Petition for Writ of Mandamus Conditionally Granted and Memorandum Opinion filed November 9, 2017.

In The

Fourteenth Court of Appeals

NO. 14-17-00701-CV

IN RE THE WILLIAMS COMPANIES, INC., JOHN DEARBORN, AND DAVID CHAPPELL, Relators

ORIGINAL PROCEEDING
WRIT OF MANDAMUS
125th District Court
Harris County, Texas
Trial Court Cause No. 2016-53287

MEMORANDUM OPINION

On August 24, 2017, relators The Williams Companies, Inc. ("Williams"), John Dearborn, and David Chappell (collectively, the "Williams Parties") filed a petition for writ of mandamus in this court. *See* Tex. Gov't Code Ann. § 22.221 (West Supp. 2017); *see also* Tex. R. App. P. 52. In the petition, relators ask this court to compel the Honorable Kyle Carter, presiding judge of the 125th District Court of Harris County, to vacate his August 4, 2017 order granting the second

motion to compel filed by real party in interest, North American Polypropylene ULC ("NAPP"). We conditionally grant the petition for writ of mandamus.

I. BACKGROUND

NAPP, a Canadian company, entered into a propylene purchase and sale agreement (the "PSA") with Williams Canada Propylene ULC ("Williams Canada"). Under the PSA, Williams Canada agreed to build a petrochemical facility in Alberta, Canada for the manufacturing of propylene by dehydrogenating propane, and NAPP agreed to build a facility next to the PDH facility to convert the PDH facility's supply of liquid propane into polypropylene pellets. The project was collectively known as the "PDH/PP Project."

On August 11, 2016, NAPP sued Williams Canada in Alberta, Canada for breach of the PSA, and later added the Williams Companies, Williams Energy Canada ULC ("WECU"), and Inter Pipeline, Ltd. ("IPL") as defendants to the Canada suit. NAPP also sued Williams, Dearborn, Chappell, and WECU on August 11, 2016, in the 125th District Court of Harris County, for fraudulent concealment, fraudulent inducement, common-law fraud, and negligent misrepresentation. NAPP later added IPL to the Texas suit.

NAPP served Williams and Dearborn with requests for production in November 2016, and Chappell in December 2016, for what the Williams Parties describe as "the entire universe of documents relating" to the PDH/PP Project, which was comprised of 606,625 documents.

On December 5, 2016, WECU filed a special appearance. Also, on December 5, 2016, the Williams Parties and WECU[1] filed a motion to dismiss, asserting that the trial court should dismiss NAPP's suit because (1) the contracts contain forum-selection clauses under which NAPP consented to Alberta, Canada as the exclusive forum for its claims; (2) Texas law requires that NAPP's claims, which arise out of a "major transaction," be brought in Alberta, Canada;[2] and (3) the doctrine of forum non conveniens requires NAPP to bring its claims in Alberta, Canada. IPL filed its special appearance on January 3, 2017.

The Williams Parties objected to NAPP's discovery requests on the grounds that the requests were overly broad, burdensome, and irrelevant to the unresolved forum and jurisdictional issues. NAPP filed a motion to compel production.

At a February 17, 2017 hearing on NAPP's motion to compel, the trial court stated that NAPP was entitled to jurisdictional discovery related to the pending special appearances and motion to dismiss, and the trial court instructed the parties to conduct discovery regarding the jurisdictional and forum issues. The trial court, however, signed an order, on February 17, 2017, directing the Williams Parties to produce within thirty days all documents requested by NAPP, which collectively pertained to a variety of issues in the case including but not limited to jurisdictional and forum issues. On March 9, 2017, the Williams Parties filed a motion to modify the February 17 order or, in the alternative, a motion to stay enforcement of the order, pending mandamus review.

[1] NAPP had not added IPL as a defendant at that time.

[2] *See* Tex. Civ. Prac. & Rem. Code Ann. § 15.020(c) (West 2017).

