

Opinion issued July 1, 2010



**In The
Court of Appeals
For The
First District of Texas**

NO. 10-00001-CV

**IN RE GM OIL PROPERTIES, INC., GARY MOORES,
AND BILL WOOD, Relators**

Original Proceeding on Petition for Writ of Mandamus

MEMORANDUM OPINION

This original proceeding for writ of mandamus arises from a suit filed by real-party-in-interest, Sheridan Wade, against relators, GM Oil Properties, Inc., Gary Moores, and Bill Wood. Relators challenge the trial court's October 12, 2009 order, which denies Wood's motion to compel arbitration and determines that

Wade’s claims against not only Wood, but also against GM Oil Properties and Moores, “are not subject to a valid and enforceable arbitration agreement and do not fall within the scope of such arbitration agreement”¹

At the time the trial court rendered the order, special appearances challenging the court’s in personam jurisdiction over Moores and GM Oil Properties were pending. We agree with relators that the trial court abused its discretion in rendering the order before determining whether it had jurisdiction over GM Oil Properties and Moores.

We hold that relators are entitled to mandamus relief. We conditionally grant the petition for writ of mandamus. A writ will issue unless the trial court vacates the October 12, 2009 order or modifies the order to make it applicable only to Wood, who does not contest personal jurisdiction.

Background

Wade sued GM Oil Properties, Gary Moores, and Bill Wood asserting claims for breach of contract, fraud, conversion, breach of fiduciary duty, and conspiracy. Wood answered the suit, asserting, inter alia, that Wade’s claims were subject to an arbitration agreement. Moores, an Oklahoma resident, and GM Oil

¹ Respondent is The Honorable Jaclanel McFarland of the 133rd District Court of Harris County. The underlying suit is *Sheridan Wade v. Bill O. Wood, G M Oil Properties, Inc., and Gary Moores*, No. 2006–53389 (133rd Dist. Ct., Harris County, Tex.).

Properties, an Oklahoma corporation, each filed a special appearance contesting personal jurisdiction.

GM Oil Properties, Moores, and Wood initiated an arbitration proceeding before the American Arbitration Association in Oklahoma, asserting that Wade's claims against them were subject to an arbitration agreement found in GM Oil Properties's bylaws. In response, Wade filed and obtained a temporary restraining order, which prohibited GM Oil Properties, Moores, and Wood from proceeding with the Oklahoma arbitration.

Wade amended her petition to include a request for a judicial declaration that her claims are not subject to arbitration. Wade also filed a motion for partial summary judgment regarding the arbitration issue. In turn, Wood filed a motion to compel arbitration in the trial court. GM Oil Properties and Moores did not join in the motion to compel arbitration. Their special appearances were still pending before the trial court.

The parties entered into a series of Rule 11 agreements in which they agreed that all pending motions were "on hold" pending the trial court's ruling on the arbitration issue. GM Oil Properties and Moores noted in the initial Rule 11 agreement that entry into the agreement did not waive their special appearance.

The trial court conducted a hearing on Wood's motion to compel arbitration on October 8, 2007. The parties, including Wade's counsel, made clear to the trial

court that the only issue to be decided was whether Wood could compel arbitration. No determination would be made without respect to arbitration and Wade's claims against GM Oil Properties and Moores because the special appearances were still pending.

Ten months later, on August 7, 2008, the trial court signed an order denying Wood's motion to compel arbitration. Wood, GM Oil Properties, and Moores filed a notice of interlocutory appeal regarding the trial court's order denying the motion to compel arbitration. The interlocutory appeal bears appellate cause number 01-08-000757-CV.

Wood, GM Oil Properties, and Moores filed a motion requesting that we abate the appeal to allow the trial court to clarify ambiguous language found in the order. A reading of the order showed that it was unclear whether the trial court had intended to deny only Wood's right to compel arbitration of Wade's claims or whether the order was intended also to preclude GM Oil Properties and Moores from compelling arbitration. In this respect the order provided, "[T]his Court has determined that [Wade's] claims in this action against the *Defendants* are not subject to a valid and enforceable arbitration agreement and do not fall within the scope of such arbitration agreement" (Emphasis added.)

We abated the appeal and ordered the trial court to clarify, modify, or reconsider the order. In our abatement order, we pointed out that it was "unclear

from the order whether the order was intended to apply only to [Wade's] claims against Wood or whether it was intended to apply to [] Wade's claims against all three defendants."

On October 12, 2009, the trial court signed its "Order of Clarification and Reconsideration." The order provides in relevant part,

The Court finds that this Court's order of August 7, 2008 intended to apply to Plaintiff Wade's claims against all three Defendants: Bill O. Wood, GM Oil Properties, Inc. and Gary Moores.

Therefore, having considered the pertinent materials submitted by the parties, including Defendant Bill O. Wood's Motion to Compel Arbitration and Plaintiff Sheridan Wade's Motion for Partial Summary Judgment on the Issue of Arbitration, this Court has determined that Plaintiff Sheridan Wade's claims in this action against Defendants Bill O. Wood, GM Oil Properties, Inc. and Gary Moores are not subject to a valid and enforceable arbitration agreement and do not fall within the scope of such arbitration agreement and hereby **REAFFIRMS** the denial of Defendant Wood's Motion to Compel Arbitration.

