

**Petition for Writ of Mandamus Denied and Memorandum Opinion filed
February 18, 2016.**



In The

Fourteenth Court of Appeals

NO. 14-16-00076-CV

**IN RE KEVIN ZABIEGALA, INDIVIDUALLY AND D/B/A AUTO TOYS
KUSTOMZ, Relator**

**ORIGINAL PROCEEDING
WRIT OF MANDAMUS
215th District Court
Harris County, Texas
Trial Court Cause No. 2015-74493**

MEMORANDUM OPINION

On January 29, 2016, relator Kevin Zabiegala, Individually and d/b/a Auto Toys Kustomz, filed a petition for writ of mandamus in this court. *See* Tex. Gov't Code Ann. § 22.221 (West 2004); *see also* Tex. R. App. P. 52. In the petition,

relator complains of the contempt order signed by the 215th District Court of Harris County on January 7, 2016.

BACKGROUND

On December 11, 2015, the trial court signed a temporary restraining order, enjoining relator from selling, leasing, renting, modifying, altering, or moving from its current location a certain truck belonging to real party in interest John D. Hundle, III. The court set a hearing on the temporary injunction for December 18, 2015.

The trial court granted a temporary injunction on December 18, 2015, prohibiting relator from selling, leasing, renting, modifying, altering, or driving the truck. The order directed that “[t]he truck be moved to a neutral third party, the location to be determined by agreement of the parties, and that Plaintiff, and/or his agents, be permitted an opportunity to inspect the truck, on or before December 28, 2015[.]” Relator did not make the vehicle available for inspection on December 28, 2015, and Hundle filed a motion for contempt.

On January 7, 2016, the trial court signed the order granting the motion for contempt and motion for sanctions. The order states, in relevant part:

[T]he Court upon considering Plaintiff’s motions, all responses filed, all supportive evidence attached, testimony presented and arguments of counsel, is of the opinion that Defendant did violate the temporary injunction entered on December 18, 2015. Additionally, there is sufficient evidence to support a finding of conduct by Defendant that is sanctionable pursuant to Tex. R. Civ. P. 13.

The trial court order relator to pay \$1,000 in attorney's fees and to return the truck to "Auto Toyz Kustomz's business address at his own expense and make it available for inspection by January 11, 2016[.]" The trial court fined relator "\$500.00/per day for violation of the temporary injunction order dated December 18, 2015."

Relator filed a petition for writ of habeas corpus in this court. Relator requests that this court grant the writ so that he may (1) introduce favorable evidence discovered since the order was entered; and (2) argue that the order is contrary to the law and the evidence. Relator further requests that this court stay the contempt order directing him to pay \$10,000 until the trial court can hold a hearing. Finally, relator requests that we hold that the contempt order is void or, in the alternative, modify the order by reducing the fine "to a reasonable amount."

ANALYSIS

The purpose of a habeas corpus proceeding is to determine whether the relator has been unlawfully restrained. *In re Hall*, 433 S.W.3d 203, 207 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding). Relator argues that he is restrained because of the collateral nature of the contempt order, i.e., the order renders him subject to imprisonment if he does not pay the fine. Relator is not restrained of liberty by the January 7, 2016 order. The trial court imposed a fine, not confinement. *See Rosser v. Squier*, 902 S.W.2d 962 (Tex. 1995) (orig. proceeding) (per curiam) (holding that relator was not physically restrained for the purpose of habeas corpus relief because the trial court only assessed a fine against him). "Contempt orders that do not involve confinement cannot be reviewed by

writ of habeas corpus, and the only possible relief is a writ of mandamus.” *In re Long*, 984 S.W.2d 623, 625 (Tex. 1999) (orig. proceeding). The court may construe the petition for writ of habeas corpus as a petition for writ of mandamus. *See In re Easton*, 203 S.W.3d 438, 441 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding). We will construe relator’s petition for writ of habeas corpus as a petition for writ of mandamus.

To be entitled to mandamus relief, a relator must demonstrate (1) the trial court clearly abused its discretion; and (2) the relator has no adequate remedy by appeal. *In re Reece*, 341 S.W.3d 360, 364 (Tex. 2011) (orig. proceeding). A contempt order cannot be appealed. *Norman v. Norman*, 692 S.W.2d 655, 655 (Tex. 1985) (per curiam). Therefore, the second prong is satisfied. *In re Aslam*, 348 S.W.3d 299, 302 (Tex. App.—Fort Worth 2011, orig. proceeding).

On January 25, 2016, relator filed his first petition for writ of habeas corpus in this court challenging the same contempt order. On January 9, 2016, we denied relator’s habeas petition because he had not filed a sufficient record, demonstrating his entitlement to relief. *See Ex parte Zabiegala*, No. 14-16-00055-CV, 2016 WL 402077, at *1 (Tex. App.—Houston [14th Dist.] Jan. 29, 2016, orig. proceeding) (mem. op.).

Relator has the burden to provide a record showing that he is entitled to relief. *See Walker v. Packer*, 827 S.W.2d 833, 837 (Tex. 1992) (orig. proceeding). Relator has not provided a record in compliance with the Texas Rules of Appellate Procedure, demonstrating that the trial court abused its discretion by finding relator in contempt. *See Tex. R. App. 52.*

For these reasons, relator has not shown that he is entitled to mandamus relief. Accordingly, we deny relator's petition for writ of mandamus.

PER CURIAM

Panel consists of Justices Busby, Donovan, and Brown.