

NO. 07-03-0428-CV
IN THE COURT OF APPEALS
FOR THE SEVENTH DISTRICT OF TEXAS
AT AMARILLO
PANEL B
DECEMBER 16, 2003

IN RE: JEFFREY DON ALFORD and
ANGELA DREW ALFORD,

Relators

Original Proceeding — Memorandum Opinion

Before JOHNSON, C.J., QUINN and CAMPBELL, JJ.

Pending before the court is the petition for a writ of mandamus filed by Jeffrey Don Alford and Angela Drew Alford (the Alfords). They request that we order the Hon. Patrick A. Pirtle, 251st Judicial District, "to vacate the Order Severing the underlying case into two causes of action" and "to revise its order to clearly reflect that a Writ of Possession shall not issue until a final judgment has been obtained." Also sought is an order directing "Jo Carter, Clerk of the 251st District Clerk [sic] to vacate her Writ of Possession which was issued prematurely." We deny the petition.

Background

The dispute arises from the performance of a contract for deed. The Alfords, as purchaser of the realty in question, and Cynthia Jean Roberts Mays, as seller, executed one. Thereafter, a question arose as to the Alfords' performance of their contractual

obligations. The Alfords sued Mays alleging that she violated provisions of the Texas Property Code and the Texas Deceptive Trade Practices Act. Mays counterclaimed and sought possession of the property and damages represented by the sums allegedly due under the contract.

Eventually, both sides moved for summary judgment. After conducting a hearing, the trial court sent the parties a letter, dated August 27, 2003. Therein, it 1) determined that Mays elected to and rescinded the contract in conformance with statute, 2) denied the Alfords their claim of title, 3) declared that Mays was entitled to immediate possession of the property, 4) declared that Mays was entitled to a writ of possession, and 5) concluded that Mays had violated nine provisions of the Texas Property Code. So too did it “sever[] those claims pertaining to [Mays’] . . . forcible entry and detainer action” from the remaining allegations and “remand[ed] that issue to the appropriate justice of the peace court.”

Several days later, the trial court also executed an order entitled “Partial Summary Judgment and Order of Severance.” Therein, it declared that the Alfords’ interest in the property was “properly terminated on or about August 12, 2002,” awarded Mays ownership and “immediate possession” of the land, and “severed from the action by [Mays] . . . to obtain declaratory relief to quiet title and remove cloud from her title” the “damage claims asserted by” the Alfords. Also, the clerk was ordered to issue a writ of possession directing that the Alfords be removed from the property. Thereafter, the Alfords filed the instant petition for writ of mandamus with the court.

Issues One, Two and Three — Finality of Summary Judgment and Severance

Through each issue, the Alfords question 1) whether a writ of possession could issue since the summary judgment was not final, and 2) whether their causes of action were

properly severed from those of Mays. It is beyond dispute that mandamus is an extraordinary remedy. *Canadian Helicopters, Ltd. v. Wittig*, 876 S.W.2d 304, 305 (Tex. 1994). One is not entitled to it simply because he may ask for it. *In re Thorton-Johnston*, 65 S.W.3d 137, 138 (Tex. App.--Amarillo 2001, orig. proc.). Instead, the applicant has a heavy burden to meet. *Canadian Helicopters, Ltd. v. Wittig*, 876 S.W.2d at 305. Not only must he prove that the trial court abused its discretion, but also that the remedy offered by a later ordinary appeal is inadequate. *Id.*; *Walker v. Packer*, 827 S.W.2d 833, 842 (Tex. 1992); *In re Thorton-Johnson*, 65 S.W.3d at 138. And, regarding the second prong, an appellate remedy is not inadequate simply because it may involve more delay or expense than obtaining an extraordinary writ. *Walker v. Packer*, 827 S.W.2d at 842. Instead, it must be shown that the relator stands to lose a substantial right if the appellate court does not intercede immediately. *Id.*

In attempting to establish their right to extraordinary relief, the Alford's do no more than purport to illustrate why the trial court erred or abused its discretion. They do not allege in their petition that they lack any remedy at law, that a later appeal would be inadequate, or that they would lose a substantive right if immediate relief were withheld.¹ Nor do they attempt to explain why presenting their complaints through an appeal would be inadequate. Furthermore, it is not an appellate court's duty to draft a relator's contentions for him or read into the petition that which he omits. This is especially so here given the Alford's complaint that the trial court already afforded Mays "a pre-judgment right . . . that *was neither pled nor proven . . .*"

¹Indeed, our records illustrate that they have filed two notices of appeal from the underlying cause of action.

Having failed *in toto* to address the second element of their burden, the Alfords did not prove their entitlement to the extraordinary relief sought. Accordingly, we deny the petition for mandamus.

Brian Quinn
Justice