

Conditionally Grant and Opinion Filed January 25, 2017



In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01145-CV

IN RE FPWP GP LLC, WIRT D. BLAFFER, CATHERINE B. HRDY, NICHOLAS H. HRDY, CAMILLA A. HRDY, CHRISTIE H. TAYLOR, AND KATHERINE C. TAYLOR,
Relators

Original Proceeding from the 14th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-03983

MEMORANDUM OPINION

Before Justices Bridges, Myers, and Whitehill
Opinion by Justice Myers

In this original proceeding, relators allege the trial court abused its discretion by denying their motion to transfer venue. The issue presented is whether the trial court abused its discretion by denying the motion to transfer venue to Harris County under the mandatory venue provision of section 65.023(a) of the Texas Civil Practice and Remedies Code. Pursuant to our order, real parties in interest Second Street Properties, L.L.C., Briarwood Capital Corporation, and Freeport Waterfront Properties, L.P., filed a response to the petition. We granted relators' emergency motion for a stay of the proceedings and deadlines in the trial court pending our review of the original proceeding and requested response to the petition. After reviewing the petition, the responses, and the record, we conditionally grant the writ.

BACKGROUND AND PROCEDURAL HISTORY

The underlying case is a dispute among the partners of Freeport Waterfront Properties,

L.P. (“the partnership” or “Freeport”) regarding (1) their rights in and obligations to the partnership, (2) which partnership agreement governs their relationship, and (3) which entity is the partnership’s general partner. Relators FPWP GP LLC, Wirt D. Blaffer, Catherine B. Hrды, Nicholas H. Hrды, Camilla A. Hrды, Christie H. Taylor, and Katherine C. Taylor are the defendants in the underlying suit and are limited partners in Freeport. Real parties in interest Second Street Properties, LLC, Briarwood Capital Corporation, and Freeport, are the plaintiffs in the underlying suit. Relators contend FPWP is the partnership’s general partner and has authority to act on behalf of the partnership because the limited partners voted on December 7, 2015 to remove Briarwood as general partner. Real parties in interest disagree, contending Briarwood is the general partner and FPWP’s actions are ineffective, invalid, and void.

In the underlying proceeding, real parties in interest seek declaratory relief and injunctive relief. Specifically, they seek declarations that (1) FPWP is not the General Partner and cannot take action on behalf of the Partnership; (2) various actions taken by FPWP are invalid, void, and ineffective, (3) Briarwood is the general partner and is the only entity with the power to handle tax matters for the partnership, and (4) the original partnership agreement is the controlling agreement. They sought a temporary and permanent injunction prohibiting FPWP from acting as general partner and taking action on behalf of the partnership. Real parties in interest also asked the trial court to enjoin relators and their counsel from prosecuting a case relators filed in Harris County the day after the Dallas suit was filed.¹ The real parties in interest contend they added the application for injunctive relief to address actions taken by relators after the real parties filed suit and to prevent relators from continuing those actions. The actions included moving partnership funds, filing the Harris County lawsuit, purporting to issue a capital call to the limited partners, and contacting the partnership’s accountants and attorneys in an effort to act as

¹ The real parties’ second amended petition, which added the application for injunctive relief, is the live pleading in this case and was filed before relators appeared and answered.

general partner, destroy documents, and access privileged information.

Relators reside in Harris County. FPWP's only Texas office is in Harris County, and the other parties sought to be enjoined also reside in Harris County. Relators filed a motion to transfer venue to Harris County pursuant to section 65.023 of the civil practice and remedies code, which provides for mandatory venue in injunction cases in the county in which the parties sought to be enjoined reside. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 65.023(a) (West 2008). The trial court first heard the motion to transfer venue on September 2, 2016, and expressed concern that section 65.023 might apply because of the request for injunctive relief. Real parties proposed that they could cure the issue by removing "the objectionable injunctive relief."² The trial court deferred ruling on the venue motion at that time. During a September 6th hearing on the pending motions for summary judgment and for temporary injunction, the court indicated it would deny the pending motion to transfer venue. On that same day, the trial court signed an order denying the motion to transfer venue. This original proceeding followed.

