Petition for Writ of Mandamus Conditionally Granted and Opinion filed March 23, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00130-CV

IN RE TREY MELCHER AND YVONNE MELCHER, TRUSTEES OF THE EVIE MELCHER NON-EXEMPT TRUST; MELCHER INVESTMENTS; AND BILL E. LEWIS AND RICHARD KERR, JR., CO-TRUSTEES OF THE LUCILE BIRMINGHAM MELCHER MANAGEMENT TRUST AND THE LEROY MELCHER MARITAL DEDUCTION TRUST AND FORMER CO-TRUSTEES OF THE EVIE MELCHER NON-EXEMPT TRUST, AND AS FORMER CO-EXECUTORS OF THE ESTATE OF LUCILLE BIRMINGHAM MELCHER, Relators

---

ORIGINAL PROCEEDING
WRIT OF MANDAMUS
215th District Court
Harris County, Texas
Trial Court Cause No. 2011-52524

MEMORANDUM OPINION

Trey Melcher and Yvonne Melcher, Trustees of the Evie Melcher Non-Exempt Trust; Melcher Investments; Bill E. Lewis and Richard L. Kerr, Jr., Co-Trustees of the Lucille Birmingham Melcher Management Trust and the Leroy Melcher Marital Deduction Trust and former Co-Trustees of the Evie Melcher Non-Exempt Trust, and as former Co-Executors of the Estate of Lucille Birmingham Melcher (collectively, the "Melchers") seek mandamus relief in this court from a sanctions order, which has the effect of adjudicating the litigation. *See* Tex. Gov't Code Ann. § 22.221; *see also* Tex. R. App. P. 52. Concluding that the Melchers are entitled to relief because the trial judge did not first consider lesser sanctions, we conditionally grant the petition for writ of mandamus.

I. BACKGROUND

Harris County sued Hallmark Cleaners and the current and former owners of the property on which Hallmark operated at 4203 San Felipe[1] for various violations of the Texas Water Code and the Texas Health and Safety Code involving the release of certain chemicals allegedly causing the contamination of groundwater.[2] The State of Texas, acting by and through the Texas Commission on Environmental Quality, was joined as a necessary and indispensable party to recover civil penalties. Harris County subsequently added the Melchers, alleging that various Melcher parties have owned the property at 4206 San Felipe, where dry cleaning operations have been in business for a number of decades.[3]

---

[1] Harris County resolved its enforcement actions against Hallmark and severed those claims.

[2] We refer to Harris County and the State of Texas collectively as "Harris County."

[3] Harris County also sued S & K Brothers, Inc. ("SKB"), the owner of River Oaks Cleaners, which operates at 4206 San Felipe. SKB is not a party to this mandamus proceeding.

Harris County alleged that environmental studies performed during the investigation of the Hallmark Site indicated that releases of a hazardous substance, perchloroethylene, from the Melchers' property had comingled with hazardous substances from the Hallmark Site, contaminating the groundwater. The Melchers asserted affirmative defenses and a counterclaim for declaratory judgment that the contingency fee agreement between Harris County and its outside counsel is void.

A. Mistrial and the November 8, 2013 Sanctions Order

The case against the Melchers went to a jury trial. On October 29, 2013, the trial court declared a mistrial on the motion of Harris County. Harris County argued that the Melchers' expert changed his testimony at trial and defense counsel violated the motions in limine multiple times, requiring the attorneys to approach the bench.

Harris County moved for sanctions, and after an evidentiary hearing on November 4, 2013, the trial court granted the motion for sanctions and ordered the Melchers, SKB, and their attorneys to pay $30,000 to Harris County upon final judgment; $16,000 to the law firm representing Harris County, Connelly Baker Wotring LLP, payable within ninety days of the order; and $10,000 to the State upon final judgment.