On March 30, 2017, NAPP and the Williams Parties entered into a Rule 11 Agreement, which defined the scope of the discovery to be undertaken in advance of the hearing on the special appearances and motion to dismiss. The Rule 11 Agreement provides, in relevant part:

> **1. Limited Scope of February 17 Order.** The Parties agree that the form of [the] order granting NAPP's Motion to Compel signed by the Court on February 17, 2017 (the "Order") does not contain certain limiting language that the Court orally confirmed with counsel at the hearing regarding the scope of discovery that the Parties were to undertake. A copy of the Order is attached as **Exhibit A**. The Parties therefore agree that, notwithstanding the text of the current Order, the obligations of the Parties under that Order are as follows:
>
> - The Parties shall undertake focused discovery on the issues raised in the *forum non conveniens* portion of Defendants' Motion to Dismiss and the Special Appearances filed by WECU and IPL; and
>
> - The Parties shall confer and establish an agreed-upon framework of search terms, document custodians and date ranges sufficient to allow that focused discovery.[3]
>
> The Parties have already conferred and they agree to continue to confer regarding an agreement about a reasonable discovery framework to be completed before a hearing on the pending Motion to Dismiss and Special Appearances. If, however, any Party should later determine that the ongoing negotiations have reached an impasse and that an agreement cannot be reached about a reasonable discovery framework, it shall be free to seek further relief from the Court regarding the appropriate search terms, document custodians and date ranges for future discovery. NAPP agrees that it shall not take any action to enforce the Order as currently written, and it shall not later contend that TWC, Dearborn and Chappell have any obligation to comply with the

[3] Footnotes omitted.

> Order as currently written; the Parties obligations under the Order shall instead be as stated in this Agreement and future supplements thereto and NAPP shall not contend anything to the contrary.

The parties agreed to the search parameters in a separate document contained in a March 23, 2017 email from counsel for the Williams Parties to NAPP's counsel. The email states:

> Thank you for your most recent, March 22 reply, which again changes the identity of the document custodians and the search terms for which NAPP now seeks discovery from The Williams Companies, Inc., John Dearborn and David Chappell.
>
> Every time that NAPP changes the identity of the document custodians and the search terms requested, the volume of discovery requested and the accompanying burden on my client increases. For example, based on our preliminary estimates, the most recent changes NAPP has requested will increase ***the potentially responsive materials that must be collected and reviewed, by 50% and increase the necessary review and production time accordingly***.[4]
>
> Nevertheless, as we have repeatedly stated, our strong preference is to reach agreement and move forward with the case. For that reason, assuming agreement on a Rule 11 Agreement and new Docket Control Order in the forms attached to this email, we are willing to agree to the latest version of the search terms, custodians, and time frames you have most recently proposed:
>
> 1. Search term: "(vinmar OR napp OR goradia OR PDH/PP **OR POLYVIN**) & any of the following items: long-term, synchroniz!, coordinat!, synergy, expedit!, incentiv!, backstop, guarant!, board, merger, Fluor, Grace, Worley, Parsons, Katoen Natie, Thurber Engineering, **IPL, Chappell, Bayle, Heagy,**

[4] Emphasis added.

Pembina)" (highlighted terms are the new terms napp proposed on March 22, 2017).

2. Custodians to be searched: Alan Armstrong, Donald Chappel, John Dearborn, David Chappell, Frank Billings, Amelie Delisle, Vanessa Wilson, Neil Montgomery, Sid Meloney, Lorraine Royer, Gordon Dawson, **Geoff Wilkinson, Tim Neuman, Mike Stiles, Paul Homik**. (highlighted terms are the new custodians NAPP proposed on March 22, 2017).

3. Time period: October 1, 2012 through October 1, 2016.

Please advise whether we now have an agreement and return a signed copy of the proposed Rule 11 agreement for filing with the Court. Once we have agreed on the search terms, custodians, and time period, we will supplement the Rule 11 agreement with that information.

