



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-18-00053-CV

IN RE THOMAS SAMES, M.D., RELATOR

ORIGINAL PROCEEDING

June 14, 2018

MEMORANDUM OPINION

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

Thomas Sames, M.D., relator, filed a petition for writ of mandamus asking this Court to vacate a November 30, 2017 protective order entered by respondent Doug Woodburn, Judge of the 108th District Court of Potter County. That order allows real party in interest, NWTX AMG Physicians Network PLLC (“NWTX”), to withhold alleged attorney-client privileged materials, notwithstanding Sames’s contention that the privilege has been waived under the offensive-use doctrine. Sames further requests that we enter an order granting his motion to compel those materials. We deny the petition.

Background

In 2014, after purchasing Sames's medical practice, NWTX employed him to provide medical services for its post-acute care medical practices. Under the employment agreement, Sames was to receive a base salary and incentive compensation (bonuses) based upon cash collections. Sames also accepted certain non-solicitation and non-competition provisions, and the parties agreed the non-competition provisions would not apply if NWTX terminated Sames without cause.

In June of 2016, Sames requested an accounting from NWTX concerning his bonuses, which he believed had been underpaid. NWTX responded in July with a defense of its bonus calculations and proposed a meeting to discuss the matter further. NWTX's response was written by Andrew Siegel, associate general counsel for Universal Health Services, Inc., the parent company of NWTX. Following the meeting, Sames requested additional information about the compensation issue. Just six days later, on September 20, Siegel sent a letter to Sames notifying him that he had breached his employment agreement with NWTX by "materially fail[ing]" in his duties and responsibilities as medical director at certain facilities. Sames quickly responded, requesting additional information on NWTX's allegations, but NWTX did not reply.

Sames filed his original petition in the underlying action on October 3, 2016. He asserted that NWTX had breached his employment agreement by failing to pay approximately \$100,000 in bonuses owed to him. On November 30, outside counsel for NWTX issued a letter to Sames immediately terminating his employment agreement for cause. In addition to setting forth five grounds for Sames's termination, the letter stated that NWTX demanded strict compliance with the employment agreement's five-year non-

competition provision. NWTX then filed a counterclaim to Sames's original petition, claiming breach of contract based on Sames's alleged failure to comply with the non-competition provision. NWTX also sought a temporary injunction to require Sames to comply with the non-competition and non-solicitation provisions, which the trial court denied with limited exceptions.

The discovery dispute underlying this proceeding arose after Sames served his first requests for production of documents on NWTX in February of 2017. Among other things, Sames sought materials reflecting communications among NWTX's representatives, specifically including UHS's associate general counsel Andrew Siegel, concerning Sames's termination from employment. NWTX objected and refused to produce responsive documents. In June, NWTX filed a motion for protective order asserting that the requests sought confidential attorney-client communications. Sames responded by filing a motion to compel. A hearing was held before the trial court on the two motions. During the hearing, counsel for NWTX tendered to the court several documents claimed to be privileged for in-camera inspection. The trial court entered an order granting in part NWTX's motion for protective order. Sames subsequently filed this petition, asking this Court to order the trial court to vacate its order.

Mandamus Standard

To be entitled to the extraordinary relief of a writ of mandamus, Sames must show that (1) the trial court clearly abused its discretion and (2) he has no adequate remedy by appeal. *In re Team Rocket, L.P.*, 256 S.W.3d 257, 259 (Tex. 2008) (orig. proceeding). A trial court abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law, or when it clearly fails to correctly

analyze or apply the law. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (per curiam). A party has no adequate remedy at law when he demonstrates that his “ability to present a viable claim or defense is vitiated or severely compromised” by the order. *In re Ford Motor Co.*, 988 S.W.2d 714, 721 (Tex. 1998) (orig. proceeding). While the scope of discovery is a matter of trial court discretion, a writ may issue if the trial court’s order improperly restricts the scope of discovery defined by the Texas Rules of Civil Procedure. *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003) (orig. proceeding) (per curiam); see *Lindsey v. O’Neill*, 689 S.W.2d 400, 401 (Tex. 1985) (orig. proceeding) (per curiam).

Attorney-Client Privilege and the Offensive-Use Doctrine

Sames’s requests for production include requests aimed at communications among NWTX’s representatives, including its attorneys, concerning his termination from employment. The trial court overruled NWTX’s objections to certain requests for production and ordered NWTX to produce any additional documents except for those protected by privilege. The order provided that “Defendant shall not be required to produce any communications of any kind between an attorney, an employee of an attorney, or a consultant for an attorney who has rendered advice to Defendant . . . regarding matters related to issues in this suit.”

