Petition for Writ of Mandamus Conditionally Granted in Part and Denied in Part and Memorandum Opinion filed December 19, 2017.

In The

Fourteenth Court of Appeals

NO. 14-17-00824-CV

IN RE PDVSA SERVICES, INC. Relator

ORIGINAL PROCEEDING
WRIT OF MANDAMUS
165th District Court
Harris County, Texas
Trial Court Cause No. 2015-51384

MEMORANDUM OPINION

The relator is PDVSA Services, Inc. ("PSI") and the real party-in-interest is the Harris County Appraisal District ("HCAD").

On October 19, 2017, PSI 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, PSI

asks this court to compel the Honorable Ursula Hall, presiding judge of the 165th District Court of Harris County ("Respondent"), to (1) rule on PSI's motion to submit PSI's underlying appeal of the orders of the appraisal review board to nonbinding arbitration (the "Motion to Submit"), and (2) vacate her October 17, 2017 order granting HCAD's motion to quash PSI's notices to take the deposition of HCAD employees, Paul Wright and Blake Samoheyl.

Section 42.225(a) of the Tax Code provides, "On motion by a property owner who appeals an appraisal review board order under this chapter, the court *shall* submit the appeal to nonbinding arbitration." Tex. Tax Code Ann § 42.225(a) (emphasis added). We conclude that Respondent failed to perform her ministerial duty to rule on the Motion to Submit within a reasonable time after it was submitted. But PSI has not shown that the trial court clearly abused its discretion by quashing the depositions. We therefore conditionally grant the petition in part, and direct the trial court to rule on the Motion to Submit, and deny the petition as to the order quashing the depositions.

FACTUAL AND PROCEDURAL BACKGROUND

PSI is a Texas corporation, engaged in the business of facilitating the purchase, storage and shipment of equipment for eventual use in the Venezuelan oil industry.

PSI brought the underlying suit to appeal the orders of the appraisal review board determining protest and denying correction for business personal property listed by HCAD on its appraisal records for account nos. 0542885 and 2217879 for

the tax years of 2014 and 2015. Among other things, PSI asserted below that it is not liable for taxes because it allegedly never owned the property in question.

A. Respondent's Failure to Rule on the Motion to Submit and Order Quashing of the Depositions

On July 12, 2016, PSI filed its Motion to Submit. The then-sitting trial judge[1] signed an order on September 12, 2016, which conditionally denied the motion, but stated that it was denied only until the deposition of a PSI representative and the deposition of the appraiser of the property have been taken, and that, after that time, PSI may re-assert its Motion to Submit. The trial judge wanted to allow the parties to conduct discovery regarding the ownership issue before referring the appeal to arbitration.

On January 5, 2017, HCAD filed a partial plea to the court's jurisdiction ("Partial Plea to Jurisdiction"), which challenged Respondent's jurisdiction to hear some, but not all of PSI's claims. To defend against the Plea, PSI noticed the depositions of HCAD employees, Paul Wright and Blake Samoheyl, for January 12 and 13, 2017. HCAD moved to quash.

The two depositions referenced in the September 12, 2016 order on the Motion to Submit were taken on January 10, 2017. PSI reasserted its Motion to Submit. PSI requested an emergency hearing on its motion, but Respondent did not rule on that request. PSI set the Motion to Submit for hearing on February 6, 2017.

[1] Debra Ibarra Mayfield served as Judge for the 165th District Court until Respondent became the judge of the court on January 1, 2017.

At the February 6 hearing, PSI presented argument on its Motion to Submit, a motion to continue the trial setting, and HCAD's motion to quash the depositions. Respondent continued the trial, but did not rule on the Motion to Submit or the motion to quash.

PSI noticed the Motion to Submit and the motion to quash for hearing on March 17, 2017, but Respondent passed the hearing. PSI then noticed the Motion to Submit and the motion to quash for hearing on March 22, 2017, but Respondent, again, passed the hearing. All told, PSI noticed four hearings on its Motion to Submit, but Respondent passed each hearing.

