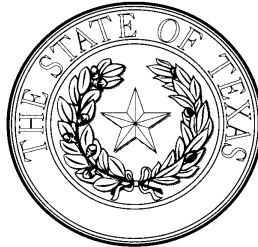


Opinion issued December 14, 2021



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

NO. 01-21-00412-CV

IN RE GREGORY T. JOSEFSBERG, Relator

Original Proceeding on Petition for Writ of Mandamus

MEMORANDUM OPINION

Relator Gregory T. Josefsberg seeks mandamus relief in connection with the trial court's order denying his Supplemented Motion to Dismiss for Lack of Jurisdiction and compelling Relator to provide responses to Real Party in Interest's deposition by written questions under Rule 202 of the Texas Rules of Civil Procedure. Relator further asks this Court to direct Respondent, the Honorable

Ursula A. Hall, to rule on Relator's Motion for Summary Judgment and Plea to the Jurisdiction.¹ We conditionally grant a portion of the relief sought.

Background

On December 7, 2018, Real Party in Interest Rachel Ann Roberts (“Real Party”) filed a Petition to Take Deposition under Rule 202 of the Texas Rules of Civil Procedure (“Rule 202 Petition”). Real Party sought to depose Relator to investigate the amount of money, if any, Relator owes on a real estate lien note and deed of trust for a condominium Relator purchased from her parents, now deceased. Relator moved to dismiss Real Party’s petition for lack of jurisdiction, arguing that because Real Party’s potential action involving the real estate lien note and deed of trust had expired under the applicable statute of limitations, her petition for pre-suit discovery failed to present a justiciable controversy.

In April 2019, after a hearing, the Honorable Sylvia A. Matthews, a visiting judge, denied Relator’s motion to dismiss holding Relator had not “met his burden to negate jurisdiction by showing when the cause of action accrued.” Relator filed a Supplemented Motion to Dismiss for Lack of Jurisdiction (“Supplemented Motion”) in August 2019, attaching additional exhibits in an effort to cure the deficiencies identified by Judge Matthews in her order. Respondent held an in-

¹ The underlying case is *Rachel Ann Roberts v. Gregory T. Josefsberg*, Cause No. 2018-87179, pending in the 165th District Court of Harris County, Texas, the Honorable Ursula A. Hall presiding.

person hearing to consider the Supplemented Motion to dismiss on October 7, 2019.²

On February 22, 2021, Relator filed a Motion for Summary Judgment and a Plea to the Jurisdiction challenging the court's jurisdiction asserting Real Party's petition is barred by limitations. On May 31, 2021, Relator filed his Second Amended Answer and Plea to the Jurisdiction asserting that both limitations and lack of standing preclude Relator's petition for pre-suit discovery.

On July 20, 2021, Respondent signed an order denying Relator's Supplemented Motion and ordering Relator to provide answers to Real Party's deposition by written questions by July 30, 2021. The order states:

ON THIS ____ DAY OF _____, 2019, came on to be considered Rachel Ann Roberts' Response to Defendant's Supplemented Motion to Dismiss. After reviewing the pleadings and hearing argument from counsel, the Court is of the opinion that the Defendant's Motion is hereby Denied.

THEREFORE, IT IS ORDERED that Gregory T. Josefsberg provide answers to Rachel Ann Roberts' deposition by written questions no later than July 30, 2021.

On July 30, 2021, Relator filed the instant petition for writ of mandamus.

On the same day, we stayed the underlying proceedings pending adjudication of

² Relator filed a petition for writ of mandamus complaining of Respondent's failure to rule on the Supplemented Motion, which at the time had been pending for twenty months. On May 27, 2021, this Court conditionally granted Relator's petition for mandamus relief directing Respondent to rule on the pending Supplemented Motion.

Relator’s petition for writ of mandamus. Real Party filed a response to Relator’s petition at this Court’s request.

Analysis

Relator asserts the trial court abused its discretion in granting Real Party’s request for pre-suit discovery under Texas Rule of Civil Procedure 202 (“Rule 202”). Relator requests we set aside the July 20, 2021 order compelling Relator to provide answers to Real Party’s deposition by written questions and order Respondent to rule on Relator’s pending Motion for Summary Judgment and Plea to the Jurisdiction filed on February 22, 2021.³

A. Standard of Review

Mandamus is an extraordinary remedy. *In re Sw. Bell Tel. Co., L.P.*, 235 S.W.3d 623, 623 (Tex. 2007) (orig. proceeding). To obtain mandamus relief, Relator must show the trial court abused its discretion and Relator has no adequate remedy by appeal. *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992) (orig. proceeding). “An improper order under Rule 202 may be set aside by mandamus.” *In re Wolfe*, 341 S.W.3d 932, 933 (Tex. 2011) (citing *In re Jorden*, 249 S.W.3d 416, 420 (Tex. 2008)); *see also In re Emergency Consultants, Inc.*, 292 S.W.3d 78,

³ Relator urges both procedural and substantive grounds for this Court to order Respondent to vacate her July 20, 2021 order.

