In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-22-00172-CV

ANTONY MCGREGOR DEY, APPELLANT

V.

SEILEVEL PARTNERS, LP, APPELLEE

On Appeal from the 53rd District Court
Travis County, Texas
Trial Court No. D-1-GN-21-002722; Honorable Amy Clark Meachum, Presiding

July 28, 2022

MEMORANDUM OPINION ON MOTION TO DISMISS

Before QUINN, CJ., and PARKER, J., and PIRTLE, SJ.[1]

Pending before this court is a motion to dismiss filed by Appellee, Seilevel Partners, LP, in an appeal from an interlocutory order requiring Appellant, Antony

[1] Senior Justice Patrick A. Pirtle, retired, sitting by assignment. TEX. GOV'T CODE ANN. § 75.002(a)(1).

McGregor Dey, to pay for one-half of a forensic examination of a Macbook Pro laptop.[2] For the reasons expressed herein, we grant the motion to dismiss.

BACKGROUND

The dispute underlying this appeal was the subject of a prior interlocutory appeal. *See Dey v. Seilevel Partners*, *LP*, No. 07-21-00244-CV, 2022 Tex. App. LEXIS 1911, at *21-22 (Tex. App.—Amarillo March 23, 2022, no pet. h.) (mem. op.) (see that opinion for a more detailed account of the dispute between the parties). Dey was previously employed by Seilevel. That relationship was terminated on January 27, 2021. Pursuant to a severance agreement, Dey was permitted to keep a Macbook Pro laptop on the condition that he would remove from it all information pertaining to Seilevel's business operations. Seilevel soon discovered, however, that Dey was accessing confidential information, downloading files, and contacting its customers.

Based on Dey's perceived violation of his severance agreement, Seilevel sued him for breach of contract, breach of fiduciary duty, and violations of the Texas Uniform Trade Secrets Act.[3] The trial court granted Seilevel a temporary injunction which among other things, required Dey to deliver the Macbook Pro laptop to a forensic examiner. In lieu of complying with that order, Dey filed the above-referenced interlocutory appeal. On March 23, 2022, Dey's appeal was resolved against him by this court. *Id.* To maintain the status quo, this court modified the temporary injunction by ordering Dey to provide the Macbook

[2] Originally appealed to the Third Court of Appeals, this appeal was transferred to this court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001. Should a conflict exist between precedent of the Third Court of Appeals and this court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. TEX. R. APP. P. 41.3.

[3] TEX. CIV. PRAC. & REM. CODE ANN. §§ 134A.001 - .008.

Pro laptop to his counsel for safekeeping until its release to a forensic examiner to be reviewed "in accordance with a forensic protocol agreed to by the parties." *Id.* at *22. In lieu of an agreement between the parties as to the forensic protocol, this court's order provided that the matter would be presented to the trial court for determination.

Within days of this court's opinion, Dey provided the laptop to his counsel. After Seilevel's futile attempts to have Dey agree to a forensic examiner and proposed protocol, Dey advised Seilevel that he would not agree to the proposed protocol and objections would follow. Seilevel then filed with the trial court its *Motion for Entry of Electronic Forensic Exam Order*. Within hours of that filing, Dey filed his objections.

On April 25, 2022, the trial court considered and granted Seilevel's motion after overruling Dey's objections. The court named a forensic examiner to conduct an inspection of the Macbook Pro laptop according to certain specifications. Included in the order was a provision that "the parties will split equally all [costs] associated with the examination of the Laptop . . . ." The Macbook Pro laptop was delivered to the forensic examiner prompting Dey to file a motion to stay the examination and requesting modification of the order that he pay one-half of the forensic examiner's fee. According to Seilevel, Dey did not bring the motion to the trial court's attention and the forensic examination proceeded.

Upon receiving the Macbook Pro laptop, the forensic examiner discovered that Dey had wiped the laptop's memory in February 2022, permanently erasing all stored data and making it unrecoverable. As requested, the examiner concluded his exam and drafted a report, which was filed with the trial court.

Soon thereafter, Dey filed his second interlocutory notice of appeal, this time appealing from the trial court's April 25th *Order for Electronic Forensic Exam*. Having questions concerning this court's interlocutory jurisdiction, the clerk of this court directed the parties to demonstrate how this court had jurisdiction to review the trial court's order of April 25, 2022.

