In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-18-00015-CV

IN RE OVERHEAD GARAGE DOOR, LLC

OPINION ON ORIGINAL PROCEEDING FOR WRIT OF MANDAMUS

February 16, 2018

MEMORANDUM OPINION

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

Relator, Overhead Garage Door, LLC (Garage), petitions this court for a writ of mandamus directing the Honorable Mackey Hancock, 99th District Court, by assignment, (trial court) to withdraw his 1) December 29, 2017 order granting a Rule 202 petition, and 2) January 17, 2018 order denying the motion to vacate the December 29th order as moot. We grant the petition.

Background

Overhead Door Company of Lubbock, Inc. (Lubbock) petitioned to depose Garage via Texas Rule of Civil Procedure 202. *See* TEX. R. CIV. P. 202.1(a) & (b) (stating that one may petition a trial court for an order authorizing a deposition orally or by written question 1) "to perpetuate or obtain the person's own testimony or that of any other person

for use in an anticipated suit"; or 2) "to investigate a potential claim or suit."). According to the allegations in the petition, Garage and Lubbock were involved in the same business. Furthermore, either Garage or individuals working on its behalf attempted to identify themselves as Lubbock through internet advertising, among other means. Its actions also purportedly caused confusion in the minds of potential Lubbock customers, the entity posited. Thus, Lubbock sought "to investigate the allegations that [Garage] engaged in deceptive acts and has employed personnel which have misled customers into thinking they are using [Lubbock] when confronted with the confusion" and "needs to obtain information from [Garage] and its employees to investigate this potential claim or lawsuit and to obtain testimony for use in an anticipated suit."

A hearing was held on the petition, at which Garage appeared.[1] After considering the evidence and argument proffered by Lubbock and Garage, the trial court granted the petition.[2] Lubbock was then allowed to depose Garage through its designated representative.

Before the deposition could be held, Garage filed suit against Lubbock and Overhead Door Corporation (Door) in the United States District Court, for the Northern District of Texas, Sherman Division. The relief Garage sought included declarations regarding whether it infringed upon trademark rights of Door under federal and state law and engaged in unfair competition under state law. So too did it ask the court to determine if Lubbock "own[ed] any protectable rights in the terms 'overhead' and 'overhead door[.]'"

[1] Lubbock conceded at the hearing that the relief was needed to obtain testimony in an anticipated suit rather than to merely investigate a potential claim or suit.

[2] The hearing included allegations of Garage engaging in unfair competition through using or advertising its name or the words therein over the internet.

Allegedly, Lubbock believed that Garage's "business name and online advertising triggered by the keywords 'overhead[,]' 'door[,]' and 'Lubbock' infringe[d] on . . . Lubbock's protectable interest and constitute[d] unfair competition."

Having filed its lawsuit, Garage returned to Lubbock County. There, it requested the trial court, through written motion, to vacate its prior order permitting Lubbock to depose a Garage representative. In its view, the need for the deposition under the auspices of Rule 202 had grown moot given the pending federal lawsuit and the ability to obtain discovery from Garage through it. The trial court denied the motion, resulting in this mandamus action.

Authority

Mandamus is an extraordinary remedy granted only when a relator shows that the trial court clearly abused its discretion and that no adequate appellate remedy exists. *In re H.E.B. Grocery Co., L.P.*, 492 S.W.3d 300, 302 (Tex. 2016) (orig. proceeding) (per curiam); *In re Lloyd*, No. 07-16-00340-CV, 2016 Tex. App. LEXIS 10489, at *3 (Tex. App.—Amarillo Sept. 26, 2016, orig. proceeding) (per curiam) (mem. op.). The latter element is satisfied here given *In re Wolfe*, 341 S.W.3d 932 (Tex. 2011). There, it said that "[a]n improper order under Rule 202 may be set aside by mandamus." *Id.* at 933. In so stating, the court also observed that pre-suit discovery under Rule 202 is not an end to itself. *Id.* Rather, it exists in aid of an anticipated suit and is ancillary to it. *Id.*

