In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00046-CV

MARK BEAUSOLEIL, Appellant

V.

READUD, MORGAN & QUINN, L.L.P., Appellee

AND

IN RE MARK BEAUSOLEIL

On Appeal from the 172nd District Court
Jefferson County, Texas
Trial Cause No. E-188,924

and

Original Proceeding

MEMORANDUM OPINION

In this proceeding, Mark Beausoleil challenges the trial court's order granting a verified petition to investigate a potential claim and ordering Beausoleil and two other persons to submit to deposition in Jefferson County. *See* Tex. R. Civ. P. 202. Beausoleil

filed a notice of appeal of the January 21, 2011 order. He also requested temporary mandamus relief. *See* Tex. R. App. P. 52.10. The petitioner in the court below, Reaud, Morgan & Quinn, L.L.P. ("RMQ"), challenged our jurisdiction over the appeal. Beausoleil responded to RMQ's challenge to appellate jurisdiction.

We conclude that the petition for pre-suit deposition is ancillary to an anticipated suit for which RMQ had sufficiently pleaded facts fixing venue in Jefferson County, and we lack appellate jurisdiction. Beausoleil alternatively pleaded for mandamus relief from the deposition order. Addressing the requested mandamus relief, we determine that the trial court had the authority to order depositions but erred in ordering the depositions to be conducted in a county other than the deponents' county of residence. Nevertheless, the benefits of mandamus review do not outweigh the detriments under the facts presented here. Accordingly, we deny mandamus relief.

RMQ filed a petition for an order authorizing the taking of a deposition on an oral examination to investigate a potential claim or suit. *See* Tex. R. Civ. P. 202.1(b). The potential claim identified by RMQ in its petition concerns alleged "fraud, conspiracy, and libel." RMQ alleged that the designated deponents "may have knowledge about libelous statements made about petitioner during calendar year 2010." According to RMQ, "[t]here are no other persons currently known by Petitioner who are expected to have interests adverse to Petitioner in the anticipated suit[.]" During the hearing conducted by the trial court on January 21, 2011, Beausoleil brought to the attention of the trial court

the difficulty presented by the vague language set forth in RMQ's petition: if Beausoleil and the other deponents are only witnesses, an order for their deposition is appealable, but if Beausoleil is someone who RMQ expects to have adverse interests in the anticipated suit, an order to submit to a pre-suit deposition is ancillary to the anticipated litigation, and relief must be sought through mandamus. *See In re Jorden*, 249 S.W.3d 416, 419 (Tex. 2008) (orig. proceeding) ("Presuit deposition orders are appealable only if sought from someone against whom suit is *not* anticipated; when sought from an anticipated defendant . . . , such orders have been considered ancillary to the subsequent suit, and thus neither final nor appealable."); c*ompare Ross Stores, Inc. v. Redken Labs., Inc.*, 810 S.W.2d 741, 742 (Tex.1991) (holding that pre-suit discovery order is final and appealable when affected party is a third party against whom suit is not contemplated), *with Office Employees Int'l Union Local 277 v. Sw. Drug Corp.*, 391 S.W.2d 404, 406 (Tex.1965) (holding that the taking of depositions to perpetuate testimony is ancillary to the anticipated suit and not subject to interlocutory appeal).

The trial court declined to order RMQ to clarify its pleadings. Faced with a petition that did not expressly identify him as the person against whom suit was anticipated, Beausoleil filed a notice of appeal but requested temporary mandamus relief. RMQ filed a response in which it contends that this Court lacks appellate jurisdiction over the order granting the deposition of a person against whom suit is contemplated. *See Ross Stores,* 810 S.W.2d at 742. RMQ has clarified that Beausoleil is an adversary in this

proceeding and not merely a person with knowledge of relevant facts against whom no suit is contemplated. Because the order is ancillary to an anticipated suit against Beausoleil, the order is not immediately appealable. *See id.*

A party should not be forced to elect to proceed under interlocutory appeal or mandamus under circumstances in which the appellate court will determine which remedy is appropriate only when it determines the merits of the claim. *See generally 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."). In this case, Beausoleil was placed in a particularly untenable position because the trial court declined to require RMQ to unequivocally state in the trial court whether or not the pre-suit deposition was ancillary to an anticipated suit against Beausoleil. Only after Beausoleil filed notice of appeal and a request for temporary relief did RMQ clearly state what it merely implied in its petition when it stated that no "other" persons are expected to have interests adverse to RMQ in the anticipated suit. We address Beausoleil's motion for emergency relief as a petition for writ of mandamus. *See* Tex. R. App. P. 52.

