COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

IN RE:	§	No. 08-21-00209-CV
MARK BURKETT,	§	AN ORIGINAL PROCEEDING
Relator.	§	IN MANDAMUS

O P I N I O N

In this mandamus action we are principally asked whether the assertion of a piercing the corporate veil theory opens an individual defendant up to discovery of financial dealings they may have with any other person or entity, whether those dealings are connected to the litigation or not. We conclude the discovery served here goes beyond the outer bounds of relevance. Because an amended petition with different allegations was filed in the trial court after the case reached this Court, we decline to parse the discovery requests to delineate the offensive from the non-offensive. It is enough to say the discovery should have been more narrowly tailored to what could be reasonably expected to aide in the disposition of the claim. We trust the trial court can do that on remand if the issue arises under the newly filed petition.[1]

[1] The mandamus arises out of a discovery order issued by the 109th District Court of Andrews County, the Honorable John Pool presiding.

I. BACKGROUND

At the time of the discovery ruling made the basis of this mandamus, the live petition alleged that plaintiff and real-party-interest Chock's Inc., an oil field service company, had invoiced Crosstex Services, LLC for $20,069.03 worth of goods and services rendered in June 2018. When Crosstex failed to pay the invoices, Chock's sued and pleaded three theories of recovery against Crosstex: a suit on a sworn account, breach of contract, and quantum meruit. The same petition also names Mark Burkett as a defendant, asking the court to pierce Crosstex's corporate veil to hold Burkett individually liable under each of its three pleaded theories.

In support of that piercing claim, the petition alleges that Crosstex "was and is undercapitalized, has no assets, no money in any bank account, no equipment, no buildings, and no property." To pierce the corporate veil, the petition alleges that Burkett:

> 1) used Crosstex as a sham to perpetrate a fraud; 2) organized and operated Crosstex as a mere tool or business conduit for himself; 3) used Crosstex to evade an existing legal obligation and to justify a wrong and protect against the discovery of a crime; 4) operated Crosstex in a manner where is [sic] was inadequately capitalized with the effect of creating an injustice; and 5) used Crosstex to perpetrate a fraud on Chock's for Crosstex 's direct personal benefit.

This section of the petition concludes that Burkett formed Crosstex to commit acts of malfeasance.

The petition also contains a separate fraud count against Burkett alleging that he made material and false representations to Chock's ("Burkett made promises to pay and indicated that Chock's would be reimbursed for the work it performed and for the goods it provided."). In discovery responses, however, Chock's clarified that this was in fact a non-disclosure claim: Burkett had failed to tell Chock's that it should have switched to invoicing another Burkett related

entity, Copper Ridge Resources, LLC, that took over the servicing of the well. Copper Ridge has apparently now gone into bankruptcy.[2]

Chock's served requests for production to Burkett that are the subject of this mandamus. The requests for production, among other things, ask Burkett to produce:

- any "payroll statements/pay stubs" for the past twenty-four months;
- "records reflecting bill payments made by any of Mark Burkett's employers for Mark Burkett's personal benefit" over the course of the past three years;
- "records reflecting bill payments by a company" of which Mark Burkett is a principal, member, or manager, for Burkett's "personal benefit";
- records of all real property currently held by Burkett, and sales of real property for the past three years;
- "records for all oil and gas wells" that Burkett has "performed work" on for the past three years;
- Burkett's tax returns for the past three years

Crosstex also served interrogatories that mirrored many of the same subjects.

In response to these discovery requests, Burkett agreed to provide information germane to himself and Crosstex, but objected to the remaining requests, complaining that the discovery's purpose "is not to discover relevant facts but is rather an improper attempt to locate assets" to satisfy a judgment. Burkett also objected that the discovery "imposes an undue burden, unnecessary expense, harassment, annoyance and invasion of Burkett's personal and property rights[.]" Finally, he objected "because it seeks information not relevant to the subject matter of the pending action and not reasonably calculated to lead to the discovery of admissible evidence."