Dey responded with a brief in which he asserts this court has jurisdiction because the order has the "character and function" of a temporary injunction which is appealable under section 51.014(a)(4) of the Texas Civil Practice and Remedies Code. *See Del Valle Ind. Sch. Dist. v. Lopez*, 845 S.W.2d 808, 809 (Tex. 1992). *See also Qwest Communs. Corp. v. AT&T Corp.*, 24 S.W.3d 334, 337-38 (Tex. 2000). He posits that the order is appealable because it directs him to take some action during the pendency of a suit (delivery of the Macbook Pro laptop and payment of one-half of the forensic examiner's fee). He also relies on this court's language in the prior appeal in which we modified the temporary injunction to "facilitate the entry of further orders as contemplated by the 'direct access' provision of the *Order Granting Temporary Injunction . . .*" Dey theorizes that because the April 25th order resulted from Seilevel's request for a temporary injunction and it supplements or clarifies the first order, it has the "character and function" of a temporary injunction and is, therefore, appealable. Seilevel responds, however, with the argument that a subsequent order to a temporary injunction that makes no substantive modification falls outside the purview of section 51.014(a)(4). *See Am. Med. Home Health Servs. LLC v. Legacy Home Health Agency, Inc.*, No. 04-20-00494-CV, 2022 Tex. App. LEXIS 2089, at *30 (Tex. App.—San Antonio March 30, 2022, no pet.) (mem. op.). In this case, the trial court's second order does not make any

substantive changes to the first order; rather, it clarifies the first order and was, in fact, anticipated by our prior opinion. The passage of time had rendered the original order of the trial court unworkable. To avoid any obstacles, the parties were ordered to confer and agree on certain parameters. In the absence of an agreement, the trial court was instructed to define those details. The "character and function" of the April 25th order was the same as the "character and function" of the original order, the subject of the first appeal. The issue of an injunction compelling a forensic examination having already been determined by the first appeal, an appeal complaining about the examiner appointed or the division of costs are not issues appealable under section 51.014(a)(4) of the Texas Civil Practice and Remedies Code.

Furthermore, Seilevel responded to this court's request to show jurisdiction with a motion to dismiss for mootness. Seilevel argues that an appellate court lacks jurisdiction to decide a moot controversy or render an advisory opinion. *NCAA v. Jones*, 1 S.W.3d 83, 86 (Tex. 1999). When a temporary injunction becomes inoperative due to a change in the status of the parties or the passage of time, the issue of its validity is also moot. *Id.* Here, the primary objective of the trial court's order was the forensic examination of the Macbook Pro laptop. That examination was completed, and a forensic report was filed with the trial court. Seilevel contends that this report renders moot any order granting temporary injunctive relief. Because the forensic examination of the Mackbook Pro laptop was complete, this court lacks jurisdiction to consider an interlocutory appeal concerning the validity of any temporary injunction ordering that examination.

Dey responds that the "direct access" order in the temporary injunction is not moot even though the examination already occurred over his objections.[4] He requests that this court consider facts outside the record to determine mootness. He asserts there is a motion pending in the trial court which could render the direct access order void thereby relieving him of the requirement to pay for half of the forensic examiner's fee. He also indicates that Seilevel may move to hold him in contempt which would keep the order "a live issue."

We agree with Seilevel that the controversy between the parties regarding the Macbook Pro laptop has become moot. It is undisputed that the Macbook Pro laptop was delivered to the forensic examiner and he inspected it and generated a report for the parties.

In addition to the controversy being moot, we agree with Seilevel that an order for a forensic examination is not one designated by the Legislature as appealable under section 51.014 of the Texas Civil Practice and Remedies Code. Furthermore, the imposition of costs or fees is also not a category of interlocutory orders appealable under section 51.014. *Cf. Markel v. World Flight*, 938 S.W.2d 74, 78 (Tex. App.—San Antonio 1996, no writ) (finding imposition of sanctions portion of a temporary injunction not reviewable by interlocutory appeal). *See generally Liang Zhao v. XO Energy LLC*, 493 S.W.3d 725, 735 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (finding that a pretrial order requiring a deposit in the registry of the court was not a temporary injunction and granting motion to dismiss for lack of jurisdiction); *Structured Capital Res. Corp. v. Arctic*

[4] Seilevel disputes the order as being for "direct access" because Dey was ordered to turn the Macbook Pro laptop over to the forensic examiner and not to Seilevel.