After the final hearing was passed, Respondent's clerk sent an email on April 10, 2017, stating that "[a]ll settings that were previously set on submission or previously heard will be ruled on without a hearing," and that "[a]ll settings that have not been heard previously/set on submission will be re-set to a later date."

PSI waited for the promised rulings and re-settings, but they never came. Because the November 13, 2017 trial setting was fast approaching, on September 8, 2017, PSI moved to continue the trial so Respondent would have adequate time to submit the appeal to arbitration before trial. On September 12, 2017, PSI sent a letter to Respondent requesting a ruling on its Motion to Submit.

On October 17, 2017, Respondent signed orders denying continuance of the November 13, 2017 trial setting and granting HCAD's motion to quash the depositions. But Respondent did not rule on the Motion to Submit.

After PSI filed its petition for writ of mandamus and motion for stay on October 19, 2017, with our court, we stayed the November 13, 2017 trial setting.

B. Respondent's Order Sustaining HCAD's Special Exceptions

PSI's Third Amended Petition, in paragraphs V.A., B., C., D., and E or 10–17, alleged the following five claims: (A) PSI has never owned the property; (B) the local taxing units lacked jurisdiction to tax the property because it was not located in Harris County for more than a temporary period; (C) the State lacked jurisdiction to tax the property because it was not located in Harris County for more than a temporary period; (D) the property was exempt from taxation because it was at all times in transit in the uninterrupted stream of interstate commerce; and (E) HCAD's appraised value of the property exceeded its market value and was excessive.

On March 21, 2017, HCAD filed special exceptions to PSI's Third Amended Petition, arguing that Respondent lacked jurisdiction of all of PSI's claims, except for the no ownership claim, because PSI has not alleged that it was the owner of the property.

Almost seven months later, on October 20, 2017, Respondent signed an order, which sustained HCAD's special exceptions and ordered PSI to amend its Third Amended Petition by October 26, 2017 to allege its ownership of the property. The order further provides that PSI's failure to timely amend its petition, to allege its ownership of the property, will result in the dismissal of those claims alleged in

Paragraphs V.B., C., D., and E. of PSI's Third Amended Petition.[2] According to HCAD, PSI has not filed an amended petition, even though October 26 has come and gone.

MANDAMUS STANDARD

To obtain mandamus relief, a relator generally must show both that the trial court clearly abused its discretion and that relator has no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). 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 Cerberus Capital Mgmt. L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (per curiam). The relator must establish that the trial court could reasonably have reached only one conclusion. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding).

"There are three requisites to a mandamus: a legal duty to perform a nondiscretionary act, a demand for performance, and a refusal." *Stoner v. Massey*, 586 S.W.2d 843, 846 (Tex. 1979). When a motion is properly filed and pending before a trial court, the act of giving consideration to and ruling upon that motion is

[2] In its Reply Brief, PSI, for the first time, asks our court to compel Respondent to vacate her order sustaining the special exceptions, arguing that such order was erroneous. "However, we are not required to consider issues raised for the first time in a reply brief." *DEK-M Nationwide, LTD v. Hill*, No. 14-15-01030-CV, 2017 WL 1450016, at *3 n.4 (Tex. App.—Houston [14th Dist.] Apr. 18, 2017, pet. denied) (substitute mem. op.) (citing *DeWolf v. Kohler*, 452 S.W.3d 373, 388 n.13 (Tex. App.—Houston [14th Dist.] 2014, no pet.)). Accordingly, we do not consider this issue.

a ministerial act.[3] A trial court has a ministerial duty to consider and rule on motions properly filed and pending before it, and mandamus may issue to compel the trial court to act. *In re Henry*, 525 S.W.3d 381, 381 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding) (per curiam) (corrected op.). "A trial court is required to rule on a motion within a reasonable time after the motion has been submitted to the court for a ruling or a ruling on the motion has been requested." *In re Foster*, 503 S.W.3d 606, 607 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding) (per curiam).