The attorney-client privilege generally protects attorney-client communications from discovery. See TEX. R. CIV. P. 193.3(c); see also *In re Hicks*, 252 S.W.3d 790, 794 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding). The privilege protects confidential communications between the client and counsel made for the purpose of facilitating the rendition of legal services to the client. TEX. R. EVID. 503(b)(1)(A). Sames

does not dispute that the materials he seeks are attorney-client communications. However, he contends that NWTX has waived its privilege under the offensive-use doctrine.

The offensive-use doctrine prohibits a party who is seeking affirmative relief from maintaining an action and, at the same time, maintaining “evidentiary privileges that protect from discovery outcome determinative information not otherwise available” to the other party. *Tex. Dep’t of Pub. Safety Officers Ass’n v. Denton*, 897 S.W.2d 757, 761 (Tex. 1995). To show a waiver of privilege under the offensive-use doctrine, the party seeking discovery must establish that (1) the party asserting the privilege is seeking affirmative relief; (2) the privileged information sought is such that, if believed by the factfinder, in all probability it would be outcome-determinative of the cause of action asserted; and (3) disclosure of the privileged information is the only means by which the aggrieved party may obtain the evidence. *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163 (Tex. 1993). If any one of these requirements is not met, the trial court must uphold the privilege. *Id.*

It is undisputed that NWTX, which has filed a counterclaim and requested damages, is seeking affirmative relief. As to the second requirement, Sames asserts that the information he seeks is outcome-determinative because the privileged materials will reveal the “actual motives” behind his termination. Sames contends he is entitled to discover the communications underlying the breach and termination letters he received from NWTX to determine whether the reasons set forth in the letters are merely pretextual.

The disposition of NWTX’s claims turns on whether Sames was discharged with good cause. NWTX gave five reasons for its decision to terminate Sames’s employment:

(1) two facilities terminated their agreements with NWTX because of Sames's actions; (2) Sames engaged in competitive activity with NWTX; (3) Sames contacted patients after a facility had excluded him from the premises; (4) Sames violated patient confidentiality; and (5) Sames violated HIPAA (Health Insurance Portability and Accountability Act) regulations. To succeed on its claims, NWTX must prove the reasons it relies upon to establish it terminated Sames for cause. See *Cushman & Wakefield, Inc. v. Fletcher*, 915 S.W.2d 538, 543 (Tex. App.—Dallas 1995, writ denied) (when an employment agreement requires cause to terminate an employee, the burden of proof for establishing cause rests upon the employer).

The Texas Supreme Court has cautioned that the offensive-use doctrine does not grant parties a license to engage in “fishing expeditions” into privileged matters. *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 108 (Tex. 1985) (orig. proceeding). The privileged information sought “must go to the very heart of the affirmative relief sought”; mere relevance or a contradiction in position is not enough. *Davis*, 856 S.W.2d at 163. Here, the heart of NWTX's claim is the validity of its assertion that it had cause to terminate Sames's employment. This claim can be tested regardless of whether there are also other factors behind NWTX's decision. While Sames harbors suspicion of NWTX's stated reasons for his termination, even evidence showing that NWTX had other motives would not invalidate those reasons.

Additionally, the discovery of NWTX's attorney-client communications is not the only means by which Sames may obtain evidence regarding NWTX's claim that he was terminated for cause. NWTX's discovery responses reveal the names of the individuals providing information that it relies on in support of its claims. For example, in response

to Sames's interrogatory seeking "any and all 'information' that you claim to have received concerning material failures of Dr. Sames in his duties and responsibilities as Medical Director in your Notice of Breach letter dated September 20, 2016 . . .," NWTX responded, "On July 13, 2016, Todd Gudgell advised Amarillo Center for Skilled Care was terminating its Medical Director Agreement with Defendant effective August 15, 2016. Mr. Gudgell advised Plaintiff's performance as a medical director was unacceptable . . ." and "On August 1, 2016, Roy Miller advised Plaintiff of the termination of Defendant's medical director agreement with Plum Creek Healthcare Residence, effective October 31, 2016. Mr. Miller advised Plaintiff was not seeing patients, as necessary . . ." NWTX's responses reflect that there are other, non-privileged sources available to investigate NWTX's claims of for-cause termination.

We conclude that the elements for establishing waiver of the attorney-client privilege under the offensive-use doctrine have not been met. Therefore, the trial court did not abuse its discretion in granting NWTX's motion for protective order.

Conclusion

For the foregoing reasons, we deny the petition for writ of mandamus.

Judy C. Parker
Justice