DISSENT and Opinion Filed July 21, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00205-CV

IN RE BYRON CURTIS COOK, TRADE RARE, L.L.C., AND JOEL HOCHBERG, Relators

Original Proceeding from the 417th Judicial District Court
Collin County, Texas
Trial Court Cause No. 417-04885-2016

DISSENTING OPINION

Before Justices Bridges, Osborne, and Reichek
Dissenting Opinion by Justice Osborne

Relators seek mandamus relief because the trial court denied their motion to designate a responsible third party. *See* TEX. CIV. PRAC. & REM. CODE § 33.004. Because I conclude that relators have met both the standard for mandamus relief and the standard for designating a responsible third party, I would grant their petition. Accordingly, I respectfully dissent from the order denying that relief.

The applicable standards are well settled. To obtain mandamus relief, relators must show the trial court abused its discretion and that relators have no adequate appellate remedy. *In re Molina*, 575 S.W.3d 76, 79 (Tex. App.—Dallas 2019, orig. proceeding). To designate a responsible third party, "notice pleading under the Texas

Rules of Civil Procedure" is required. *In re Greyhound Lines, Inc.*, No. 05-13-01646-CV, 2014 WL 1022329, at *2 (Tex. App.—Dallas Feb. 21, 2014, orig. proceeding) (mem. op.). In my view, relators have met both standards.

In *In re Greyhound Lines, Inc.*, this Court explained that Texas's proportionate responsibility statute "provides a framework for apportioning percentages of responsibility in the calculation of damages in any case in which more than one person, including the plaintiff, is alleged to have caused or contributed to cause the harm for which recovery of damages is sought." *Id.* "The statute's purpose is to hold each party responsible only for the party's own conduct causing injury." *Id.* Chapter 33 defines "responsible third party" as "any person who is *alleged* to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission, . . . by other conduct or activity that violates an applicable legal standard, or by any combination of these." TEX. CIV. PRAC. & REM. CODE § 33.011(6) (emphasis added).

Real party/plaintiff Calco Land Development, L.L.C., has pleaded that it is the victim of relators' securities fraud. It has asserted claims against relators for fraud, fraud by nondisclosure, fraud in a real estate transaction, breach of fiduciary duty, aiding and abetting breaches of fiduciary duty and fraud, fraudulent transfer, and two causes of action under the Texas Securities Act. Calco also alleges a conspiracy and seeks to pierce the corporate veil of the defendant entities. Calco has also pleaded for actual and exemplary damages and rescission.

Relators, in turn, allege that Warren K. Paxton, in his roles as manager, member, and counsel to defendant Unity Resources, LLC, contributed to Calco's harm by:

- failing to "diligently and competently counsel Unity and [relator Byron Curtis Cook] about compliance with securities regulation and corporate governance duties, specifically including the propriety of and disclosures regarding interested-party transactions and direct sales of mineral acreage" such as the purchase from which Calco's claims arise,

- failing to advise Calco's principal Charles A. Loper III about interested-party transactions between Unity, Cook, and Unity's other managers and members, including transactions involving "the land banking of mineral acreage for subsequent purchase by Unity's funds," and

- disclosing Unity's privileged and confidential information to Calco but not to Unity's own counsel, impairing relators' ability to develop their defenses.

In these ways and others, relators allege, Paxton "caused or contributed to causing" the harm for which Calco seeks damages. *See* TEX. CIV. PRAC. & REM. CODE § 33.011(6).

"In determining whether to grant a motion for leave to designate a responsible third party, the trial court is restricted to evaluating the sufficiency of the facts pleaded by relators and is not permitted to engage in an analysis of the truth of the allegations or consider evidence on the third party's ultimate liability." *In re Greyhound Lines, Inc.*, 2014 WL 1022329, at *2. Whether there is sufficient evidence to establish—or even to raise a genuine issue of material fact about—the third party's liability is not the standard. That inquiry may be made by motion for

summary judgment, motion to strike the designation, or objection to the third party's inclusion in the jury charge, among other challenges permitted by the rules. *See id*. Accordingly, I express no opinion on whether there is sufficient evidence to establish—or to raise a fact issue on—Paxton's liability. That was not the issue before the trial court in considering relators' motion to designate, nor is it the issue before this Court today.

Instead, at this point in the proceedings, the sole question is the sufficiency of the movant's pleading. And the standard by which that question is resolved is "fair notice." *See id.*; *see also* TEX. R. CIV. P. 47(a) (claim for relief "shall contain . . . a short statement of the cause of action sufficient to give fair notice of the claim involved"). In my view, relators have given fair notice of their allegations that Paxton "caused or contributed to causing . . . the harm for which recovery of damages is sought." *See* TEX. CIV. PRAC. & REM. CODE § 33.011(6).

Further, even if real parties are correct that Chapter 33's apportionment scheme does not apply to some of their claims, *see, e.g.*, *Pierre v. Swearingen*, 331 S.W.3d 150, 154–55 (Tex. App.—Dallas 2011, no pet.) (trial court was not required to determine percentage liability of defendant whose liability was "purely derivative"), it does apply to others. *See Challenger Gaming Sols., Inc. v. Earp*, 402 S.W.3d 290, 292 (Tex. App.—Dallas 2013, no pet.) (noting that Chapter 33 applies to "any cause of action based on tort," including claims for negligence, fraud, and

"any other conduct that violates an applicable legal standard," although concluding it did not apply to claim under uniform fraudulent transfer act).

I conclude that relators' allegations provide "fair notice of the claim involved," *see* TEX. R. CIV. P. 47(a), and consequently are sufficient to require the trial court to grant relators' motion for leave to designate Paxton as a responsible third party under civil practice and remedies code section 33.004. I also conclude relators have met the standard for mandamus relief. As this Court explained in *In re Molina*, "[b]ecause the erroneous denial of a motion for leave to designate a responsible third party skews the proceedings, potentially affects the litigation's outcome, and compromises the defense in ways unlikely to be apparent in the appellate record, such an error ordinarily renders the appellate remedy inadequate." *In re Molina*, 575 S.W.3d at 79 (citing *In re Coppola*, 535 S.W.3d 506, 509–10 (Tex. 2017) (orig. proceeding) (per curiam)). Because the majority's opinion concludes otherwise, I respectfully dissent.

/Leslie Osborne/
LESLIE OSBORNE
JUSTICE

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