80 (Tex. App.—Houston [14th Dist.] 2007, orig. proceeding) (“A writ for mandamus may lie to challenge a trial court’s order for pre-suit depositions.”).

B. The July 20, 2021 Order Compelling Pre-Suit Deposition

Relator argues we should vacate Respondent’s order requiring him to provide answers to Real Party’s deposition on written questions under Rule 202 because the order does not comply with Texas Rule of Civil Procedure 202.4. We agree the challenged order is deficient.

Rule 202 provides an avenue for parties to seek pre-suit discovery. Texas Rule of Civil Procedure 202.1 provides that “a person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either: (a) to perpetuate or obtain the person’s own testimony or that of any other person for use in an anticipated suit; or (b) to investigate a potential claim or suit.” TEX. R. CIV. P. 202.1. “Presuit discovery is not intended for routine use; it creates practical and due process problems because discovery demands are made of individuals or entities before they are told what the issues are.” *In re City of Tatum*, 578 S.W.3d 203, 209 (Tex. App.—Tyler 2019, orig. proceeding) (citing *In re Jordan*, 249 S.W.3d at 423). Therefore, “[c]ourts must strictly limit and carefully supervise pre-suit discovery to prevent abuse of the rule.” *In re Wolfe*, 341 S.W.3d at 933.

Texas Rule of Civil Procedure 202.4(a) identifies certain findings a trial court must make before granting an order for pre-suit deposition. Rule 202.4 expressly provides

- (a) *Required Findings.* The court must order a deposition to be taken if, *but only if*, it finds that:
 - (1) allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit[;] or
 - (2) the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure.

Tex. R. Civ. P. 202.4(a) (emphasis added). A trial court lacks discretion to order a pre-suit deposition on written questions without first making the requisite findings under Rule 204. *Patton Boggs LLP v. Moseley*, 394 S.W.3d 565, 571 (Tex. App.—Dallas 2011, orig. proceeding) (“The trial court had no discretion to order depositions under rule 202 without the required finding under rule 202.4(a)(2).”); *In re Denton*, No. 10-08-00255-CV, 2009 WL 471524, at *3 (Tex. App.—Waco Feb. 25, 2009, orig. proceeding) (mem. op.) (“[T]he trial court abused its discretion in ordering a pre-suit deposition under Rule 202 when it did not make the required finding that ‘allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit.’”) (citing TEX. R. CIV. P. 202.4(a)(1)). Rule 202.4 “requires that discovery may be ordered ‘only if’ the

required findings are made. The rule does not permit the findings to be implied from support in the record.” *In re Does*, 337 S.W.3d 862, 865 (Tex. 2011).

In her Rule 202 Petition, Real Party seeks to take Relator’s deposition by written questions “to investigate potential actions that are civil in nature.”⁴ Thus, under Rule 202.4(2), Respondent had to find that the “likely benefit of allowing the [Real Party] to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure” before ordering Relator’s pre-suit deposition. Respondent’s order does not make this required finding or any finding at all.⁵ Rather, in granting Petitioner’s Rule 202 request for Relator’s deposition, the trial court’s order merely states:

THEREFORE, IT IS ORDERED that Gregory T. Josefsberg provide answers to Rachel Ann Roberts’ deposition by written questions no later than July 30, 2021.⁶

⁴ Real Party’s Rule 202 Petition is devoid of any allegations concerning the findings required under Rule 202.4(2).

⁵ Texas Rule of Civil Procedure 202.3 provides that “[a]t least 15 days before the date of the hearing on the [Rule 202] petition, the petitioner must serve the petition and a notice of the hearing . . . on all persons petitioner seeks to depose and, if suit is anticipated, on all persons petitioner expects to have interests adverse to petitioner’s in the anticipated suit.” TEX. R. CIV. P. 202.3(a). Petitioner’s Rule 202 Petition was set for submission. Other than Real Party’s verified Rule 202 Petition, the record before us does not reflect any evidence proffered in support of Real Party’s Rule 202 Petition.

⁶ During an unrelated hearing on Relator’s motion for leave to file his amended answer and plea to the jurisdiction, the trial court stated, in reference to Real Party’s Rule 202 Petition: “I understand [the petition is a Rule 202 motion for discovery] and it is going to be granted if these pleas are not honored. So if the Court has jurisdiction which have [sic] to be analyzed to the issues about notices, then the Court can then grant the 202 motions.” Subsequently, in a single order

Respondent abused her discretion by failing to make the required findings under Rule 202.4, and Relator lacks an adequate appellate remedy. *See In re Hewlett Packard*, 212 S.W.3d 356, 360 (Tex. App.—Austin 2006, orig. proceeding) (holding relators had no adequate remedy by appeal with respect to order for Rule 202 depositions because “their only opportunity to appeal the trial court’s order would occur after the depositions ha[d] occurred” and because order was not final and appealable); *see also In re East*, 476 S.W.3d 61, 65 (Tex. App.—Corpus Christi–Edinburg 2014, orig. proceeding) (“[D]epositions, once taken, cannot be ‘untaken[.]’”).