Burkett also filed a Motion for Protective Order directed at this same discovery. In his motion, Burkett outlined the claims against him, and complained that Chock's discovery "seeks to

[2] Copper Ridge was named as a defendant in the original petition but was dropped from the suit based on the bankruptcy.

obtain information about Burkett's other business interests and activities, personal financial affairs, asset ownership, banking information and other information having nothing to do with whether or not Burkett made fraudulent representations with respect to Crosstex's dealings with Chock's." He sought a protective order because "[a]ny dealings Burkett may have had with any other entity at any time for any other reason are simply not within the scope of discovery permitted by TEX.R.CIV.P. 192.3(a)." He then cited the trial court to Rule 192.6(b) that permits a court to protect litigants from discovery based on "undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights." TEX.R.CIV.P. 192.6(b).

Following what the parties conceded was a non-evidentiary hearing, the trial court denied the motion from which Burkett seeks mandamus relief. The trial court's order limits the time-period for responsive financial records to those from May 2018 to the present.

II. STANDARD OF REVIEW AND CONTROLLING LAW

Mandamus is an extraordinary remedy. *In re Prudential Ins. Co. of America*, 148 S.W.3d 124, 138 (Tex. 2004) (orig. proceeding). To obtain mandamus relief, a relator must show that (1) a trial court has clearly abused its discretion, and (2) the relator has no adequate remedy by appeal. *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992) (orig. proceeding).

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. *Id.* at 840; *In re CSX Corp.*, 124 S.W.3d 149, 151 (Tex. 2003) (orig. proceeding) (per curiam); *In re ReadyOne Industries, Inc.*, 394 S.W.3d 697, 700 (Tex.App.--El Paso 2012, orig. proceeding). "The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred." *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238,

242 (Tex. 1985). We also explain the standard this way: The question is whether the trial court acted without reference to any guiding rules and principles. *Id.* at 241-42.

Germane here, those guiding rules and principles are found in our discovery rules, and a trial court abuses its discretion by ordering discovery that exceeds that permitted by the rules of procedure. *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995) (orig. proceeding) (per curiam); *see also In re Contract Freighters, Inc.*, 646 S.W.3d 810, 814 (Tex. 2022) (orig. proceeding) (per curiam) ("A discovery order that compels production well outside the bounds of proper discovery is an abuse of discretion for which mandamus is the proper remedy."); *In re UPS Ground Freight, Inc*., 646 S.W.3d 828, 831-32 (Tex. 2022) (orig. proceeding) (per curiam) (same).

"In general, a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party." TEX.R.CIV.P. 192.3(a). Evidence is "relevant" if "it has any tendency to make a fact [of consequence to the action] more or less probable than it would be without the evidence[.]" TEX.R.EVID. 401; *In re N. Cypress Med. Ctr. Operating Co., Ltd.*, 559 S.W.3d 128, 131 (Tex. 2018) (orig. proceeding). Moreover, relevance for purposes of discovery is broader than relevance under the Texas Rules of Evidence. *In re N. Cypress*, 559 S.W.3d at 131 (holding that it is not a ground for objection that the information sought will be inadmissible at trial if the information sought "appears reasonably calculated to lead to the discovery of admissible evidence"). The phrase "relevant to the subject matter" is "liberally construed to allow the litigants to obtain the fullest knowledge of the facts and issues prior to trial." *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 664 (Tex. 2009).

While the scope of discovery is generally within the trial court's discretion, *In re CSX Corp.*, 124 S.W.3d at 152, the trial court must try to impose reasonable limits on discovery. *In re American Optical, Corp.*, 988 S.W.2d 711, 713 (Tex. 1998) (orig. proceeding) (per curiam). For

instance, a discovery order that requires document production over an unreasonably long time-period or from distant and unrelated locales is impermissibly overbroad and subject to mandamus correction. *In re CSX Corp.*, 124 S.W.3d at 152. "A central consideration in determining overbreadth is whether the request could have been more narrowly tailored to avoid including tenuous information and still obtain the necessary, pertinent information." *Id.* at 153; *see Texaco, Inc.*, 898 S.W.2d at 815 (explaining that discovery requests should be "reasonably tailored to include only matters relevant to the case"). Stated otherwise, "discovery may not be used as a fishing expedition." *In re Am. Optical Corp.*, 988 S.W.2d at 713.

The second burden on the relator is to show the lack of an adequate remedy by appeal. *Walker*, 827 S.W.2d at 843. If a discovery order compels production of "patently irrelevant or duplicative documents," there is no adequate remedy by appeal if the order "clearly constitutes harassment or imposes a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party." *Id.*; *see also In re CSX Corp.*, 124 S.W.3d at 153.