Indeed, the adoption of Rule 202 by our Supreme Court served the purpose of combining former Texas Rules of Civil Procedure 187 (permitting discovery to perpetuate testimony) and Rule 737 (providing for a bill of discovery). *In re Doe*, 444 S.W.3d 603, 605-06 (Tex. 2014). Via Rule 187, a potential litigant had the ability to preserve for a later

suit evidence that was at risk of being lost. *Id.* Rule 737 came to have a similar use for it provided a way to investigate a lawsuit before it was filed. *Id.* at 606-07. Given this and the fact that Rule 202 had its genesis in Rules 187 and 737, we see a common thread underlying each, that thread being the need to afford potential litigants a way to conduct discovery prior to the actual initiation of a lawsuit.

But what if a suit were filed encompassing the same litigants and factual disputes, would that dispense with the need for invoking Rule 202? That is the question before us now, and we conclude from the current record that the answer is yes for several reasons. First, it seems rather illogical to suggest that one could invoke Rule 202 to investigate a potential claim or suit or perpetuate testimony for an "anticipated suit" if the suit has already been commenced. There would be no need for it since the investigation or perpetuation could occur through the existing suit. Indeed, we encountered authority issued from a sister court many years ago indicating as much.

The authority is *Guthrie v. Speck*, 53 S.W.2d 318 (Tex. Civ. App.—Austin 1932, no writ), and it concerned effort to perpetuate testimony in anticipation of a later suit through a statutory predecessor of Rule 202. Under the statute, one seeking to perpetuate testimony filed a written statement disclosing the names and residences of those supposedly having an adverse interest.[3] *Id.* at 320, *quoting* TEX. REV. CIV. STAT.

[3] *See Lambert v. Tex. Emp'rs Ins. Ass'n.*, 121 S.W.2d 406, 407 (Tex. App.—Dallas 1938, no writ) (providing the language of art. 3742 of the Texas Revised Civil Statutes as follows:

> When any person may anticipate the institution of a suit in which he may be interested, and may desire to perpetuate the testimony of a witness to be used in such suit, he, his agent or attorney, may file a written statement in the proper court of the county where such suit could be instituted, representing the fact and the names and residences, if known, of the persons supposed to be interested adversely to said person; a copy of which statement and writ shall be served on the persons interested adversely; . . . after which the depositions of such witnesses may be taken and returned by the parties making the said statement in the form and under the rules prescribed for taking testimony

art. 3742 (West 1925). That was done by Guthrie who then obtained leave to take the deposition of T.J. Jacoby. *Id.* at 319. Guthrie also named Fred Speck as an interested party. *Id.* Speck and Jacoby then sued Guthrie to enjoin the deposition. Among his various grounds for securing the injunction, Speck averred that 1) "'Fred Speck has two suits in the district court of Bexar County, Texas, wherein George Guthrie is a party, and . . . the only transactions that could possibly be pending between the said George Guthrie and Fred Speck are now pending in the said two suits in the district court of Bexar County, Texas,'" and 2) "'[t]hat the said George Guthrie and companies that he represents, have sued T. J. Jacoby in the district court of Bexar County, Texas, and . . . that said attempt to take the deposition of T. J. Jacoby is but a fishing scheme to find out what the said Jacoby knows concerning either his own or said Fred Speck suits pending in the Bexar County courts.'" *Id.* The trial court granted Speck and Jacoby a temporary injunction, which ruling Guthrie appealed. The reviewing court ultimately affirmed the decision based upon three "conclusions." *Id.* at 319-20. The "conclusion" pertinent here was that stating: "[t]he petition for injunction negatived any right on appellant's part to perpetuate Jacoby's testimony, and was sufficient to put in issue the bona fides of the proceeding. . . ." *Id.* at 320.

What the reviewing court found determinative was the assertion that "'the only transactions that could possibly be pending between the said George Guthrie and Fred Speck are now pending in said two suits in the District Courts of Bexar County, Texas.'"

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by deposition; and such testimony may be used in any suit which may be thereafter instituted by or between any of the parties to the statement, or those claiming under them, in like manner as if such depositions had been taken after the institution of such suit . . . When such suit has been instituted, all such depositions so taken and returned shall be subject to the like exceptions as other depositions.)