On March 9, 2015, Harris County filed a motion to amend the November 8, 2013 sanctions order. Although the Melchers' attorney, Nathan Beedle, had argued at the November 4, 2013 hearing that immediate payment of the monetary sanctions would hinder the Melchers' ability to continue to defend the case, the Melchers, nonetheless, had hired Wayne Dolcefino and Dolcefino Consulting to draft press releases, contact the State's counsel and Harris County Judge Ed

Emmett in writing, and appear before Harris County Commissioner's Court in person on behalf of the Melchers. Harris County asserted that, because the Melchers were paying Dolcefino, they had the financial ability to pay the monetary sanctions award. After a hearing, the trial court denied the motion to amend the November 8, 2013 sanctions order.

B. Discovery Violations and the August 28, 2015 Sanctions Order

On April 23, 2015, Harris County served requests for production on the Melchers concerning their communications with Wayne Dolcefino (the "Dolcefino documents"). The Melchers objected that the request was untimely because it was served after the discovery cutoff date in the trial court's docket control order before the first trial. Nevertheless, Harris County filed a motion to compel that was granted by the trial court. On May 18, 2015, Harris County filed a motion to compel supplemental responses to its first and second requests for production from the Melchers that also was granted by the trial court.

Harris County moved for sanctions, complaining, among other things, that the Melchers had not complied with the orders to compel, and reiterating the reasons for the mistrial and the fact that the trial court had awarded monetary sanctions against the Melchers for the mistrial. On August 28, 2015, the trial court held a hearing on Harris County's motions for sanctions. At the end of the hearing, the trial court granted Harris County's request for sanctions, struck the Melchers' pleadings, and stated that default judgment would be entered against them.

On December 18, 2015, Harris County filed motions for summary judgment on liability and minimum daily civil penalties and attorney's fees against the Melchers based on the August 28, 2015 sanctions order. On January 21, 2016, the

Melchers filed a motion for substitution of counsel of record, which was granted, and a response to Harris County's motion for summary judgment. On February 19, 2016, the Melchers filed this petition for mandamus, seeking to compel the trial judge to set aside the August 28 sanctions order. This court issued an order staying the trial court proceedings.[4]

II. MANDAMUS STANDARD OF REVIEW

To be entitled to mandamus relief, a relator must demonstrate (1) the trial court clearly abused its discretion; and (2) the relator has no adequate remedy by appeal. *In re Reece*, 341 S.W.3d 360, 364 (Tex. 2011) (orig. proceeding). A trial court clearly abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law or if it clearly fails to analyze the law correctly or apply the law correctly to the facts. *In re Cerberus Capital Mgmt. L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (per curiam).

The adequacy of an appellate remedy must be determined by balancing the benefits of mandamus review against the detriments. *In re Team Rocket, L.P.*, 256 S.W.3d 257, 262 (Tex. 2008) (orig. proceeding). Because this balance depends heavily on circumstances, it must be guided by analysis of principles rather than simple rules that treat cases as categories. *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 464 (Tex. 2008) (orig. proceeding). In evaluating benefits and detriments, we consider whether mandamus will preserve important substantive and procedural rights from impairment or loss. *In re Prudential Ins. Co. of Am.*,

[4] This proceeding was abated pursuant to the request of the parties from June 2, 2016 until January 24, 2017.

148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding). We also consider whether mandamus will "allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments." *Id.* Finally, we consider whether mandamus will spare the litigants and the public "the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings." *Id.*

III. ANALYSIS

A. Equitable Issues

As an initial matter, Harris County contends that the Melchers are not entitled to mandamus relief due to the equitable doctrines of laches and unclean hands.

1. Laches

Mandamus is an extraordinary remedy, not issued as a matter of right, but at the discretion of the court. *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993). Although mandamus is not an equitable remedy, its issuance is largely controlled by equitable principles, including the principle that equity aids the diligent and not those who slumber on their rights. *Id.* Laches requires a showing of (1) unreasonable delay; and (2) a good faith and detrimental change in position because of the delay. *In re Laibe Corp.*, 307 S.W.3d 314, 317 (Tex. 2010) (orig. proceeding) (per curiam). Delay in the filing of the mandamus petition may waive the right to mandamus relief unless the relator can justify the relief. *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 676 (Tex. 2009) (orig. proceeding).