III. SCOPE OF THE DISPUTE

"To determine the subject matter of the action, and the claims and defenses urged, we logically start with the parties' pleadings." *In re Walmart, Inc.*, 620 S.W.3d 851, 858 (Tex.App.--El Paso 2021 orig. proceeding [mand. denied]); *see also In re Plains Pipeline, L.P.*, 618 S.W.3d 780, 789-90 (Tex.App.--El Paso Oct. 30, 2020, orig. proceeding) (stating that discovery is based on matters relevant to the claims pleaded).

Chock's suit seeks to recover unpaid invoices for services rendered in June 2018. To make Burkett liable for those amounts, Chock's pleaded a "piercing the corporate veil" theory against Burkett. The parameters of that theory are defined by the Texas Business Organization Code that first states the owner of shares in a corporation "may not be held liable to the corporation or its obligees with respect to . . . (2) any contractual obligation of the corporation[.]"

TEX.BUS.ORGS.CODE ANN. § 21.223(a)(2). This limitation expressly precludes theories based on "alter ego of the corporation or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory[.]" *Id*. The same section, however, would permit the imposition of liability if the owner "caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder, beneficial owner, subscriber, or affiliate." *Id*. § 21.223(b). This latter theory is "exclusive and preempts any other liability imposed for that obligation under common law or otherwise." *Id*. § 21.224. Section 21.223(b) does not define "actual fraud" but this Court has recognized that the actual fraud requirement in the Code involves "dishonesty of purpose or intent to deceive[.]" *TransPecos Banks v. Strobach*, 487 S.W.3d 722, 730 (Tex.App.--El Paso 2016, no pet.) (collecting cases for same proposition), *quoting Castleberry v. Branscum*, 721 S.W.2d 270, 273 (Tex. 1986).[3]

Chock's also alleged fraud against Burkett, which as noted above, is based on a non-disclosure. Fraud by nondisclosure is a subcategory of fraud, and requires proof of these elements: (1) the defendant deliberately failed to disclose material facts; (2) the defendant had a duty to disclose those facts to the plaintiff; (3) the plaintiff was ignorant of the facts and did not have an equal opportunity to discover them; (4) the defendant intended the plaintiff to act or refrain from acting based on the nondisclosure; and (5) the plaintiff relied on the non-disclosure, which resulted in injury. *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 219-20 (Tex. 2019); *see also Cantillo v. Cantillo*, 627 S.W.3d 367, 370 (Tex.App.--El Paso 2021, no pet.).

[3] Crosstex is a limited liability corporation. Consistent with other intermediate courts, we have applied section 21.223 to limited liability corporations. *Chico Auto Parts & Serv., Inc. v. Crockett*, 512 S.W.3d 560, 571–72 (Tex.App.--El Paso 2017, pet. denied) (collecting cases).

IV. DISCUSSION

Burkett made two relevance objections. First, Burkett complains about producing information on, and documents from, business entities wholly unrelated to the allegations in the petition before the trial court when the Motion for Protective Order was denied. Second, he contends that Chock's fraud claim, as clarified in its discovery responses, and as statutorily limited by the Texas Business Organizations Act, is not broad enough to justify the far-reaching discovery sought from him.

Measured against the elements of the claims that Chock's alleged, the discovery requests are overbroad in seeking information beyond what is plausibly relevant. *See In re CSX Corp*., 124 S.W.3d at 831-32 ("Requests must show a reasonable expectation of obtaining information that will aid the dispute's resolution."). As for the section 21.223(b) piercing claim, the requests are overbroad in scope and time. Assuming that Chock's could legitimately ask for information on whether Burkett used Crosstex to perpetrate a fraud for his personal benefit for the unpaid invoices, Burkett's transactions with other entities goes well beyond what is conceivably relevant. The requests sought information on his earnings from any entity, and reimbursement for expenses from any other entity in which he held an interest. It sought identification of his personal assets. The requests are also overbroad in time. The specific transactions at issue are for unpaid invoices in June 2018. How Burkett interacted with Crosstex near that time frame might well lead to relevant information. Requiring him to produce financial information well after that date fails a cursory relevance test. *See In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180 n.1 (Tex. 1999) ("[O]verbroad requests [include those] encompassing time periods, products, or activities beyond those at issue in the case—in other words, matters of questionable relevancy to the case at hand.").

