In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-17-00031-CV

IN RE KAREN DESHETLER

Original Proceeding
60th District Court of Jefferson County, Texas
Trial Cause No. B-198,783

MEMORANDUM OPINION

Relator Karen deShetler filed a petition for writ of mandamus contending that the trial court abused its discretion and violated her due process rights by issuing an interlocutory default judgment against Lawrence deShetler and deShetler & Co., Inc. (hereinafter referred to as "deShetler"), which contained a turnover provision requiring Merrill Lynch to turn over funds allegedly belonging to Karen deShetler, who was not a party in the underlying lawsuit. We conditionally grant the petition for writ of mandamus.

BACKGROUND

In 2016, Clifford "Cliff" Sponsler, individually and as trustee of The Gene A. Sponsler Revocable Living Trust, and Denise Sponsler, individually and as successor trustee of The Gene A. Sponsler Revocable Living Trust (hereinafter referred to as "the Sponslers"), sued (1) Bank of America, National Association; (2) The Ohio National Life Insurance Company; (3) Ohio National Financial Services; (4) Lawrence deShetler; (5) CLA Estate Services, Inc.; (6) CLA USA, Inc.; and (7) Merrill Lynch, Pierce, Fenner & Smith, Incorporated. The Sponslers alleged that CLA Estate Services, Inc., (and/or) CLA USA, Inc. (hereinafter referred to as the "CLA defendants"), and deShetler entered into an agreement to manage and represent the interests of Gene Sponsler, the deceased, and to create various estate planning documents, including a trust, and that those documents were negligently and/or fraudulently prepared. The Sponslers alleged that after the death of Gene Sponsler, deShetler, as an agent of the CLA defendants, recommended that the Sponslers liquidate their existing investments of more than $700,000 and purchase a whole life insurance policy from one or more of the principals of deShetler, which included the Ohio National Life Insurance Company and/or the Ohio National Financial Services (hereinafter referred to as "Ohio"). According to the Sponslers, deShetler's investment advice and recommendations were a substandard investment

choice, and deShetler's representations concerning the investment were unconscionable and made for the purpose of defrauding the Sponslers.

Specifically, the Sponslers alleged that deShetler represented that a fee or premium of $172,850 would be paid to Ohio for the purchase of policy number 1716862, and that the remaining balance from the $700,000 investment would be retained by one or more of the defendants and used to timely pay the policy premiums. The Sponslers later discovered that the defendants had failed to pay Ohio the additional policy premiums, and Ohio had "fraudulently and unconscionably represented that the policy was cancelled and the paid premium forfeited, despite its agent agreeing to pay the same and retaining the money for payment of same." The Sponslers further alleged that deShetler, who could not be found, wrongfully took possession of, converted, and absconded with the Sponslers' money despite representations and an agreement to hold the money in safekeeping and make earnings on the balance. The Sponslers asserted causes of action for breach of contract, fraud, and quantum meruit.

The Sponslers further alleged that defendants, Bank of America, National Association ("Bank of America"); Merrill Lynch, Pierce, Fenner & Smith, Incorporated ("Merrill Lynch"); and deShetler represented that the Sponslers' monies, including interest, were being held in Account Number 321-05155 and/or

Account Number 321-05155(IIA) as of September 8, 2014. The Sponslers requested a restraining order and injunctive relief to preserve the status quo of any monies, securities, stocks, bonds, and/or assets held by Bank of America and/or Merrill Lynch in Account Number 321-05155 and/or Account Number 321-05155(IIA), and/or in any account, and also requested that deShetler and his agents be restrained from spending, distributing, assigning, conveying, transferring, selling, or disposing of any monies, securities, shares, real property, personal property, and/or assets owned or controlled in whole or part by deShetler. The Sponslers did not request that the trial court create a constructive trust or issue a turnover order.

