Conditionally Granted and Opinion Filed October 15, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00708-CV

IN RE DAVID REISS, Relator

Original Proceeding from the 191st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-18-02498

MEMORANDUM OPINION

Before Justices Myers, Molberg, and Evans
Opinion by Justice Molberg

Relator David Reiss filed a petition for writ of mandamus, seeking to compel the respondent trial court judge to rule on seven motions filed by Reiss and real party in interest Jason Hanson. The motions have been pending from six to over twenty-four months. We conditionally grant the petition.

BACKGROUND

The underlying proceeding is a contentious "business divorce" case between Reiss and Hanson, two owners of Spy Games, LLC. Reiss and Spy Games filed suit against Hanson and other defendants on February 21, 2018, and filed a second amended petition—the live pleading—on December 3, 2018, asserting numerous claims, including breach of contract, fraud, and conversion, and requesting

temporary and permanent injunctive relief. Hanson filed a range of counterclaims, including fraud, breach of contract, and breach of fiduciary duty, and also requested temporary and permanent injunctive relief. Hanson sums up the lawsuit thus: "Once business partners, Reiss and Hanson have been locked in a years'-long battle for control over the company and its assets."

In his mandamus petition, Reiss seeks to compel the trial judge to rule on the following properly filed motions, all of which were the subject of hearings conducted by the trial judge: (1) *Counter-Plaintiff Jason R. Hanson's Motion for Partial Summary Judgment* (Motion for Partial Summary Judgment), filed by Hanson on February 8, 2019, and heard on March 26, 2019; (2) *Plaintiffs' Motion to Amend June 11, 2019 Temporary Injunction and to Dissolve December 21, 2018 Injunction* (Motions on Injunctions), filed by Reiss on July 1, 2019, and heard on September 12, 2019[1]; (3) *Plaintiffs' Motion for Leave to Amend Pleadings, to Reopen Discovery, and to Continue Trial Setting* (Motion for Leave), filed by Reiss on July 30, 2019, and heard on September 12, 2019; (4) *Defendant's Amended Motion to Exclude David Reiss as an Expert Witness at Trial* (Amended Motion to Exclude David Reiss), filed by Hanson on August 29, 2019, and heard on January 17, 2020; (5) *Plaintiffs' Supplement to Motion to Amend June 11, 2018 Temporary Injunction and to Dissolve December 21, 2018 Injunction* (Supplemental Motion on

[1] The trial court initially granted a temporary injunction, which was vacated by this Court following an appeal. While the appeal was pending, the trial court revised the injunction.

Injunctions), filed by Reiss on September 12, 2018, and heard during a hearing conducted on September 12, 2019; (6) *David Reiss' Motion to Compel* (Motion to Compel), filed by Reiss on December 10, 2019, and heard on January 17, 2020; and (7) *Defendant's Motion for Protection from Plaintiffs' Request for Disclosures* (Motion for Protection), filed by Hanson on April 9, 2020, and heard on May 8, 2020.

The record indicates the trial date was reset four times. Originally set for trial on April 15, 2019, the case was reset for trial on October 21, 2019, February 3, 2020, May 26, 2020, and November 9, 2020. At a January 17, 2020 hearing on the Amended Motion to Exclude David Reiss, a motion to strike plaintiffs' amended answer to the counterclaims, and the Motion to Compel, the trial judge stated she would "get y'all rulings Tuesday or Wednesday." The transcript of that hearing indicates Reiss's attorney asked the trial judge several times to rule on various pending motions.

On May 11, 2020, Reiss's attorney sent a lengthy letter to the trial judge "recapping outstanding matters, noting the trial settings had passed, in part, because these motions had not been decided, and the trial court's failure to rule had caused Plaintiffs actual prejudice." The May 11 letter listed the pending motions the trial judge had not ruled on and the dates the motions had been heard. Attachments to the letter included, among other things, transcripts of various hearings and "various

proposed orders the Court requested for the various pending motions." The letter identified the attached proposed orders.

STANDARD OF REVIEW

Mandamus is an extraordinary remedy, available only when the relator can show the trial judge clearly abused its discretion and there is no adequate remedy by way of appeal. *In re Mo. Pac. R.R. Co.*, 998 S.W.2d 212, 215 (Tex. 1999) (orig. proceeding); *In re Tex. Am. Express, Inc.*, 190 S.W.3d 720, 723 (Tex. App.—Dallas 2005, orig. proceeding). A trial judge abuses her discretion if she reaches a decision that is so arbitrary and unreasonable that it amounts to a clear and prejudicial error of law or if it clearly fails to correctly analyze or apply the law. *In re Olshan Found. Repair Co., L.L.C.*, 277 S.W.3d 124, 129 (Tex. App.—Dallas 2009, orig. proceeding).

ANALYSIS

The act of giving consideration to and ruling on a motion that is properly filed and pending before a trial court is a ministerial act, and mandamus may issue to compel the trial judge to act. *In re Greater McAllen Star Props., Inc.*, 444 S.W.3d 743, 748 (Tex. App.—Corpus Christi-Edinburg 2014, orig. proceeding); *Barnes v. State*, 832 S.W.2d 424, 426 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding). To obtain mandamus relief for a trial judge's refusal to rule on a motion, the relator must establish the motion was properly filed and has been

pending for a reasonable time; the relator requested a ruling on the motion; and the trial judge refused to rule. *Greater McAllen Star Props., Inc.*, 444 S.W.3d at 748.