Id. at 321. According to the court, "[t]his positive verified allegation, if true, negatived the right to perpetuate testimony." *Id.* These passages from the court denote that the existence of an actual suit involving the controversy underlying the anticipated suit vitiated any right to invoke article 3742. In other words, Guthrie could not invoke the statutory procedure for gathering testimony for a potential suit when an actual suit involving the same controversy already existed. That was logical then and is no less so now.

Second, and as said in *Wolfe*, a Rule 202 action for pre-suit discovery is not an end in itself but rather ancillary to the "anticipated suit." *In re Wolfe*, 341 S.W.3d at 933. That is why the limitations applicable to discovery if the suit were filed are applicable to discovery permitted under Rule 202. *See id.)* quoting TEX. R. CIV. P. 202.5 and (stating that "Rule 202 restricts discovery in depositions to 'the same as if the anticipated suit or potential claim had been filed'" so as to prevent "an end-run around discovery limitations that would govern the anticipated suit"); *In re Depinho*, 505 S.W.3d 621, 623 (Tex. 2016) (orig. proceeding) (per curiam) (quoting *Wolfe* and holding that when the trial court would have no jurisdiction to adjudicate the anticipated suit, Rule 202 could not be used to obtain discovery for that anticipated suit); *In re Amarillo II Enters., LLC*, No. 07-17-00005-CV, 2017 Tex. App. LEXIS 1000, at *3-4 (Tex. App.—Amarillo Feb. 3, 2017, orig. proceeding) (mem. op.) (quoting *Wolfe* and holding that if the trial court is barred from entertaining the anticipated suit due to an enforceable arbitration clause it may not permit pre-suit discovery on claims to be raised in that barred suit and within the arbitration clause).

If nothing else, *Wolfe, Depinho,* and *Amarillo II* illustrate that the life of a Rule 202 action is inescapably tied to the prospect of the "anticipated suit." Nullifying the prospect of the "anticipated suit" via some mechanism effectively does away with the Rule 202

proceeding, as indicated by *Depinho* and *Amarillo II.* Little nullifies an anticipated suit more than an actual one. Just as the birth of a child is no longer anticipated once born, a suit is no longer anticipated once filed.

Here, the stork made its delivery. It arrived on the steps of the United States District Court in Sherman, Texas. Furthermore, a reading of the original complaint filed by Garage discloses that the scope of the suit encompasses the factual allegations of deceit and unfair competition underlying the "anticipated suit" Lubbock used to justify a Rule 202 ancillary proceeding. More importantly, the federal rules of civil procedure permit general discovery and depositions, much like the Texas Rules of Civil Procedure. FED. R. CIV. P. 26-37. Thus, the "anticipated suit" and need to conduct limited discovery related to it no longer exists given that the discovery desired by Lubbock may be had through the actual suit.

The Rule 202 debate at bar has grown moot. *See Tex. Lottery Comm'n v. Willis*, No. 03-10-00330-CV, 2011 Tex. App. LEXIS 5185, at *1-2 (Tex. App.—Austin July 6, 2011, orig. proceeding) (per curiam) (mem. op.) (dismissing the Rule 202 action as moot because "Willis has since filed suit against persons and entities he named in the rule 202 petition"); *see also Johnson v. State*, No. 07-09-00286-CR, 2009 Tex. App. LEXIS 8399, at *1-2 (Tex. App.—Amarillo Oct. 30, 2009, no pet.) (mem. op., not designated for publication) (stating that a case is moot when, a party seeks a judgment to resolve a controversy that no longer exists or judgment is sought on a matter that cannot have any practical legal effect on an existing controversy). The trial court abused its discretion in allowing it to continue under the circumstances before it and us. We conditionally grant the writ of mandamus. It is conditioned upon the trial court failing to substitute its order

denying Garage's motion to vacate with one granting the motion and denying Lubbock's Rule 202 petition within 30 days.

Brian Quinn
Chief Justice