STANDARD OF REVIEW

To be entitled to mandamus relief, a relator must show both that the trial court has clearly abused its discretion and that relator has no adequate appellate remedy. *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). The trial court 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 correctly analyze or apply the law." *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (quoting *Walker v. Packer*, 827 S.W.2d 833, 839, 840 (Tex. 1992)). The question of proper venue is raised by a party by simply objecting to a plaintiff's venue choice through a motion to transfer venue. *Billings v. Concordia Heritage Ass'n, Inc.*, 960 S.W.2d 688, 692 (Tex. App.—El Paso 1997, pet. denied). If the

² There is no indication in the record that real parties in interest amended their pleadings to remove the request for injunctive relief.

plaintiff's chosen venue rests on a permissive venue statute and the defendant files a meritorious motion to transfer venue based upon a mandatory venue provision, the trial court must grant the motion. *In re City of Dallas*, 977 S.W.2d 798, 803 (Tex. App.—Fort Worth 1998, orig. proceeding). An erroneous denial of such a motion is reviewable by mandamus. *Id.* In determining whether a lawsuit constitutes a suit for permanent injunction for the purpose of determining proper venue, courts look only to the express relief sought in the allegations and prayer of the plaintiff's petition. *Id.*

APPLICABLE LAW

Section 65.023 provides that writs of injunction against a Texas resident “shall be tried in a district or county court in the county in which the party is domiciled.” TEX. CIV. PRAC. & REM. CODE ANN. § 65.023(a) (West 2008). Section 65.023 is a mandatory venue statute that applies to suits “in which the relief sought is purely or primarily injunctive.” *In re Cont'l Airlines*, 988 S.W.2d 733, 736 (Tex. 1998) (orig. proceeding).

“A declaratory judgment simply declares the rights, status, or other legal relations of the parties without ordering anything to be done.” *See In re Daniel*, 12–06–00232–CV, 2006 WL 2361350, at *2 (Tex. App.—Tyler Aug. 16, 2006, orig. proceeding) (mem. op.). In contrast, “the function of injunctive relief is to restrain motion and to enforce inaction.” *Id.* (citing *Qwest Commc'ns Corp. v. AT&T Corp.*, 24 S.W.3d 334, 336 (Tex. 2000)). A request for injunctive relief is ancillary when a review of the pleadings and the relief sought shows that the “principal or primary relief sought” is something other than injunctive relief. *See Howell v. Tex. Workers' Comp. Comm'n*, 143 S.W.3d 416, 432–33 (Tex. App.—Austin 2004, pet. denied) (reviewing pleadings to determine whether relief sought was “purely or primarily injunctive” for purposes of mandatory venue under section 65.023); *see also In re Cont'l Airlines, Inc.*, 988 S.W.2d at 736–37 (same).

When the injunctive relief is sought simply to maintain the status quo pending resolution of the lawsuit, then the injunctive relief is ancillary to the relief sought and section 65.023 does not apply. *See, e.g., In re City of Corpus Christi*, 13–12–00510–CV, 2012 WL 3755604, at **1, 5 (Tex. App.—Corpus Christi Aug. 29, 2012, orig. proceeding) (mem. op.) (injunctive relief ancillary to declaratory relief where plaintiff sought only temporary injunctive relief pending final hearing of the merits of the declaratory judgment action); *see also In re Adan Volpe Props., Ltd.*, 306 S.W.3d 369, 377–78 (Tex. App.—Corpus Christi 2010, orig. proceeding) (holding that request for injunctive relief was ancillary in libel action in which declaratory judgment was also sought where injunction was sought to maintain status quo until libel suit could be resolved); *see also Shuttleworth v. G & A Outsourcing, Inc.*, No. 01–08–00650–CV, 2009 WL 277052, at **1, 4 (Tex. App.—Houston [1st Dist.] Feb. 5, 2009, no pet.) (holding that temporary injunction to prevent party from using, disseminating, or destroying confidential information was ancillary to suit against former employee for violation of non-compete and non-solicitation agreements where injunction sought to preserve evidence for trial and plaintiff sought substantial damages on contract and tort claims).