Following the issuance of the order, relators, Wood, Moores, and GM Oil Properties (hereinafter "relators") filed a petition for writ of mandamus. Relators contend that the trial court committed "clear error" when it "adjudicated their arbitration defenses" before ruling on GM Oil Properties's and Moores's special appearances.²

² Relators challenge both the original August 7, 2008 order denying Wood's motion to compel arbitration and the October 12, 2009 "Order of Clarification and Reconsideration." We note that the August 7, 2008 order was rendered by the Hon. Lamar McCorkle. On January 1, 2009, Judge

Standard of Review

To be entitled to the extraordinary relief of a writ of mandamus, relators must show the trial court abused its discretion and there is no adequate remedy by appeal. *In re Team Rocket, L.P.*, 256 S.W.3d 257, 259 (Tex. 2008) (orig. proceeding). A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to constitute a clear and prejudicial error of law, or if it clearly fails to correctly analyze or apply the law. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding).

Determining Arbitration Issue before Special Appearances

With respect to the trial court's ruling that Wade's claims against GM Oil Properties and Moores are not subject to arbitration, relators make the following assertion:

[T]he trial court seemingly deprived GM Oil and Moores of their due process rights to be heard on their arbitration defenses, vitiated those substantive defenses and, in essence, exercised

McCorkle was succeeded by the Hon. Jaclanel McFarland, who rendered the "Order of Clarification and Reconsideration." Relators filed their petition for writ of mandamus on January 4, 2010.

We examine only the October 12, 2009 order signed by Judge McFarland to determine whether relators are entitled to mandamus relief. The later-signed order superseded the earlier August 7, 2008 order signed by Judge McCorkle. *See In re Office of Attorney Gen.*, 276 S.W.3d 611, 617 (Tex. App.—Houston [1st Dist.] 2008, orig. proceeding). Moreover, "[m]andamus will not issue against a new judge for what a former one did." *In re Baylor Med. Ctr. at Garland*, 280 S.W.3d 227, 228 (Tex. 2008).

jurisdiction over GM Oil and Moores before considering whether sufficient “minimum contacts” exist that would allow it to properly do so in accordance with Due Process and the Texas long-arm statute.

Relators further assert,

The trial court acted outside of its discretion and in violation of its legal duties under Tex. R. Civ. P. Rule 120a when it took up and adjudicated arbitration motions prior to resolving GM Oil’s and Moores’ special appearances. . . . The trial court further exacerbated this error and ran afoul of constitutional Due Process protections by including verbiage in its Orders that unwittingly appears to adjudicate and impinge upon GM Oil’s and Moores’ individual arbitration defenses and, thus, seemingly exerts jurisdiction over GM Oil and Moores despite these nonresidents’ still-pending special appearances.

Personal jurisdiction concerns the court’s power to bind a particular person or party. *CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996). Thus, it follows that personal jurisdiction must be determined before a trial court grants a plaintiff’s requested relief against a defendant who challenges personal jurisdiction.

As pointed out by relators, Rule 120a(2) specifically provides that any motion to challenge jurisdiction “*shall* be heard and determined before a motion to transfer venue or any other plea or pleading may be heard.” TEX. R. CIV. P. 120a (emphasis added); *see IRN Realty Corp. v. Hernandez*, 300 S.W.3d 900, 902–03 (Tex. App.—Eastland 2009, no pet.). Wade points out in her response to the mandamus petition that the parties had a Rule 11 agreement permitting that trial court to decide the issue of arbitration before ruling on pending motions. We note, however, that the Rule 11 agreement was limited to determining the arbitration

issue with respect to Wade's claims against Wood only. The record does not reflect that relators agreed to allow the trial court to determine whether Wade's claims against GM Oil Properties and Moores are subject to a valid arbitration agreement.

We conclude that the trial court abused its discretion when it determined that Wade's claims against GM Oil Properties and Moores are not subject to a valid arbitration agreement before determining the defendants' special appearances. We further conclude that relators do not have an adequate remedy by appeal. We hold that relators are entitled to mandamus relief.³

Accordingly, we conditionally grant the petition for writ of mandamus. We order the trial court either (1) to vacate its October 12, 2009 Order of Clarification

³ Relators also request that we compel the trial court to rule on the special appearances. We conclude that relators have not shown that they are entitled to such relief. Some indication exists in the record that the trial court has not ruled on the special appearances due to a discovery dispute between the parties pertinent to the jurisdictional issue. Relators further seek mandamus relief on the basis that the trial court abused its discretion when it denied the motion to compel arbitration. With respect to this request, relators have an adequate remedy by appeal, and have filed an interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.016 (Vernon Supp. 2009) (providing for interlocutory appeal of order denying motion to compel arbitration under Federal Arbitration Act); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(1) (Vernon 2005) (providing for interlocutory appeal of order denying motion to compel arbitration under Texas arbitration act).

and Reconsideration⁴ or (2) to modify the order to limit its application to Wade's claims against Wood and to delete the order's language stating that Wade's claims against GM Oil Properties and Moores are not subject to, or within the scope of, a valid arbitration clause. We will issue writ only if the trial court fails to comply.

We further order that the interlocutory appeal in appellate cause number 01–08–00757–CV be abated. We will reinstate the appeal when a supplemental clerk's record containing (1) the trial court's modified order denying Wood's motion to compel arbitration or, (2) in the event that the trial court vacates the October 12, 2009 order, an order replacing that order and denying arbitration is filed. *See* TEX. R. APP. P. 27.3. ("After an order or judgment in a civil case has been appealed, if the trial court modifies the order or judgment, or if the trial court vacates the order or judgment and replaces it with another appealable order or judgment, the appellate court must treat the appeal as from the subsequent order or judgment and may treat actions relating to the appeal of the first order or judgment

⁴ The trial court may want to consider whether judicial economy will be better served if it first determines the special appearances and then, if the special appearances are denied, unitarily consider whether Wade's claims against all three defendants are subject to a valid and enforceable arbitration clause.

as relating to the appeal of the subsequent order or judgment.”).

Laura Carter Higley
Justice

Panel consists of Justices Keyes, Hanks, and Higley.