After deShetler failed to appear in the lawsuit, the Sponslers filed a motion for default judgment against deShetler, alleging that deShetler was in jail as a result of the alleged theft of property and that the balance of the Sponslers' funds were in Merrill Lynch Account Number 321-05155 (hereinafter referred to as "the Account"). The Sponslers maintained that the Account contains the funds that the Sponslers provided to deShetler in 2014, and the Account was in the name of a company that was a named defendant in the lawsuit and that was solely owned by deShetler. The Sponslers requested that the trial court award them the amount of money that was provided to deShetler and order that Merrill Lynch return the funds to the Sponslers within ten days of the date of the default judgment order. On

November 22, 2016, the trial court granted the Sponslers' motion for default judgment, finding that the Sponslers were entitled to judgment against deShetler in the amount of $700,000. The trial court ordered that the monies in the Account "are and always have been legally owned by Plaintiff, THE GENE A. SPONSLER REVOCABLE LIVING TRUST, to the exclusion of all others as a result of the transfer of those monies from Plaintiffs to Defendant, LAWRENCE DESHETLER, prior to September 8, 2014."

The trial court found that deShetler was unjustly enriched by at least $567,935 and imposed a constructive trust on the sum of $567,935, which the Sponslers provided to deShetler and which deShetler deposited into the Account. The trial court ordered deShetler to liquidate all monies and funds in the Account and to turn over the funds to the Sponslers. The trial court further ordered Merrill Lynch to comply with the trial court's orders and judgment by turning over and paying the Sponslers and their attorneys all monies and funds in the Account.

Merrill Lynch filed a motion for clarification concerning the trial court's default judgment order, informing the trial court that the Account is "subject to multiple court orders that are partially inconsistent with each other regarding the proper ownership, distribution of, and entitlement to a portion of the Account." Merrill Lynch explained that it had "also received notice from divorce counsel for

Karen [d]eShetler, former wife of Lawrence [d]eShetler, that the 418th District Court in Montgomery County, Texas, awarded Karen [de]Shetler 64.75% of the Account set forth in a Qualified Domestic Relations Order signed August 9, 2016 ("QDR[O] Order")." Merrill Lynch attached a copy of the QDRO Order to its motion, and the QDRO Order indicates that it applies to the "deShetler & Company, Inc. Defined Benefit Pension Plan, Account Number: 321-05155 . . . ." The QDRO Order further indicates that Lawrence deShetler is the Participant and Karen deShetler is the Alternative Payee, and that the "Alternative Payee shall be entitled to a portion of the Participant's benefits under the Plan as her sole and separate property. The Alternative Payee's portion is 64.75% of the Participant's total account value as of May 11, 2016[.]" (emphasis omitted). In its motion, Merrill Lynch explained that it was a disinterested custodian of the Account and that it had complied with the default judgment order to the extent it is not inconsistent with the QDRO Order by turning over 35.25% of the balance in the Account to the Sponslers. However, Merrill Lynch sought clarification from the trial court regarding the distribution of the remaining 64.75%, which another Texas court had ordered belongs to Karen.

Karen filed a petition in intervention alleging that she is the legal owner of 64.75% of the Account, which is a defined benefits pension plan protected under the

Employee Retirement Income Security Act of 1974 ("ERISA"). Karen claimed that she had been a participant in the pension plan since its inception in January 2012, and that her husband, deShetler, initially funded the pension plan with $244,000 in August 2013, almost a year prior to the Sponslers having invested funds with deShetler. Karen explained that she had filed for divorce in May 2015, a mediated settlement agreement concerning the division of the Account was entered in May 2016, a Final Decree of Divorce dividing the Account was entered in June 2016, and the QDRO Order was entered in August 2016. Karen complained that the November 2016 default judgment order against deShetler is inconsistent with the Final Decree of Divorce and the QDRO Order and divests Karen of funds belonging to her. Karen argued that she had not been provided with notice of the default judgment until after it had been entered, and that she was never made a party to the underlying lawsuit or given an opportunity to be heard. Karen further argued that prior to the Sponslers having invested funds with deShetler, the Account had been set up and initially funded with money legitimately earned by deShetler, and the Sponslers had not demonstrated that any additional deposits made in the Account belonged to the Sponslers. In her motion for intervention, Karen asked that the trial court declare that she is the legal owner of 64.75% of the Account, and that the funds comprising Karen's portion of the Account "have never and do not belong to [the Sponslers.]"

