



NUMBER 13-17-00289-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

IN RE ODEBRECHT CONSTRUCTION, INC.

On Petition for Writ of Mandamus.

DISSENTING MEMORANDUM OPINION

**Before Justices Rodriguez, Contreras, and Benavides
Dissenting Memorandum Opinion by Justice Benavides**

I respectfully dissent.

Relator Odebrecht Construction, Inc. (Odebrecht) alleged in its motion to dismiss solely that real party-in-interest Rodolfo Mora's claim has no basis in law. Under our de novo review of a trial court's ruling under Rule 91a, see *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016) (per curiam), when determining whether a non-movant's cause of action has no basis in law, we take the allegations as true, together with inferences reasonably drawn from them, and determine whether they entitle the claimant

to the relief sought. See TEX. R. CIV. P. 91a.1.¹ Furthermore, we construe pleadings liberally in favor of the plaintiff, look to the pleader's intent, and accept as true the factual allegations in the pleadings to determine if the cause of action has a basis in law or fact. See *Stedman v. Paz*, 511 S.W.3d 635, 637 (Tex. App.—Corpus Christi 2015, no pet.) (citing *Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied)).

Under the appropriate standard, review of the petition shows the following: Rodolfo worked for Odebrecht as the foreman of a construction crew that included his son, Juan. On December 12, 2015, Juan suffered an injury involving construction machinery which caused Juan to be “entangled, almost killed, and severely injured.” Rodolfo and other crew members witnessed the incident. Subsequently, Juan filed suit against Odebrecht and others. Juan alleged specifically that Odebrecht failed to provide him with “adequate and sufficient medical care and treatment” and terminated his employment in retaliation for Juan exercising his rights under the Workers Compensation Act in violation of section 451 of the Texas Labor Code. See TEX. LAB. CODE ANN. § 451.001 (West, Westlaw through Ch. 49, 2017 R.S.). A few weeks after Juan's accident, Odebrecht terminated Rodolfo and the other employee-crew-members who witnessed Juan's accident. Rodolfo claims that one of the crew members who was laid off was told by someone at Odebrecht that “wink, wink’ he was going to be retained” but make the termination “appear [as if] it was a lay off even though there was additional work which needed [to] be done, and there was not a reduction in force, that was being actually

¹ In considering a Rule 91a motion to dismiss, the trial court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Texas Rule of Civil Procedure 59. TEX. R. CIV. P. 91a.6.

imposed.” In January 2017, Rodolfo sued Odebrecht for wrongful termination alleging that he was discriminated against pursuant to Chapter 451 of the Texas Labor Code.

Chapter 451 of the labor code expressly prohibits discharge or any other form of discrimination against employees who have (1) filed a workers' compensation claim in good faith; (2) hired a lawyer to represent the employee in a claim; (3) instituted or caused to be instituted in good faith a proceeding under the Texas Workers' Compensation Act; or (4) testified or are about to testify in a proceeding under the Texas Workers' Compensation Act. *See id.*

I agree with the majority that Rodolfo's pleadings do not support a claim that he (1) filed a workers' compensation claim, (2) hired a lawyer to represent him in a workers' compensation claim, or (3) instituted or caused to be instituted a proceeding under the Texas Workers' Compensation Act. I disagree, however, with the majority's conclusion that we cannot reasonably infer from Rodolfo's pleading that he “testified or is about to testify in a proceeding under the Texas Workers' Compensation Act.” *Id.* at 451.001(4).

While Rodolfo did not specifically allege that he testified or is about to testify in a worker's compensation proceeding, he nevertheless alleged that: (1) he was protected under chapter 451; (2) he witnessed Juan's injury on the jobsite; (3) Juan filed a claim or proceeding under the Texas Workers' Compensation Act; and (4) shortly after Juan's injury, Odebrecht terminated all of the witnesses to Juan's accident. Reading these allegations liberally and taking them as true, as well looking at Rodolfo's intent, I would hold that Rodolfo alleges he was protected as a witness who was “about to testify” in Juan's workers' compensation claim based on his status as the foreman of the crew and witness to his son Juan's accident. *See id.*; TEX. R. CIV. P. 91a.1. Additionally, Rodolfo alleged other facts such as the timing and nature of his termination, which allow

reasonable inferences that Odebrecht terminated him and the other crew members because they were witnesses to this accident and would likely testify in Juan's worker's compensation proceeding.

With that said, I appreciate Odebrecht's arguments that Rodolfo does not allege any facts about the status or outcome of his son's workers' compensation claim. However, he does reference his son's workers' compensation claim and subsequent lawsuit, the suspicious timing of his termination, and the fact that he was a witness. And any further merits-based arguments by Odebrecht of Rodolfo's allegations are premature at this stage and without the benefit of one line of pre-trial discovery. As a result, I would hold that Rodolfo's pleading states a claim that has a basis in law that overcomes Odebrecht's Rule 91a motion to dismiss.

Lastly, I wholeheartedly join the portion of the majority's holding which reaffirms that Texas remains a notice-pleading jurisdiction. See *Kopplow Dev., Inc. v. City of San Antonio*, 399 S.W.3d 535, 536 (Tex. 2013); see also *Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982). Notwithstanding this long-standing practice, the Texas Legislature in 2011 granted the Texas Supreme Court the rulemaking authority to adopt Rule 91a, which permits a trial court to dismiss a cause of action early, based purely on the pleadings, if it has no basis in law or fact. See TEX. R. CIV. P. 91a. The Legislature identified its intent behind the creation of Rule 91a as an "efficient resolution of certain civil matters in certain Texas courts" that would "make the civil justice system more accessible, more efficient, and less costly to all Texans while reducing the overall costs of the civil justice system to all taxpayers." See Sen. Comm. on State Affairs, Bill Analysis, Tex. H.B. 274, 82d Leg., R.S. (2011). Additionally, the Legislature also enacted section 451.001 of the labor code as a means to protect workers from retaliatory discrimination or termination for testifying

against employers in workers' compensation proceedings. See *Tex. Mex. Ry. Co. v. Bouchet*, 963 S.W.2d 52, 55 (Tex. 1998) (analyzing the legislative purpose and intent of section 451.001's predecessor statute). The majority's opinion today hardly fulfills or furthers any of these stated goals and policies—litigation has been halted to make way for a separate mandamus proceeding, costs have likely increased for all parties, the courthouse doors are being shut on Rodolfo because of a less-than-perfect pleading, and employers' allegedly improper conduct is permitted without review. Today's decision cannot be what the Legislature intended, and further, it produces too harsh result that I, respectfully, cannot join.

I would deny mandamus relief.

GINA M. BENAVIDES,
Justice

Delivered and filed the
15th day of August, 2017.