The Williams Parties state that they conducted the search in accordance with the terms, custodians, and dates agreed upon by the parties. The Williams Parties represent that they produced all emails to or from NAPP and its affiliates regardless of whether those emails pertained to the jurisdictional or forum issues. From the remaining documents, counsel for the Williams Parties then reviewed each document for relevance to the jurisdictional and forum issues. The Williams Parties identified 3,828 non-privileged documents that are relevant to the motion to dismiss and the special appearances, i.e., they have some connection to activities in or directed towards Texas or involved communications with NAPP and its affiliates, and produced those documents to NAPP. The Williams Parties identified 8,632 privileged documents, which they did not produce. Finally, the Williams Parties identified 21,757 non-privileged documents, which they claim are not relevant to the special appearances or the forum non conveniens issue, i.e., they have nothing to do with activities in or directed towards Texas, and did not produce them.

After the Williams Parties' production of documents to NAPP, a dispute materialized over the Rule 11 Agreement's meaning. On June 29, 2017, NAPP filed a second motion to compel, in which NAPP contended that the Williams Parties' production failed to comply with the Rule 11 Agreement. Specifically, NAPP argued that the Williams Parties were required to produce the entire pool of documents resulting from the agreed search parameters (the search terms, custodians, and time period). NAPP contended that the Rule 11 Agreement did not permit the Williams Parties to "pick and choose" from the search results to "make their own determination of relevance." In response, the Williams parties asserted that the Rule 11 Agreement limited discovery to jurisdictional and forum issues, and the agreed search parameters allowed a more manageable pool of documents which the Williams Parties would review and exclude from production documents that are either privileged or irrelevant to the jurisdictional and forum issues.

On August 4, 2017, the trial court granted NAPP's second motion to compel and ordered the Williams Parties to produce all documents responsive to the agreed-upon search parameters, including those the Williams Parties contend are privileged or irrelevant to the jurisdictional and forum issues, as follows:

> Having considered NAPP's Second Motion to Compel, the Court is of the opinion that it should be granted in all of its particulars. It is therefore ordered that defendants produce (within 45 days) all documents responsive to the search terms agreed to by the parties, states as follows:
>
> **Search term**: "(vinmar OR napp OR goradia OR PDH/PP OR POLYVIN) & any of the following items: long-term, synchroniz!, coordinat!, synergy, expedit!, incentiv!, backstop, guarant!, board, merger, Fluor, Grace, Worley, Parsons, Katoen Natie, Thurber Engineering, IPL, Chappell, Bayle, Heagy, Pembina)"

Custodians to be searched: Alan Armstrong, Donald Chappel, John Dearborn, David Chappell, Frank Billings, Amelie Delisle, Vanessa Wilson, Neil Montgomery, Sid Meloney, Lorraine Royer, Gordon Dawson, Geoff Wilkinson, Tim Neuman, Mike Stiles, Paul Homik.

Time period: October 1, 2012 through October 1, 2016.

In its mandamus petition, the Williams Parties maintain that the trial court abused its discretion by incorrectly interpreting the Rule 11 agreement to require them to produce the entire pool of documents identified by the search parameters without regard to relevance to the jurisdictional and forum issues, or to privilege.

II. MANDAMUS STANDARD OF REVIEW

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 Nat'l Lloyds Ins. Co.*, 507 S.W.3d 219, 226 (Tex. 2016) (orig. proceeding) (per curiam). A trial court clearly abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law or if it clearly fails to analyze the law correctly or apply the law correctly to the facts. *In re H.E.B. Grocery Co., L.P.*, 492 S.W.3d 300, 302–03 (Tex. 2016) (orig. proceeding) (per curiam); *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (per curiam). An order that compels discovery that is well outside proper bounds is an abuse of discretion for which mandamus is the proper remedy. *In re Nat'l Lloyds Ins. Co.*, No. 15-0591, — S.W.3d —, 2017 WL 2501107, at*4 (Tex. June 9, 2017) (orig. proceeding).

