**In The**

***Court of Appeals***

***Ninth District of Texas at Beaumont***

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**NO. 09-10-00386-CV**

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**WELLS FARGO BANK, N.A. AND TIMOTHY D. ZEIGER, Appellants**

**V.**

**DANIEL J. GOLDBERG, CHAPTER 7 TRUSTEE, Appellee**

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**On Appeal from the 60th District Court**
**Jefferson County, Texas**
**Trial Cause No. B-183,094**

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**MEMORANDUM OPINION**

This is an interlocutory appeal from a trial court's order denying Wells Fargo Bank, N.A.'s and Timothy D. Zeiger's Motion to Stay Lawsuit and Alternative Motion for Reconsideration. We conclude the appeal must be dismissed for lack of jurisdiction.

BACKGROUND

Appellee Daniel J. Goldberg is the Chapter 7 bankruptcy trustee for Longleaf Production, LLC and L-Texx Petroleum, LP. Charles W. Tucker and Thomas H. Noble are the sole members and managers of Longleaf and are the sole managing partners of L-

Texx. The sole general partner of L-Texx is L-Texx Management, LLC. Tucker and Noble are the sole owners and members of L-Texx Management.

Longleaf executed two promissory notes to Wells Fargo totaling $1,000,000. Tucker and Noble executed a deed of trust in their capacity as representatives of Longleaf. The deed of trust pledged certain oil and gas leases owned by Longleaf and certain oil and gas leases owned by L-Texx as collateral for the promissory notes. The deed of trust includes an FAA arbitration provision.

Longleaf defaulted on the loans. Wells Fargo posted the collateral for foreclosure and notified the purchaser of the oil production of the foreclosure. L-Texx and Longleaf filed for bankruptcy. Goldberg, as bankruptcy trustee for both L-Texx and Longleaf, sued Wells Fargo and its agent, Timothy Zeiger, for tortious interference with the oil purchase contract. L-Texx and Longleaf claimed the interference forced the companies into bankruptcy.

In March 2009, Wells Fargo and Zeiger filed a motion to abate and to compel arbitration. They requested the trial court dismiss or alternatively abate the case pending arbitration between the parties. Goldberg filed a non-suit of Longleaf's claims. He informed the trial court that the party to the arbitration provision, Longleaf, would no longer pursue its claim. In June 2009, the trial court denied the motion to abate and to compel arbitration. Wells Fargo and Zeiger did not file an appeal or a mandamus petition challenging the ruling.

In January 2010, appellants filed another motion to stay and a motion for reconsideration requesting the trial court reconsider the June 2009 ruling. The trial court conducted a hearing in May, but then took the motion under advisement. On August 13, 2010, the trial court denied the motion. On August 24, 2010, appellants filed their notice of appeal.

## JURISDICTION

Wells Fargo and Zeiger assert this Court has jurisdiction pursuant to section 51.016 of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.016 (West Supp. 2010). Goldberg maintains this Court does not have jurisdiction over the appeal, because the order denying appellants' 2009 motion was signed before the effective date of section 51.016. *See id.* He asserts the trial court's August 2010 order did not deny a new motion to compel arbitration or a new motion to abate, but "[i]nstead, the Court simply refused to reconsider and change its order denying Appellants' March 2009 Motion to Compel Arbitatration/Motion to Abate issued more than one year earlier." Appellants respond that the 2010 motion to stay was not solely a motion for reconsideration, but a different motion that requested substantively different relief than the original motion.

The substance of a motion, rather than its title, determines its nature. *Tex.-Ohio Gas, Inc. v. Mecom*, 28 S.W.3d 129, 142 (Tex. App.—Texarkana 2000, no pet.) ("A motion's substance is to be determined from the body of the instrument and its prayer for

relief.”). The 2010 motion states, “In support of this Motion to Stay, Defendants hereby incorporate by reference as if same were set forth in full herein the [2009] Motion to Compel Arbitration, along with all the attached evidence. . . .” The 2010 motion stated that “Defendants respectfully request that the Court reconsider the [2009] Motion to Compel Arbitration and compel L-Texx to arbitrate its claims.” Appellants do not identify any change of circumstances that prompted the 2010 motion other than the pursuit of discovery in the litigation.