Karen attached copies of the Final Decree of Divorce and the QDRO Order to her motion.

Karen also filed a brief in support of Merrill Lynch's motion for clarification, in which she argues she is the legal owner of funds in the Account under three different legal theories, and that without clarification, her due process rights would be violated. According to Karen, "[a]t a minimum, due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner." Karen requested that the trial court enter an order clarifying the default judgment order entered against deShetler by limiting the turnover provision to funds owned by deShetler.

The trial court conducted a hearing on Merrill Lynch's motion for clarification. Karen's counsel was present and explained that the Account, which is an ERISA defined benefit contribution plan, was initially created and funded prior to the Sponslers having given any money to deShetler, and further explained that a family law court signed a divorce decree awarding Karen a portion of the Account prior to the trial court having entered the default judgment order. Karen's counsel argued that the trial court's order granting default judgment against deShetler and ordering Merrill Lynch to turn over the Account is improper because (1) the Account belongs, in part, to Karen and her due process rights have been violated; (2) the anti-

alienation provision of the federal statute governing ERISA accounts does not allow creditors to impose judgment against funds in an ERISA account; and (3) the Texas Property Code provides that funds that are held in any type of federally deferred taxation savings and pension account are not subject to execution.

Karen's counsel further argued that there was not a good evidentiary record showing that any of the funds in the Account came from the money the Sponslers gave to deShetler, and that records attached to Karen's brief showed that the initial deposits in the Account could not belong to the Sponslers because the deposits were made prior to the date the Sponslers gave deShetler any money. Karen's counsel argued that Karen was "never given the opportunity to prove or disprove anything because she was not a party to the case[,]" that she "was a stranger to this suit until we intervened on her behalf[,]" and it was premature to claim that Karen was required to prove her whole case on one day.

After hearing arguments, the trial court denied the motion for clarification and ordered Merrill Lynch to turn over all monies and funds in the Account not exceeding the amount of judgment. Karen then brought this mandamus proceeding asserting that the trial court abused its discretion and violated her due process rights by issuing a default judgment order against deShetler that contains a turnover order requiring Merrill Lynch to turn over funds allegedly belonging to Karen, a stranger

to the underlying lawsuit. Karen also argues that the turnover order is void because it was issued prior to a final judgment.

ANALYSIS

To obtain mandamus review, a relator must show both that the trial court has clearly abused its discretion and that she has no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992) (orig. proceeding). A trial court has no discretion in determining what the law is or in applying the law to the facts. *In re Prudential*, 148 S.W.3d at 135 (citing *Walker*, 827 S.W.2d at 840).

Turnover orders are governed by Section 31.002 of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code Ann. § 31.002 (West 2015). Section 31.002(a) affords a judgment creditor aid from a court of appropriate jurisdiction through injunction or other means to reach property to obtain satisfaction of a judgment if the judgment debtor owns property that cannot readily be attached or levied on by ordinary legal process, and is not exempt from attachment, execution, or seizure. *Id.* § 31.002(a). The purpose of the turnover proceeding is merely to ascertain whether or not an asset is in the possession of the judgment debtor or subject to the judgment debtor's control. *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 227 (Tex. 1991). The purely procedural nature of the turnover statute is well

settled, and the statute does not allow for a determination of the substantive rights of the involved parties. *See Republic Ins. Co. v. Millard*, 825 S.W.2d 780, 783 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding). When there is a factual dispute as to the ownership interest of the judgment debtors, the trial court needs to hold an evidentiary hearing prior to entering a turnover order to establish the ownership. *Plaza Court, Ltd. v. West*, 879 S.W.2d 271, 277 (Tex. App.—Houston [14th Dist.] 1994, orig. proceeding). Turnover orders must be attacked on direct appeal. *Davis v. West*, 317 S.W.3d 301, 309 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

"Without a final judgment, a turnover order is void, and mandamus relief lies to vacate the void order." *In re Alsenz*, 152 S.W.3d 617, 620 (Tex. App.—Houston [1st Dist.] 2004, orig. proceeding). An order or judgment is not final for purposes of appeal unless it actually disposes of every pending claim and party or unless it clearly and unequivocally states that it finally disposes of all claims and parties. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 205 (Tex. 2001). If the record reveals the existence of parties or claims not mentioned in the order or judgment, such as in this case, then the order or judgment is not final. *Id.* at 206. We hold that the trial court abused its discretion by including a turnover order in a default judgment that does not dispose of every pending claim and party. *See id.* at 205; *In re Alsenz*, 152 S.W.3d at 620, 623. Because there is no final judgment to support the turnover order,

the order is void and mandamus relief lies to vacate the void order. *See In re Alsenz*, 152 S.W.3d at 620.