Harris County disputes that the Melchers' need for new counsel justifies a six-month delay in seeking mandamus relief from the August 2015 sanctions order, as the need was apparent as early as November 2013 when Beedle's conduct at the first trial resulted in a mistrial and $56,000 in sanctions. Harris County contends that the Melchers did not provide evidence that they diligently tried to hire other counsel between September 2015 and December 2015.

To their reply, the Melchers attached an affidavit signed by one of their new attorneys, Jacqueline Lucci Smith, testifying that Trey Melcher first contacted her in September 2015 and they met about the case on September 14, 2015. At that time, Smith was preferentially set for a three-week trial in October 2015 and a two-week trial in December 2015, and attorney Joan Lucci Bain, with whom Smith often works, was preferentially set for trial in November 2015 and December 2015. This case would require a significant amount of time, and Smith and Bain were unable to assist the Melchers at that time.

Smith further testified that Trey Melcher contacted her again in December 2015 because he had not found other counsel willing to take the case. Smith believed that Melcher's difficulty was due to the complex nature of the case and its procedural posture, involving the imposition of death penalty sanctions. Smith met with Trey Melcher on December 23, 2015, and Smith and Bain agreed to take the case. Trey Melcher retained them on behalf of some of the defendants. There were other defendants for whom Trey Melcher did not have authority to retain counsel, and Smith and Bain were unable to substitute in until those defendants had obtained executed engagement agreements.

Smith explained satisfactorily the delay in the Melchers' hiring her and Bain as their attorneys. Moreover, there is nothing in the record to indicate any harm to Harris County resulting from the delay. *See In re Hamel*, 180 S.W.3d 226, 230 (Tex. App.—San Antonio 2005, orig. proceeding) (holding there was nothing in the record to indicate any harm to the real party in interest). Under these circumstances, we conclude that the Melchers' claims are not barred by laches.

2. Unclean Hands

Harris County further claims that the Melchers come to this court with "unclean hands" because they are currently in violation of the trial court's orders compelling the production of documents.

The doctrine of unclean hands has been used to deny mandamus relief. *See Westerman v. Mims*, 227 S.W. 178, 182 (Tex. 1921) (denying mandamus relief because the relators "did not come into court with clean hands"); *In re Roberts*, No. 05-06-00638-CV, 2006 WL 2106799, at *1 (Tex. App.—Dallas July 31, 2006, orig. proceeding) (mem. op.) (denying the relator's petition because relator "comes before us with unclean hands"); *Luxenberg v. Marshall*, 835 S.W.2d 136, 142 (Tex. App.—Dallas 1992, orig. proceeding) (denying relief sought under the unclean hands doctrine). The doctrine will be applied only to one whose own conduct with the same matter or transaction has been unconscientious, unjust, or marked by want of good faith, or one who has violated the principles of equity and righteous dealing. *In re Jim Walter Homes, Inc.*, 207 S.W.3d 888, 899 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding). In addition, the complaining party must show an injury to himself arising from the conduct. *Id.* The clean hands maxim should not be applied when the party asserting the doctrine has not

been seriously harmed and the wrong complained of can be corrected. *Id.* Harris County does not argue that it has been seriously harmed by its ongoing discovery disputes with the Melchers or that the disputes cannot be resolved through additional disclosures by the Melchers once the stay on trial court proceedings is lifted. Harris County's complaints, no matter how frustrating, involve the ordinary activities and possible misunderstandings of litigation, and without more, there is no basis for invoking the unclean hands doctrine. *See id.* at 900.