We conditionally grant mandamus relief as to that portion of the trial court’s July 20, 2021 order compelling Relator to submit to a deposition on written questions.

C. Relator’s Remaining Challenges

Relator complains the trial court abused its discretion in granting Real Party’s request for pre-suit discovery because Real Party has no right to pre-suit discovery. To the extent Relator claims the trial court abused her discretion in denying his Supplemented Motion, pursuant to which he challenged the trial court’s jurisdiction, Relator has not demonstrated he lacks an adequate appellate

dated July 20, 2021, the trial court denied Relator’s Supplemented Motion and granted Real Party’s Rule 202 Petition.

remedy for the trial court's denial of his motion. *See In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 375 (Tex. 1998) (denying mandamus relief for trial court's denial of plea to jurisdiction because relator failed to show it lacked adequate appellate remedy).

Relator also seeks an order from this Court compelling the trial court to rule on his Motion for Summary Judgment and Plea to the Jurisdiction filed on February 22, 2021.⁷ The Motion for Summary Judgment was set for submission on May 4, 2021, approximately three months before Relator filed his present petition for writ of mandamus. And Relator's Plea to the Jurisdiction was originally set for hearing on June 23, 2021, but the court coordinator cancelled the hearing because the court was in trial on that date.

A trial court abuses its discretion by failing to rule if it (1) had a legal duty to perform a nondiscretionary act; (2) was asked to perform the nondiscretionary act; and (3) failed to do so. *In re Josefsberg*, No. 01-21-00179-CV, 2021 WL 2149831, at *2 (Tex. App.—Houston [1st Dist.] May 27, 2021, orig. proceeding) (mem. op.) (citing *In re Robbins*, 622 S.W.3d 600, 601 (Tex. App.—Houston [14th Dist.] 2021, orig. proceeding)). Mandamus may be granted to compel a trial court to

⁷ After seeking and obtaining leave from the trial court, Relator filed his Second Amended Answer and Plea to the Jurisdiction on May 31, 2021, asserting limitations and for the first time, lack of standing, as an additional jurisdictional challenge.

perform the nondiscretionary⁸ or ministerial act of ruling on a properly filed, pending motion “within a reasonable time.” *In re SMS Fin. XV, L.L.C.*, No. 01-19-00850-CV, 2020 WL 573247, at *1 (Tex. App.—Houston [1st Dist.] Feb. 6, 2020, orig. proceeding) (mem. op.); *In re Greater McAllen Star Props., Inc.*, 444 S.W.3d 743, 748 (Tex. App.—Corpus Christi–Edinburg 2014, orig. proceeding); *see also Barnes v. State*, 832 S.W.2d 424, 426 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding) (“When a motion is properly filed and pending before a trial court, the act of giving consideration to and ruling on that motion is a ministerial act.”).

“The test for determining what time period is reasonable is not subject to exact formulation, and no ‘bright line’ separates a reasonable time from an unreasonable one.” *In re Greater McAllen Star Props.*, 444 S.W.3d at 748; *see also In re Cunningham*, 454 S.W.3d 139, 143 (Tex. App.—Texarkana 2014, orig. proceeding) (“There is no bright-line rule establishing a reasonable time period” for trial court to rule on properly filed, pending motion) (citing *Ex parte Bates*, 65 S.W.3d 133, 135 (Tex. App.—Amarillo 2001, orig. proceeding)). This Court may consider factors such as the state of the trial court’s docket, the trial court’s actual knowledge of the motion, any overt refusal to act on it, and other judicial and

⁸ “An act is ministerial, or nondiscretionary, when ‘the law clearly spells out the duty to be performed with sufficient certainty that nothing is left to the exercise of discretion.’” *Bd. of Trs. of Hous. Firefighters’ Relief & Ret. Fund v. City of Houston*, 466 S.W.3d 182, 187 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) (citation omitted).

administrative matters that must be addressed first. *Ex parte Bates*, 65 S.W.3d at 135. In addition, the trial court’s “inherent power to control its own docket [must] be included in the mix.” *Id.* (citing *Ho v. Univ. of Texas at Arlington*, 984 S.W.2d 672, 694–695 (Tex. App.—Amarillo 1998, pet. denied)).

Relator has not shown the trial court’s delay in ruling on his Motion for Summary Judgment and Plea to the Jurisdiction is unreasonable. We thus deny Relator’s request that we compel the trial court to rule on such motions.

Conclusion

We conditionally grant Relator’s petition for writ of mandamus, in part, and direct the trial court to vacate that portion of its July 20, 2021 order compelling Relator to respond to Real Party’s deposition on written questions for failure to comply with the express directives of Texas Rule of Civil Procedure 204.2. Our writ of mandamus will issue only if Respondent does not comply within thirty days of the date of this opinion. We deny the remainder of the mandamus relief sought in Relator’s petition. All pending motions are dismissed as moot.

PER CURIAM

Panel consists of Justices Goodman, Rivas-Molloy, and Farris.