A trial judge must rule "within a reasonable time" on motions that are properly filed, considering all surrounding circumstances. *In re Foster*, 503 S.W.3d 606, 607 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding); *In re Blakeney*, 254 S.W.3d 659, 661 (Tex. App.—Texarkana 2008, orig. proceeding). Whether a reasonable period of time has elapsed depends on the circumstances of the case. *Id.* at 662. "The test for determining what time period is reasonable is not subject to exact formulation, and no 'bright line' separates a reasonable time period from an unreasonable one." *Greater McAllen Star Props., Inc.*, 444 S.W.3d at 748 (quoting *Blakeney*, 254 S.W.3d at 662).

> We examine a "myriad" of criteria, including the trial court's actual knowledge of the motion, its overt refusal to act, the state of the court's docket, and the existence of other judicial and administrative matters which must be addressed first.

Id. at 748–49.

Here, Reiss and Hanson stand at opposite extremes in their arguments to this Court relating to our consideration of whether to grant mandamus relief. On the one hand, Reiss asks this Court to "provide presumptive time periods for deciding pending motions" and "outline comprehensive guidelines, principles, and other considerations . . . when confronting pending motions that have been heard but remain undecided for several months." On the other hand, Hanson argues that mandamus should not issue on any of the pending motions despite the quickly

approaching November 9, 2020 trial setting because "Reiss has already 'been heard'" on some issues raised in the pending motions and the failure of the trial judge to rule will not affect Reiss's due process rights. Hanson also appears to assert at least four times in his response brief that mandamus should not issue because of the "world-wide pandemic." For example, without alleging any facts upon which this Court could reasonably conclude the Covid-19 pandemic has prevented the trial judge from ruling, the entirety of one paragraph of Hanson's response generally contends:

> The context of this petition [for writ of mandamus] should not be forgotten. Like the rest of the world, Texas courts are still wrestling with a hugely disruptive pandemic. Under such circumstances, Hanson respectfully submits that mandamus should not issue.

While trial judges have broad discretion to manage their dockets and conduct business in their courtrooms, this discretion is not unlimited. *Clanton v. Clark*, 639 S.W.2d 929, 930–31 (Tex. 1982). Trial courts also have a duty to tend to and schedule cases so as to expeditiously dispose of them. *King Fisher Marine Serv., L.P. v. Tamez*, 443 S.W.3d 838, 843 (Tex. 2014); *Clanton*, 639 S.W.2d at 931. In this case, Hanson does not argue that the challenges inherent in conducting judicial proceedings during the Covid-19 pandemic underlie the trial judge's failure to rule in this case. Nor does the record before this Court reflect that any special docket conditions or other matters, including the Covid-19 pandemic, have prevented the trial judge from ruling on the motions subject of this petition. We further note that

courts across Texas—including this Court—have continued to fully tend to most business of the courts and serve the citizens of Texas while implementing safety precautions above and beyond recommendations by the Centers for Disease Control and Prevention and accommodating Covid-19-related exigencies, such as sick family members and school-age children learning at home virtually due to school closures. While circumstances caused by the Covid-19 pandemic certainly may arise and extend the "reasonable time" for a trial judge to rule on properly filed pending motions, it does not appear from this record—and Hanson does not allege—any such circumstances exist in this case.

Hanson contends Reiss has not met his burden on mandamus with respect to *Plaintiffs' Supplement to Motion to Amend June 11, 2018 Temporary Injunction and to Dissolve December 21, 2018 Injunction*, filed by Reiss on September 12, 2018, by not including the motion in the record. Hanson is incorrect. That motion appears in the appendix at APP. 0607. However, Reiss did not include in the appendix a sworn copy of *Plaintiffs' Motion to Amend June 11, 2019 Temporary Injunction and to Dissolve December 21, 2018 Injunction*, filed by Reiss on July 1, 2019. Noting Reiss's failure to do so, Hanson included a sworn copy of that motion "[f]or the Court's convenience" in a supplemental record filed in this Court. The rules of appellate procedure require the petition to include an appendix which "must contain: (A) a certified or sworn copy of any order complained of, or any other document showing the matter complained of." TEX. R. APP. P. 52.3(k)(1)(A), 52.7(a)(1)

("Relator must file with the petition: (1) a certified or sworn copy of every document that is material to the relator's claim for relief and that was filed in any underlying proceeding . . ."). However, the appellate rules also permit supplementation. "After the record is filed, relator or any other party to the proceeding may file additional materials for inclusion in the record." TEX. R. APP. P. 52.7(b). Because the mandamus record includes a sworn copy of *Plaintiffs' Motion to Amend June 11, 2019 Temporary Injunction and to Dissolve December 21, 2018 Injunction*, it is sufficient for this Court to consider whether the trial court abused its discretion.

The fifth and current trial setting is for November 9, 2020, less than one month away. The motions subject of relator's petition have been pending from six to over twenty-four months. We conclude the motions were properly filed and have been pending a reasonable time, relator requested rulings on the motions, and the trial judge has failed to rule. Having examined and considered relator's petition for writ of mandamus, the response, and the applicable law, this Court is of the opinion that relator has met his burden to obtain relief.

Accordingly, without addressing the merits of the motions subject of this petition, we conditionally grant the petition for writ of mandamus and direct the trial judge to rule on said motions within seven days of the date of this opinion. The writ will issue only if the trial judge fails to act in accordance with this opinion.

/Ken Molberg//
KEN MOLBERG
JUSTICE

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