B. Abuse of Discretion

The Melchers claim that the trial court abused its discretion by imposing death penalty sanctions without considering lesser sanctions. Generally, before a sanction that prevents a decision on the merits is justified, lesser sanctions must first be tested to determine their efficacy. *Cire v. Cummings*, 134 S.W.3d 835, 840 (Tex. 2004). In all but the most exceptional cases, the trial court must "test the effectiveness of lesser sanctions by actually implementing and ordering each sanction that would be appropriate to promote compliance with the trial court's orders in the case." *Id*. at 842. "[T]he trial court need not test the effectiveness of each available lesser sanction by actually imposing the lesser sanction on the party before issuing the death penalty; rather, the trial court must analyze the available sanctions and offer a reasoned explanation as to the appropriateness of the sanction imposed." *Id*. at 840 (citing *Spohn Hosp. v. Mayer*, 104 S.W.3d 878, 883 (Tex. 2003) (noting that the record should "contain some explanation of the appropriateness of the sanctions imposed")). The Melchers argue that neither the record of the sanctions hearing nor the sanctions order suggests that the trial court considered lesser sanctions. Here, the order does not refer to any lesser sanctions

or explain why lesser sanctions are inappropriate in this case. The sanctions order is deficient in this regard. *See id.* at 842 ("The trial court must analyze the available sanctions and offer a reasoned explanation as to the appropriateness of the sanction imposed."). Even orders with conclusory statements that lesser sanctions were considered are not sufficient to meet the standard set forth by the Texas Supreme Court. *See GTE Commc'ns Sys. Corp. v. Tanner*, 856 S.W.2d 725, 729 (Tex. 1993) (orig. proceeding) (giving no deference to unsupported conclusions in the trial court's order, which stated without explanation that lesser sanctions would have been ineffective); *Associated Air Ctr. LP v. Tary Network Ltd.*, No. 05-13-00685-CV, 2015 WL 970664, at *6 (Tex. App.—Dallas Mar. 4, 2015, no pet.) (mem. op.) ("[T]he sanctions order simply recites, without any further explanation or analysis, that lesser sanctions were considered but 'would not promote compliance with the Texas Rules of Civil Procedure.' Beyond this general statement and description of the offensive conduct, the trial court in this case offered no reasoned explanation of the appropriateness of the sanctions imposed.").

Here, although the trial court recited its reasons for imposing sanctions, it did not mention in the order that it considered lesser sanctions before imposing death penalty sanctions. Therefore, the trial court abused its discretion by granting death penalty sanctions without offering a reasoned explanation for not considering a less stringent sanction in this case.[5]

[5] We further note that before a court may deprive a party of its right to present the merits of its case because of discovery abuse, it must determine that a party's hindrance of the discovery process justifies a presumption that its claims or defenses lack merit. *GTE Commc'ns*

C. No Adequate Remedy by Appeal

When the trial court imposes sanctions that have the effect of adjudicating a dispute, which does not result in the rendition of an appealable judgment, the remedy of an eventual appeal is not adequate, unless the sanctions are imposed simultaneously with the rendition of a final, appealable judgment. *TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 919–20 (Tex. 1991) (orig. proceeding). If such an order is not immediately appealable, then the party may seek review by petition for writ of mandamus. *Id.* at 920. The August 28, 2015 sanctions order is not immediately appealable. Therefore, the Melchers do not have an adequate remedy by appeal.[6]

IV. CONCLUSION

We conclude that the trial court abused its discretion by entering its August 28, 2015 sanctions order and the Melchers do not have an adequate remedy by appeal. Therefore, we conditionally grant the Melchers' petition for writ of mandamus and order the trial court to vacate its August 28, 2015 sanctions order. The writ will only issue if the trial court fails to act in accordance with our opinion. We also lift our stay issued on February 29, 2016.

/s/ Martha Hill Jamison
Justice

Panel consists of Justices Jamison, Donovan and Brown.

Sys. Corp., 856 S.W.2d at 730. Because of our holding, we need not consider whether such a presumption is warranted here.

[6] Because this issues is dispositive, we do not address the Melchers' remaining issues.