III. SCOPE OF DISCOVERY

Discovery requests must be reasonably tailored to include only matters relevant to the case. *In re Nat'l Lloyds Ins. Co.*, 507 S.W.3d at 223–24; *Hernandez v. Abraham, Watkins, Nichols, Sorrels & Friend*, 451 S.W.3d 58, 67 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Discovery may not be used as a fishing expedition or to impose unreasonable discovery costs on the opposing party. *In re Alford-Chevrolet-Geo*, 997 S.W.2d 173, 181 (Tex. 1999) (orig. proceeding). A trial court has broad discretion to define the scope of discovery, but it must make an effort to impose reasonable discovery limits. *In re State Farm Lloyds*, 520 S.W.3d 595, 604 (Tex. 2017) (orig. proceeding). Courts may limit discovery pending resolution of threshold issues such as venue, jurisdiction, forum non conveniens, and official immunity. *Sells v. Drott*, 330 S.W.3d 696, 706 (Tex. App.—Tyler 2010, pet. denied).

IV. ANALYSIS

A. Abuse of Discretion

The crux of this case involves the interpretation of the parties' Rule 11 Agreement. A Rule 11 agreement is a contract subject to the usual rules of contract interpretation. *Barton v. Fashion Glass & Mirror, Ltd.*, 321 S.W.3d 641, 644 (Tex. App.—Houston [14th Dist.] 2010, no pet.). Our primary concern in construing a contract is to ascertain the parties' true intent by the plain language of the contract. *Great Am. Ins. Co. v. Primo*, 512 S.W.890, 893 (Tex. 2017). "Courts must 'examine the entire agreement and seek to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.'" *Nassar v. Liberty Mut. Fire Ins. Co.*, 508 S.W.3d 254, 258 (Tex. 2017) (per curiam) (quoting *Gilbert Tex.*

Constr., L.P. v. Underwriters at Lloyd's London, 327 S.W.3d 118, 126 (Tex. 2010)). "Absent ambiguity, contracts are construed as a matter of law." *Plains Expl. & Prod. Co. v. Torch Energy Advisors, Inc.*, 473 S.W.3d 296, 305 (Tex. 2015). The court may not rewrite the parties' contract or add to its language. *In re Davenport*, 522 S.W.3d 452, 457 (Tex. 2017) (orig. proceeding).

The Williams Parties assert that the purpose of the "focused discovery" with the agreed-upon search parameters was to identify, from the more-than 600,000 documents in Williams' database, potentially relevant, non-privileged documents. The Williams Parties would then review the results to identify only relevant non-privileged documents to produce to NAPP. NAPP posits that, under the Rule 11 Agreement, the Williams Parties agreed produce the documents identified by the agreed-upon search parameters, and there is no provision for the Williams Parties to conduct a review of those documents for relevance.

The first prong of the Rule 11 Agreement provides for "focused discovery" on issues related to forum non conveniens and personal jurisdiction. It does not state that the parties agreed that the Williams Parties would produce every document identified by the search parameters agreed upon in counsels' March 23, 2017 email. That is, nowhere in the Rule 11 Agreement do the parties state that they intended for the Rule 11 Agreement to supplant the Texas discovery rules, which limit the scope of discovery to information that is relevant or is reasonably calculated to lead to the discovery of admissible evidence. *See* Tex. R. Civ. P. 192.3(a). Because the parties agreed to limit discovery at this time to forum and personal jurisdiction issues, documents not relevant to those issues are not discoverable at this time. Under NAPP's reading of the agreement, the entire universe of documents resulting from

the agreed search parameters are necessarily relevant to the jurisdictional and forum issues on which the parties agreed to limit discovery at this stage. However, the search parameters agreed to in the March 23, 2017 email are broad and would undoubtedly capture documents relevant to issues beyond the limited scope of jurisdiction and forum. Accordingly, as the trial court's August 4, 2017 order compels production of documents contrary to the agreed scope of discovery under the Rule 11 Agreement, it is a clear abuse of discretion.