The prayer for relief in the 2009 motion states:

> WHEREFORE, PREMISES CONSIDERED, Defendants Wells Fargo Bank, N.A. and Timothy D. Zeiger request that the court dismiss this proceeding or in the alternative abate all claims, that the Court order that Trustee’s claims and causes of action are subject to mandatory arbitration, that the Court order that Trustee may assert his claims, if at all, only in connection with the provisions of the Arbitration Program contained in the Deed of Trust; Defendants seek such other and further relief, general or specific, at law or in equity, to which they may be justly entitled.

The prayer for relief in the 2010 motion states:

> WHEREFORE, PREMISES CONSIDERED, Defendants Wells Fargo Bank, N.A. and Timothy D. Zeiger request that the court stay this proceeding pending arbitration between Defendants and Longleaf, or in the alternative order that Trustee’s claims and causes of action are subject to mandatory arbitration and that Trustee may assert his claims, if at all, only in connection with the provisions of the Arbitration Program contained in the Deed of Trust; Defendants seek such other and further relief, general or specific, at law or in equity, to which they may be justly entitled.

The 2010 motion was essentially a motion to reconsider the ruling denying appellants’ 2009 motion. *See Hydro Mgmt. Sys., LLC v. Jalin, Ltd.,* No. 04-09-00813-CV,

2010 WL 1817813 (Tex. App.—San Antonio May 5, 2010, no pet.) (mem. op.). At oral argument before this Court, appellants noted that some of the claims asserted by Goldberg in the trial court should not be subject to a stay order. Appellants do not request that this Court compel arbitration. Goldberg represented to the trial court an arbitration claim would not be made by Longleaf. The only relief requested from this Court, then, is a partial stay order pending a non-existent proceeding.

Effective September 1, 2009, the Texas Legislature authorized interlocutory appeal of a trial court's order in a matter subject to the Federal Arbitration Act under the same circumstances an appeal would be permitted in federal court. Act of May 27, 2009, 81st Leg., R.S., ch. 820, §§ 1, 3, 2009 Tex. Gen. Laws 2061 (codified at Tex. Civ. Prac. & Rem. Code Ann. § 51.016). Section 51.016 does not apply to an appeal of the June 2009 order. *See id.* Appeals from interlocutory orders are accelerated, and unless otherwise authorized by statute, an accelerated appeal is perfected by filing a notice of appeal within twenty days of the order as allowed by Rule 26.1(b), or as extended by Rule 26.3. *See* Tex. R. App. P. 26.1(b), 26.3, 28.1(b). Section 51.016 applies to an appeal initiated after September 1, 2009. *J.B. Hunt Transp., Inc. v. Hartman,* 307 S.W.3d 804, 808 n.3 (Tex. App.—San Antonio 2010, no pet.). We conclude that the statute does not make appealable an interlocutory order that merely declined a request to reconsider the June 2009 order.

At the time of the June 2009 order denying appellants' motion, a mandamus petition was the proper vehicle to address a failure to stay litigation based on the Federal Arbitration Act. *See In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 188 (Tex. 2007) ("[M]andamus relief is appropriate if the trial court abused its discretion in failing to stay the litigation and compel arbitration."); *see also In re Helix Energy Solutions Group, Inc.*, 303 S.W.3d 386, 395 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding); *Zuffa, LLC v. HDNet MMA 2008 LLC*, 262 S.W.3d 446, 449 (Tex. App.—Dallas 2008, no pet.) ("A party seeking relief pursuant to the FAA from the trial court's denial of arbitration or a stay of litigation must file a petition for writ of mandamus."). More than a year and a half later, no mandamus petition has been filed. Appellants nevertheless request that this Court issue a partial stay order pending non-existent arbitration, but it is not clear what purpose a partial stay would serve. It is possible a partial stay would unnecessarily complicate the trial court's proceedings, and would further delay resolution of the dispute. Under the circumstances, the appeal process for any adverse judgment is an adequate remedy. *See generally In re Prudential Ins. Co. of Am.,* 148 S.W.3d 124, 136 (Tex. 2004); *see also In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 784 (Tex. 2006) (Brister, J., concurring) ("When this and other Texas appellate courts decide that an appeal or other pleading should have been pursued by mandamus, we do not generally toss out the appeal or require it to be done twice; instead, we treat the improper appeal as a proper mandamus."). The appeal is dismissed.

APPEAL DISMISSED.

DAVID GAULTNEY
Justice

Submitted on December 9, 2010
Opinion Delivered February 24, 2011

Before McKeithen, C.J., Gaultney and Kreger, JJ.