We further note that mandamus relief is also appropriate if a trial court includes a non-judgment third party in a turnover order. *Id.* It is undisputed that Karen was not a party in the underlying lawsuit and not a judgment debtor. Texas courts do not apply the turnover statute to non-judgment debtors. *Buller*, 806 S.W.2d at 227. Because Karen is a non-judgment debtor, she is not an appropriate party to a turnover procedure. *See Millard*, 825 S.W.2d at 783. Additionally, the turnover statute cannot be used to adjudicate the ownership of property in a manner that would be binding upon third parties. *Bay City Plastics, Inc., v. McEntire*, 106 S.W.3d 321, 325 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). Thus, mandamus relief is also appropriate in instances such as this, when a trial court issues a turnover order jeopardizing assets of a non-judgment debtor, thereby endangering a relator's rights. *West*, 879 S.W.2d at 275-76; *Millard*, 825 S.W.2d at 783-85.

A judgment may be enforced against a non-party to the judgment only by bringing a separate lawsuit alleging a basis for enforcing the judgment against that party. *In re Smith*, 192 S.W.3d 564, 568 (Tex. 2006) (noting that a judgment may not be amended to include any other non-judgment debtor that was not named in the lawsuit); *see also Custom Corporates, Inc. v. Sec. Storage, Inc.*, 207 S.W.3d 835,

840 (Tex. App.—Houston [14th Dist.] 2006, no pet.). As a result, the trial court could not order Merrill Lynch to turn over property in which Karen claims an ownership interest without conducting proceedings to which Karen was a party and afforded the opportunity to assert her claim to that property. *See Ex Parte Swate*, 922 S.W.2d 122, 126 (Tex. 1996) (Gonzalez, J., joined by Owen, J., concurring) (reasoning that a creditor may not seek a turnover order against third parties without other initial proceedings).

Although the record shows that Karen intervened post-judgment seeking declaratory relief and that her counsel appeared at the hearing on Merrill Lynch's motion for clarification and was allowed to make arguments in support of the motion, the record does not show that the trial court allowed Karen an opportunity to present evidence to prove her ownership interest in the Account and to defend her interest. *Cf. Alexander, Dubose, Jefferson & Townsend LLP v. Chevron Phillips Chemical Co., L.P.*, 503 S.W.3d 1, 6-8 (Tex. App.—Beaumont 2016, pet. filed) (determining third party's ownership of disputed funds when third party voluntarily intervened in a turnover proceeding to assert an interest in property sought by the judgment creditor and the trial court heard arguments on the third party's plea in intervention and finally adjudicated the matter); *Cre8 Int'l, LLC v. Ric*e, No. 05-14-00377-CV, 2015 WL 3492629, at *3 (Tex. App.—Dallas June 3, 2015, no pet.)

(mem. op.) (concluding that the trial court did not abuse its discretion in determining the substantive property rights of a third party when the third party voluntarily intervened, appeared at the turnover hearing, and introduced evidence regarding its ownership interest).

We conclude that mandamus relief is appropriate because there is no final judgment to support the turnover order and because the trial court improperly included Karen, a non-judgment third party, in the turnover order. *See Lehmann*, 39 S.W.3d at 205; *In re Alsenz*, 152 S.W.3d at 620, 623. Accordingly, we conditionally grant Karen's petition for writ of mandamus. A writ will issue only in the event the trial court fails to vacate the turnover order from its November 22, 2016, default judgment.

PETITION CONDITIONALLY GRANTED.

PER CURIAM

Submitted on February 17, 2017
Opinion Delivered March 30, 2017

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