Likewise, the Rule 11 Agreement does not provide that the Williams Parties agreed to waive any privileges, including the attorney-client privilege. *See* Tex. R. Evid. 503. Here again, the search parameters' facial breadth clearly would not exclude privileged documents from the search results, as that determination can be made only by substantive review of the documents. Given that the Rule 11 Agreement does not waive the Williams Parties' right to withhold production based on recognized privileges, and that NAPP acknowledges it does not seek production of responsive documents that are privileged, the trial court's August 4, 2017 order mandating production of such documents is a clear abuse. *See* Tex. R. Civ. P. 192.3; *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding) (stating that mandamus will issue to prevent disclosure of privileged information); *In re Tex. Health Res.*, 472 S.W.3d 895, 900 (Tex. App.—Dallas 2015, orig. proceeding). "Clearly, once privileged information is disclosed, there is no way to retrieve it; therefore, mandamus is an appropriate remedy to prevent the publication of confidential documents." *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 424 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

We hold that the agreement is unambiguous, and the Williams Parties' interpretation of the Rule 11 Agreement is the only reasonable interpretation. *See Primo*, 512 S.W.3d at 893 (explaining that a contract is ambiguous only if it is "susceptible to two or more reasonable interpretations" (quoting *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003))). To hold that NAPP's interpretation of the Rule 11 Agreement—that the Williams Parties must produce every document identified by the agreed-upon search parameters—is the only reasonable interpretation, would require us to add terms to the agreement which we have identified as having been excluded by the parties. This we may not do. *See Davenport*, 522 S.W.3d at 457.

The Rule 11 Agreement does not require the Williams Parties to produce every document that is responsive to the agreed-upon search parameters without regard to relevance or privilege. Therefore, the trial court abused its discretion by granting NAPP's second motion to compel the production of all documents responsive to the agreed-upon search parameters.[5]

B. No Adequate Remedy by Appeal

Having determined that the trial court abused its discretion, we must determine whether the Williams Parties have an adequate remedy by appeal. "[A] party will not have an adequate remedy by appeal when the appellate court would not be able to cure the trial court's discovery error." *Walker v. Packer*, 827 S.W.2d

[5] The Williams Parties also argue that the burden and expense of producing the 21,757 irrelevant documents would require it to further review those documents and "make significant redactions for privilege, confidentiality obligations to third-parties, and relevance." Because we have determined that the Rule 11 Agreement does not require the Williams Parties to produce all documents responsive to the agreed-upon search parameters, we need not address this assertion.

833, 843 (Tex. 1992) (orig. proceeding). This occurs when the trial court erroneously orders the relator to produce documents protected by the attorney-client privilege or irrelevant documents. *Id.*; *see also Nat'l Lloyds Ins. Co.*, 507 S.W.3d at 224–26 (granting mandamus relief when the trial court ordered discovery of irrelevant information); *In re Tex. Health Res.*, 472 S.W.3d 895, 904 (Tex. App.—Dallas 2015, orig. proceeding) (granting mandamus relief when the trial court ordered discovery of information protected by the attorney-client privilege). We conclude that the Williams Parties do not have an adequate remedy by appeal.

V. CONCLUSION

The trial court abused its discretion by ordering the Williams Parties to produce all documents responsive to the agreed-upon search parameters, and the Williams Parties do not have an adequate remedy by appeal. We conditionally grant the writ of mandamus and direct the trial court to vacate its August 4, 2017 order granting NAPP's second motion to compel production of all documents identified by the agreed-upon search parameters. The writ will issue only if the trial court fails to act in accordance with this opinion. We also lift our stay entered on October 5, 2017.

/s/ Marc W. Brown
Justice

Panel consists of Justices Brown, Wise, and Jewell.