discovery, Petitioners would have an adequate remedy via plenary appeal and an accompanying stay. Id. at 758-59 (appeal of final summary judgment ordering the defendant to produce documents sought in a pure bill of discovery); see also Trak Microwave Corp. v. Culley, 728 So. 2d 1177 (Fla. 2d DCA 1998) (appeal of a final judgment granting a pure bill of discovery).[2]

III. Conclusion

The challenged order merely denies Petitioners' motion to dismiss Respondents' amended pure bill of discovery complaint. The challenged order does not require Petitioners to produce any discovery. For these reasons, we conclude that Petitioners have not demonstrated the requisite irreparable harm for us to exercise certiorari jurisdiction to reach the merits of the petition. We, therefore, dismiss the instant petition for lack of jurisdiction.

---

[2] We note that an order dismissing a complaint for a pure bill of discovery is also reviewable on plenary appeal. See Otto's Heirs v. Kramer, 797 So. 2d 594 (Fla. 3d DCA 2001); Nat'l Car Rental v. Sanchez, 349 So. 2d 829 (Fla. 3d DCA 1977).

Petition for writ of certiorari dismissed.