RMQ also contends that Beausoleil cannot complain of an abuse of discretion by the trial court with regard to the other two deponents. RMQ's designation of Beausoleil as a person against whom suit is contemplated affects his standing to seek protection

from an improper order. The Rules of Civil Procedure allow "any other person affected by the discovery request" to seek a protective order. Tex. R. Civ. P. 192.6(a). Beausoleil is affected by a discovery request for a pre-suit deposition if he will be a defendant in the anticipated litigation and may seek protection. *See* Tex. R. Civ. P. 202.3(a) (requiring service and a notice on all persons the petitioner expects to have interests adverse to petitioner's in the anticipated suit), 202.4, ("The order must contain any protections the court finds necessary or appropriate to protect the witness or any other person who may be affected by the procedure.").

Beausoleil contends that RMQ did not file its petition in the correct venue. *See* Tex. R. Civ. P. 202.2(b)(2) (the petition must be filed in a proper court of any county where the witness resides, if no suit is yet anticipated). RMQ alleged that venue of its anticipated suit would be in Jefferson County because a substantial part of the acts made the basis of the suit occurred there and the damages allegedly suffered by RMQ took place in that county. RMQ alleged venue facts under Rule 202.2(b)(1) that place proper venue for its petition for pre-suit depositions in Jefferson County. *See* Tex. R. Civ. P. 202.2(b)(1) (the petition must be filed in a proper court of any county where venue of the anticipated suit may lie, if suit is anticipated).

Beausoleil also contends that the trial court improperly ordered the depositions to take place in Jefferson County. Depositions authorized by Rule 202 "are governed by the rules applicable to depositions of nonparties in a pending suit." Tex. R. Civ. P. 202.5.

Generally, a deposition of a party may be taken in the county of suit, but a deposition of a nonparty must be taken in the county of the witness's residence. *See* Tex. R. Civ. P. 199.2(b)(2)(A),(C). Because the taking of the deposition is governed by the rules applicable to depositions of nonparties in a pending suit, Beausoliel is subject to deposition in his county of residence, even though he is a person expected to have an interest adverse to the petitioner in the anticipated suit. *See* Tex. R. Civ. P. 202.5; *see also* Tex. R. Civ. P. 199.2(A). Mandamus relief is appropriate, however, only when the benefits outweigh the detriminents of mandamus review. *In re BP Prods. N. Am., Inc.*, 244 S.W.3d 840, 845 (Tex. 2008) (orig. proceeding). In this case, Beausoliel's counsel did not identify the prejudice that would result from conducting the depositions in the county neighboring the county of Beausoleil's residence, and his counsel also suggested to the trial judge that the deposition should be taken at his offices in Harris County. Under these circumstances, the order to take the deposition in Jefferson County is an incidental ruling for which mandamus relief is not appropriate. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding); *In re Entergy Corp.*, 142 S.W.3d 316, 320 (Tex. 2004).

The trial court's pre-suit deposition order is ancillary to an anticipated suit to which Beausoleil is an anticipated defendant. Because we lack appellate jurisdiction, the appeal must be dismissed. Beausoleil also requested mandamus relief, and we consider the request for emergency relief as a mandamus petition. Beausoleil has not shown that

mandamus relief is necessary under the circumstances present in this case. Accordingly, we dismiss the appeal for lack of jurisdiction and deny the petition for writ of mandamus.

APPEAL DISMISSED; PETITION DENIED.

PER CURIAM

Opinion Delivered February 11, 2011

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