Opinion issued October 6, 2011

In The
Court of Appeals
For the
First District of Texas

NO. 01-10-00817-CV

IN RE JOHN-BAPTIST SEKUMADE AND ELLEN CAROL SEKUMADE, Relators

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Original Proceeding on Petition for Writ of Mandamus

MEMORANDUM OPINION

Relators John-Baptist and Ellen Sekumade filed a petition for writ of mandamus complaining that (1) the trial court's statement during a hearing that relators waived their motion to transfer venue by filing a counterclaim "stifled" and "dissuaded" relators from pursuing the motion; (2) the trial court abused its discretion when it denied relators' motion to transfer venue; (3) the trial court abused its discretion when it ordered relators to pay $3,000 to real party in interest Build by

Owner, LLC ("Build by Owner") within thirty days as a discovery sanction, and further ordered payment of $13,000 and completion of forty hours of community service upon failure to timely pay the original $3,000 sanction; (4) the trial court abused its discretion when it struck relators' pleadings after relators could not pay the $13,000 sanction; and (5) the trial court abused its discretion when court staff "prevented" relators from filing a motion to compel arbitration.[1]

We dismiss the petition for writ of mandamus.

Procedural Background

On April 23, 2010, in response to Build by Owner's motion to compel discovery responses and motion to strike Sekumade's pleadings, the trial court entered an order requiring Sekumade to pay Build by Owner's counsel $3,000 within thirty days "for reasonable attorney['s] fees incurred in attempting to enforce a court order to obtain discovery responses." The trial court also ordered Sekumade to "fully comply" with the discovery rules and to answer all interrogatories and requests for production within forty-five days. The order provided that if Sekumade did not comply the court would require Sekumade to pay an additional $10,000 to Build by Owner as a sanction for discovery abuse and complete forty

[1] The Honorable John Ellisor, Judge of the 122nd District Court of Galveston County, Texas, Respondent. The underlying lawsuit is *Build by Owner, LLC v. John-Baptist Sekumade and Ellen Carol Sekumade*, No. 09-CV-1019 (122nd Dist. Ct., Galveston County, Tex.).

hours of community service and that it would strike Sekumade's pleadings.

After Sekumade failed to pay Build by Owner's counsel within the allotted thirty days, Build by Owner moved the trial court for enforcement of its April 23, 2010 order and for the imposition of sanctions on Sekumade for his failure to comply. At a hearing on September 2, 2010, the trial court granted Build by Owner's motion and ordered Sekumade to pay $13,000 to Build by Owner's counsel by 5:00 p.m. on September 10, 2010, and to complete forty hours of community service. The trial court also struck Sekumade's pleadings.

Sekumade then filed this petition for writ of mandamus.

After Sekumade filed this petition, he sued Judge Ellisor and his court coordinator in the Southern District of Texas for civil rights violations pursuant to 42 U.S.C. § 1983. As a result, the Administrative Judge of Galveston County assigned the Honorable Hugo Touchy to hear the underlying lawsuit. We abated this mandamus proceeding pursuant to Texas Rule of Appellate Procedure 7.2(b) to allow Judge Touchy the opportunity to reconsider Judge Ellisor's original rulings on Build by Owner's motion to compel discovery responses and motion to strike Sekumade's pleadings and on Sekumade's motion to transfer venue. *See* TEX. R. APP. P. 7.2(b) ("If the case is an original proceeding under Rule 52, the court must abate the proceeding to allow the successor to reconsider the original [respondent's]

decision."); *In re Baylor Med. Ctr. at Garland*, 280 S.W.3d 227, 228 (Tex. 2008) ("Mandamus will not issue against a new judge for what a former one did. . . . As a new judge now presides over the trial court, [Texas Rule of Appellate Procedure] 7.2 requires abatement of this original proceeding to allow the successor to reconsider the order."); *State v. Olsen*, 360 S.W.2d 402, 403 (Tex. 1962) (per curiam) ("A writ of mandamus will not lie against a successor judge in the absence of a refusal by him to grant the relief Relator seeks. If the successor judge refuses to grant the relief sought, Relator may then amend its application for writ of mandamus and the matter will be decided on the merits.").

After we abated the case, Judge Touchy considered Sekumade's motion to transfer venue and Build by Owner's motion to compel discovery responses and motion to strike Sekumade's pleadings. On April 11, 2011, Judge Touchy granted Sekumade's motion to transfer venue, ruling that venue was proper in Harris County instead of Galveston County. Judge Touchy also granted Build by Owner's motion to compel and awarded Build by Owner's counsel $4,000 in attorney's fees and stated at the hearing that this amount was to be included as part of the final judgment. The April 11, 2011 order also provided that Sekumade had twenty days from the date of the order to comply with all outstanding discovery requests or the court would then strike his pleadings. Unlike Judge Ellisor's original rulings,

Judge Touchy did not require Sekumade to complete community service, Judge Touchy specified that the $4,000 in attorney's fees to Build by Owner as a discovery sanction was not payable until the final judgment, and the order granted Sekumade additional time to comply with the outstanding discovery requests before the court would strike his pleadings.

Because Judge Touchy's rulings vacated Judge Ellisor's original rulings, we conclude that Sekumade's petition for writ of mandamus is moot.[2] *See In re Baylor Med. Ctr.*, 280 S.W.3d at 228 ("Two months later, Judge Thomas vacated the new trial order and reinstated judgment on the jury verdict. As required by our order, Baylor notified us of the development and moved to dismiss its petition as moot."). We therefore dismiss the petition for writ of mandamus as moot.

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[2] Sekumade, in his petition for writ of mandamus, complained that Judge Ellisor and his court staff "prevented" him from filing a motion to compel arbitration. According to Sekumade, before he filed his motion he asked the court coordinator about when he could obtain a hearing date on the motion, and she responded that a hearing date was not available "next week or for that matter anytime in the near future." The coordinator also informed Sekumade that, to obtain a hearing date, he had to file his motion with a blank notice of hearing or submission. Sekumade has not, at any point during the proceedings, actually filed a motion to compel arbitration. At the hearing before Judge Touchy, after we abated the case, the parties presented argument solely on whether Judge Touchy should vacate Judge Ellisor's venue and sanctions rulings. Sekumade never referenced a motion to compel arbitration before Judge Touchy, and Sekumade does not complain of Judge Touchy's actions regarding a motion to compel arbitration. Thus, this issue has not been adequately presented for our consideration.

PER CURIAM

Panel consists of Justices Keyes, Higley, and Massengale.