

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-11-00062-CV

IN RE CYPRESS TEXAS LLOYDS

Original Proceeding

MEMORANDUM OPINION

At the conclusion of a hearing on a motion to compel discovery, the trial court ordered the relator, Cypress Texas Lloyds (“Cypress”), to produce certain discovery by 8:00 a.m. the following day without a protective order. The real parties in interest, Kevin Newman and Chantel Newman, contend that Cypress withdrew its objections to the discovery requests at an earlier hearing and thereby waived a protective order as to all but one request for production. The record shows that the parties’ agreement regarding discovery contemplated that the discovery would be made under a protective order. The trial court abused its discretion by ordering discovery without a protective order in place. Accordingly, we conditionally grant affirmative relief.

The case before the trial court concerns a homeowner's tort and contract claims against an insurer and others arising out of a homeowner's disputed insurance claim filed after Hurricane Ike. The Newmans' discovery requests include discovery about internal corporate documents and claims by other homeowners. On December 10, 2010, the Newmans filed a written request for entry of a protective order to protect against unintended disclosure of Cypress's allegedly confidential or proprietary information beyond those involved in the pending litigation. The Newmans alleged that their proposed protective order had been entered in several cases against insurance companies in substantially similar matters. On the same day, the Newmans filed a motion to compel discovery from Cypress. The trial court heard the motion to compel on December 21, 2010. At that time, the parties resolved Cypress's objections to the discovery requests by agreement. During the hearing, counsel for Cypress mentioned that the parties were going to agree on a protective order. Counsel for the Newmans asked the counsel for another defendant if he would "send one" and that person replied that he was "fine with the one you submitted... for this case." This exchange shows that the parties had a particular protective order in mind, that they agreed a protective order would be entered in the case, and that the protective order would follow the order entered in the case mentioned in the Newmans' motion.

The parties to a case may make agreements concerning discovery and the trial court may enforce such agreements if they are made in open court. *See* Tex. R. Civ. P.

11; Tex. R. Civ. P. 191.1. Here, Cypress agreed to waive its objections subject to a protective order that had already been proposed by the Newmans. Because Cypress waived its objections subject to the agreed entry of an agreed protective order, the trial court did not have the discretion to order Cypress to produce discovery pursuant to the parties' agreement without the contemplated protective order. *See In re BP Prods. N. Am., Inc.*, 244 S.W.3d 840, 848-49 (Tex. 2008). Because the discovery concerns the disclosure of potentially privileged information, appeal would not be an adequate remedy. *Huie v. DeShazo*, 922 S.W.2d 920, 928 (Tex.1996). Although the trial court did not reduce its order to writing, the order made in open court was specific enough to be enforced; accordingly, relator met the procedural requirement for seeking mandamus. Tex. R. App. P. 52.3(k)(1)(A); *In re Bledsoe*, 41 S.W.3d 807, 811 (Tex. App.—Fort Worth 2001, orig. proceeding).

Cypress also seeks mandamus relief that would compel the trial court to deny the Newmans' motion to impose sanctions on Cypress's counsel. The mandamus record does not contain a written sanctions order and it appears the trial court intended to hold a hearing on the matter at a later date. Relator has not shown that mandamus relief from a sanctions order is required at this time. Accordingly, that requested relief is denied without prejudice to re-filing of same in the future.

We are confident that the trial court will rescind its order and will not compel Relator to answer the discovery in accordance with the parties' agreement without first

entering a protective order. The writ of mandamus shall issue only in the event the trial court fails to rescind its order of February 14, 2011, that compels discovery under the parties' agreement without first entering a protective order.

PETITION CONDITIONALLY GRANTED.

PER CURIAM

Submitted on February 25, 2011
Opinion Delivered March 17, 2011

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