Petition for Writ of Mandamus Denied and Memorandum Opinion filed December 14, 2010.

In The

Fourteenth Court of Appeals

NO. 14-10-01186-CV

IN RE JASON GONZALEZ, Relator

ORIGINAL PROCEEDING
WRIT OF MANDAMUS

MEMORANDUM OPINION

On December 3, 2010, relator Jason Gonzalez filed a petition for writ of mandamus in this court. *See* Tex. Gov't Code Ann. §22.221; *see also* Tex. R. App. P. 52. In the petition, relator asks this court to compel the Honorable Sharon McCally, presiding judge of the 334th District Court of Harris County to withdraw the order signed November 12, 2010, requiring production of relator's bank records.

Background

Relator is a defendant in a suit filed by former Fed Ex Ground route drivers. Fed Ex Ground terminated the contracts of three route drivers who worked as independent contractors. The contracts permitted the drivers to sell their routes in the event their contracts were terminated. In their petition, the plaintiffs alleged that Fed Ex Ground terminated their contracts and prohibited them from selling their routes. Relator Jason

Gonzalez is a manager at the Fed Ex Ground terminal where the route drivers worked. The plaintiffs alleged that relator accepted "under-the-table" payments from individuals in exchange for the sale of the drivers' routes.

In the course of discovery, plaintiffs sought production of several documents from relator including his "monthly bank records for the time period January 1, 2008 until present." Relator objected to the request for his bank records on the grounds that the request exceeded the scope of discovery, violated his privacy rights, and was irrelevant and harassing.

Mandamus Standard

Mandamus relief is available only to correct a clear abuse of discretion for which the relator has no adequate remedy at law. *In re Prudential Ins. Co. of Am*., 148 S.W.3d 124, 135–36 (Tex .2004). The scope of discovery is largely within the trial court's discretion. *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998). Mandamus is appropriate if we conclude that privileged documents have been improperly ordered disclosed by the trial court. *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 436 (Tex. 2007).

The general rule in financial records production cases is that the party attempting to prevent or restrict discovery has the burden of pleading and proving the basis for the desired limitation. *Peeples v. Honorable Fourth Supreme Judicial Dist*., 701 S.W.2d 635, 637 (Tex. 1985). Absent a privilege or specific exception, a party is entitled to discover any relevant material. *See* Tex. R. Civ. P. 192.3. The party resisting discovery has the burden to plead and prove any privilege claimed. *See Huie v. DeShazo*, 922 S.W.2d 920, 926 (Tex. 1996); *Arkla, Inc. v. Harris*, 846 S.W.2d 623, 629 (Tex. App.—Houston [14th Dist.] 1993, no writ). The trial court determines whether an in camera

inspection is necessary at that point, and if so, the documents are produced to the court. *See Arkla*, 846 S.W.2d at 631.

Discussion

Relator first argues that mandamus is appropriate because the trial court abused its discretion in ordering him to produce his bank records without first performing an in camera examination. Relator relies on this court's opinion in *Weilgosz v. Millard*, 679 S.W.2d 163, 167 (Tex. App.—Houston [14th Dist.] 1984, orig. proceeding). In that case, this court held that certain financial records, including income tax returns, are subject to review by the trial court before they are ordered produced. *See Weilgosz*, 679 S.W.2d at 167. This court specifically held, however, that an individual's bank records were "clearly not privileged." *Id*. The United States Supreme Court has held that there are no constitutional rights to privacy affected by disclosure of banking records. *See United States v. Miller*, 425 U.S. 435, 442 (1976) (involving the subpoena of banking records served on a third party); *Neely v. Commission for Lawyer Discipline*, 302 S.W.3d 331, 341 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

Relator has failed to show the trial court abused its discretion in ordering the production of the bank records without conducting an in camera hearing.

Relator further argues the trial court abused its discretion in failing to require the real parties to first show how the discovery sought was material and relevant. Discovery may not be used as a fishing expedition. *In re American Optical*, 988 S.W.2d 711, 713 (Tex. 1998). Requests must be reasonably tailored to include only matters relevant to the case. *Id.* Relator bears the burden of proving that the real parties' request is overbroad. *See Miller v. O'Neill*, 775 S.W.2d 56, 59 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding).

The real parties' original petition alleges that relator arranged for the sale of the drivers' delivery routes to three different contractors who were relator's friends. The petition further alleges: "These three individuals made "under the table" payments to [relator] in exchange for the routes." Real parties' request for relator's bank records is relevant to their claim that he received payment in exchange for the sale of the routes. Consequently, relator has failed to show the discovery request is overbroad. *See In re Manion*, No. 07-08-0318-CV; 2008 WL 4180294 *3 (Tex. App.—Amarillo Sept. 11, 2008, orig. proceeding) (memo. op.) (bank records found discoverable when plaintiff alleged defendant misused management position for financial gain).

Relator has not established entitlement to the extraordinary relief of a writ of mandamus. Accordingly, we deny relator's petition for writ of mandamus.

PER CURIAM

Panel consists of Justices Anderson, Frost, and Brown.