The fraudulent non-disclosure claim adds one other dimension to the scope of discovery. Chock's appears to claim that Burkett should have informed it that billings to Crosstex should have

been directed to another entity, Copper Ridge Resources, LLC. How that entity related to Crosstex in 2018 might also bear on the materiality of any non-disclosure claim. We could envision that allegation opening some inquiry into Burkett's dealing with Copper Ridge Resources, LLC near the relevant time period. But as stated above, the fraud by non-disclosure claim would not allow inquiry into every other entity that Burkett may be associated, or all his personal financial records. *See In re Elara Signature Homes, Inc.*, 611 S.W.3d 62, 67 (Tex.App.--Beaumont 2020, orig. proceeding) (far reaching request for financial records from multiple companies involved in a home's construction was too broad).

Chock's filed an amended petition, *after* Burkett filed this mandamus petition, that alters the allegations, and thus the scope of what might be relevant information.[4] Rather than attempt to re-write the requests, or tailor each against the petition before the trial court at the protective order hearing, we remand the case with instructions to narrow the scope of discovery to the specific issues raised in the pleading. *See id.* at 68 (Tex.App.--Beaumont 2020, orig. proceeding) ("While we could narrow the order the trial court issued, we choose not to do so here.").

V. CHOCK'S CROSS-POINTS

Chock's urges that we can dispose of the mandamus on two procedural points. First it contends that Burkett waited too long in pursuing mandamus and is now barred by laches. Second, he contends that Burkett waived his discovery objections by obscuring valid objections with numerous unfounded objections. We disagree with both arguments.

[4] Chock's supplemented our record with the new petition and contends it renders "a number of Relator's complaints" moot. The petition names several other specific entities that Burnett allegedly owns or controls. Chock's has not withdrawn any of its discovery requests, and the trial court's order denying the motion for protective order is still in effect based on our record. The amended petition does not moot the dispute here. *See In re Contract Freighters, Inc.*, 646 S.W.3d 810, 814 (Tex. 2022) (orig. proceeding) (per curiam) (concluding that one party's unilateral withdrawal of discovery did not moot a discovery dispute). We do conclude, however, that it would be largely an academic exercise to opine of which specific discovery request is viable under a superseded pleading.

The trial court issued its order overruling Burkett's Motion for Protective Order on November 4, 2021. The order made the discovery responses due on November 29, 2021. Burkett filed his mandamus with this Court on December 2, 2021. Chock's contends the three-day delay between the discovery due date and the filing of the mandamus is fatal. A party who unreasonably delays petitioning for mandamus relief may waive its right to such relief unless the delay is justified. *In re Am. Airlines, Inc.*, 634 S.W.3d 38, 42-43 (Tex. 2021) (orig. proceeding) (per curiam), *citing In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 676 (Tex. 2009) (orig. proceeding) (per curiam). We are aware of cases finding delays of four months in pursuing mandamus have resulted in a waiver. *See Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (unexplained four-month delay warranted denying mandamus relief to quash a jury demand); *Furr's Supermarkets, Inc. v. Mulanax*, 897 S.W.2d 442, 443 (Tex.App.--El Paso, 1995, orig. proceeding) (relator sought mandamus relief from severance order four months after severance and six days before trial on severed claim). We are not directed to any case similarly finding a waiver based on a mandamus filed within a month of the order complained of and days from the due date of discovery. Chock's first cross-point is overruled.

Next, Chock's claims that Burkett's objections to discovery were waived by obscuring good objections with numerous unfounded ones. *See* TEX.R.CIV.P. 193.2(e). Its argument in support of that claim, however, focuses more on what it claims Burkett failed to produce in discovery. The failure to produce promised discovery is addressed through a motion to compel, and not a waiver argument under Rule 193.2. Moreover, all Burkett's objections to the several discovery requests were in a single paragraph that in multiple ways urged a relevance objection. We simply disagree that the relevance objection was obscured. Chock's second cross point is overruled.

VI. CONCLUSION

The trial court's order of November 4, 2021, is set aside and the case is remanded for further proceedings not inconsistent with this opinion.

JEFF ALLEY, Justice

October 6, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.