ANALYSIS

A. Respondent failed to perform her ministerial duty to rule on the Motion to Submit.

Section 42.225(a) of the Tax Code provides, "On motion by a property owner who appeals an appraisal review board order under this chapter, the court *shall* submit the appeal to nonbinding arbitration." Tex. Tax Code Ann. § 42.225(a) (emphasis added). "The Code Construction Act makes clear that the use of "shall" normally imposes a mandatory requirement. Tex. Gov't Code Ann. § 311.016(2)." *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 392 (Tex. 2014); *see also Wichita Cty. v. Hart*, 917 S.W.2d 779, 781 (Tex. 1996) ("Legislature's use of the word 'shall' in a statute generally indicates the mandatory character of the

[3] *See Eli Lilly and Co. v. Marshall*, 829 S.W.2d 157, 158 (Tex. 1992) (per curiam) (mandamus conditionally issued to compel trial court to conduct a hearing); *Barnes v. State*, 832 S.W.2d 424, 426 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding); *In re Bishop*, No. 14-06-00636-CV, 2006 WL 2434200, at *1 (Tex. App.—Houston [14th Dist.] Aug. 24, 2006, orig. proceeding) (per curiam) (mem. op.).

provision"). Accordingly, upon the filing of a motion, the trial court has a mandatory duty to submit the appeal to nonbinding arbitration.

Section 42.225(e), however, requires the trial court to determine certain matters before submitting the case to arbitration. "Prior to submission of a case to arbitration the court shall determine matters related to jurisdiction, venue, and interpretation of the law." Tex. Tax Code Ann. § 42.225(e). But section 42.225 is clear that a trial court may not proceed to trial without first determining these matters and submitting the appeal to arbitration.

PSI argues that Respondent has failed to perform its ministerial duty to rule on its Motion to Submit within a reasonable time after it was submitted.

Because HCAD filed special exceptions to PSI's Third Amended Petition, arguing that Respondent lacked jurisdiction of all of PSI's claims, except for the no ownership claim, it was appropriate for Respondent to rule on these jurisdictional matters, as required by section 42.225(e), before submitting the appeal to arbitration, as required by section 42.225(a). But Respondent refused to continue the November 13, 2017 trial setting, to allow time for arbitration, and did not rule on the special exceptions until almost seven months after they were filed.

HCAD argues that arbitration is premature under section 42.225(e) until PSI either amends its petition to allege that it is the owner of the property, as required by the special exceptions order, or refuses to amend and stands on its pleadings. However, section 42.225(e) only requires the trial court to determine matters related to jurisdiction, not dismiss the claims. The special exceptions order determined

jurisdictional issues based on PSI's Third Amended Petition; a dismissal order would merely implement Respondent's determination of the jurisdictional matters. Moreover, because PSI did not amend its petition by October 26, 2017, as ordered by Respondent, it appears that PSI has opted to stand on its Third Amended Petition. Accordingly, section 42.225(e) presents no obstacle to Respondent ruling on the Motion to Submit.

For these reasons, we conclude that Respondent failed to perform her ministerial duty to rule on the Motion to Submit within a reasonable time after it was submitted, especially given Respondent's refusal to continue the November 13 trial setting. *See In re Foster*, 503 S.W.3d at 607.

B. PSI has not shown that Respondent clearly abused her discretion by granting the motion to quash depositions.

PSI noticed the depositions of HCAD's employees, Paul Wright and Blake Samoheyl, to attempt discover evidence to defeat HCAD's Partial Plea to Jurisdiction. PSI generally sought to depose these persons regarding HCAD's determinations and the evidence and argument that was presented at hearings.

HCAD moved to quash the depositions on the grounds, among others, that the depositions were noticed after Respondent's discovery deadline and that Respondent lacks jurisdiction to hear the subject matters of the depositions. It appears that the depositions which PSI seeks became moot after Respondent sustained HCAD's special exceptions and jurisdictional challenges on October 20, 2017.

We conclude that PSI has not shown that Respondent clearly abused her discretion by quashing the depositions.

CONCLUSION

For the above reasons, we conditionally grant the petition in part, and direct the trial court to rule on the Motion to Submit. But we deny the petition as to the order quashing the depositions.

We are confident the trial court will act in accordance with this opinion. The writ of mandamus shall issue only if the trial court fails to do so.

PER CURIAM

Panel consists of Justices Christopher, Brown, and Wise.