Cold Storage, *LLC*, 237 S.W.3d 890, 894 (Tex. App.—Tyler 2007, no pet.) (finding that deposit of funds into registry of the court cannot be characterized as an appealable temporary injunction even if entered in response to a motion for injunctive relief); *Faddoul, Glasheen & Valles*, *P.C. v. Oaxaca*, 52 S.W.3d 209, 212 (Tex. App.—El Paso 2001, no pet.) (finding that the portion of a temporary injunction which required a disputed fee to be deposited in the registry of the court was not injunctive relief subject to an interlocutory appeal). Accordingly, we further conclude that the portion of the order requiring Dey to pay for one-half of the forensic examiner's fee is not reviewable by interlocutory appeal.

Based on the controversy being moot and the lack of authority for an interlocutory appeal of that portion of the order requiring Dey to pay one-half of the forensic examiner's fee, we grant Seilevel's motion to dismiss. Our disposition requires us to consider other issues raised by the parties.

SEILEVEL'S MOTION FOR APPELLATE SANCTIONS UNDER RULE 45

Rule 45 of the Texas Rules of Appellate Procedure gives an appellate court discretion to award a prevailing party damages for a frivolous appeal. TEX. R. APP. P. 45. In exercising that discretion, an appellate court may not consider any matter outside the record. *Id.* The decision to grant appellate sanctions is a matter of discretion that an appellate court exercises with prudence and caution and only after careful deliberation. *Caldwell v. Zimmerman*, No. 03-17-00273-CV, 2017 Tex. App. LEXIS 10010, at *8 (Tex. App.—Austin Oct. 26, 2017, pet. denied) (mem. op.). An appeal is frivolous when the record, viewed from the perspective of the advocate, does not provide reasonable grounds for the advocate to believe that the case could be reversed. *Jones v. Heslin*, No. 03-19-00811-CV, 2020 Tex. App. LEXIS 2441, at *18 (Tex. App.—Austin March 25, 2020,

pet. denied) (mem. op.). Although bad faith is not dispositive in deciding whether an appeal is frivolous, the presence of bad faith may be relevant to determining the amount of the sanction. *Hunt v. CIT Group/Consumer Fin.*, *Inc.*, No. 03-09-00046-CV, 2010 Tex. App. LEXIS 2767, at *27 (Tex. App.—Austin April 15, 2010, pet. denied) (mem. op.).

Seilevel requests that sanctions be imposed against Dey for filing a frivolous appeal because the controversy over the forensic examination had been resolved and all that remained at issue was the outstanding fee owed by Dey, an issue not subject to interlocutory appeal. According to Seilevel, Dey should have moved to voluntarily dismiss this appeal after receiving this court's notice questioning jurisdiction. Instead, Seilevel was forced to incur appellate fees for briefing "a meritless case."

Although Seilevel contends that it can produce evidence of its fees and damages by affidavit, it has failed to do so. Even if it were to have provided us with such information, we are not inclined to impose "sanctions" at this time because we consider such a determination best left to the trial court's broad discretion on completion of the entire litigation.

PERSONAL COUNSEL FOR DEY'S COUNSEL'S RESPONSE TO REQUEST FOR SANCTIONS

Rule 45 provides that damages may be awarded to each prevailing party "after notice and a reasonable opportunity for response . . . ." TEX. R. APP. P. 45. Counsel for Dey, who is not a party to this appeal, retained outside counsel to respond to Seilevel's request for sanctions. The document was "received" by this court, but was not formally filed as a pleading in this matter. In light of our disposition of Seilevel's *Motion for Appellate Sanctions,* and in the absence of notice and an opportunity to respond as

provided by Rule 45, we take no further action with respect to Dey's counsel's response to motion for sanctions.

UNOPPOSED MOTION TO SEAL APPENDIX B (FORENSIC EXAMINER'S REPORT)

Seilevel has also filed a motion to seal Appendix B to its *Motion to Dismiss and for Fees* to protect the parties' confidential information. That motion is unopposed. By order of the court, the motion is granted.

CONCLUSION

Dey's attempted appeal of the trial court's *Order for Forensic Exam* is dismissed for want of jurisdiction.

Per Curiam