Similarly, when the party does not plead for a permanent injunction, the injunctive relief is ancillary to the other relief sought. *See, e.g., In re Cont'l Airlines*, 988 S.W.2d at 736–37 (section 65.023 inapplicable and injunctive relief ancillary to prayer for declaratory relief where the plaintiff did not pray for permanent injunctive relief, the pleadings would not support a permanent injunction, the controversy can be fully resolved by declaratory judgment, and “throughout the pleading the only requests for court action ask the trial court to declare the parties’ rights under the contract.”). Other examples of ancillary injunctive relief are when the petition and prayer do not ask the court to order the defendant “to do or not to do anything” and when the injunction is sought to enforce rights established in declaratory judgment action. *In re*

City of Dallas, 977 S.W.2d at 805, 806 (holding that suit was primarily declaratory, not injunctive, where only mention of injunctive relief was a reservation of statutory right to seek supplemental injunctive relief post-trial to enforce the declaratory judgment); *Flewellen v. Brownfield State Bank & Tr. Co. of Brownfield*, 517 S.W.2d 384, 388 (Tex. Civ. App.—Amarillo 1974, no writ) (“The petition demonstrates that the principal and primary relief sought is to establish by the court’s decree the correlative rights of the plaintiff and the defendants for possession and disposition of the cotton grown by Weiss, and the respective priorities thereto, and that the injunctive relief sought is only incidental to such main relief and to protect and enforce the rights so established.”).

On the other hand, a request for injunctive relief is the primary or principal relief sought, and section 65.023 therefore governs venue, when the plaintiff specifically pleads for permanent injunctive relief, when the plaintiff seeks only declaratory and injunctive relief that are essentially mirror image claims, and/or the claims cannot be resolved solely as a declaratory judgment. *See In re Daniel*, 2006 WL 2361350, at *3 (citing *In re Cont’l Airlines*, 988 S.W.2d at 736)). In *Daniel*, the plaintiff, General Shelters, argued that its former employee, Darryl Daniel, breached his non-compete and non-disclosure agreements by starting a competing business and sharing proprietary information with third parties. *In re Daniel*, 2006 WL 2361350, at *1. General Shelters sought a declaratory judgment to declare the rights, duties, and legal relations of General Shelters and Daniel. *Id.* General Shelters also sought a temporary and a permanent injunction against Daniel requiring him to abide by the provisions of the non-compete agreement and the non-disclosure agreement. *Id.* Daniel moved to transfer venue under section 65.023, and the trial court denied the motion. *Id.* at *1–2. The Tyler Court of Appeals determined that the case should have been transferred because injunctive relief was the primary purpose of the lawsuit. *Id.* at *3. The *Daniel* court explained that the suit could not be resolved

solely under the Declaratory Judgments Act because General Shelters also sought injunctive relief. *Id.* Moreover, General Shelters’ petition could be construed as seeking an order requiring Daniel to “specifically perform the nondisclosure and noncompete agreements,” and by seeking an injunction to restrain Daniel from violating the agreements, General Shelters sought the “negative form of specific performance.” *Id.* The court reasoned that injunctive relief was the primary relief sought by General Shelters because General Shelters ultimately sought the same relief through both types of requested relief—to stop Daniel from violating the agreements. *Id.*

DISCUSSION

It is undisputed that relators reside in Harris County. As such, if the primary purpose of the underlying suit is injunctive, then transfer to Harris County is mandatory under section 65.023.

Relators rely on *In re Daniel* to support their arguments. The real parties in interest contend *In re Daniel* is inapplicable. First, they argue the *Daniel* court’s decision is premised on a misstatement of the facts of *In re Continental Airlines*. Specifically, the real parties take issue with a statement in *Daniel* that the plaintiff in *Continental Airlines* sought only declaratory relief. A review of *Continental Airlines*, however, reveals that the plaintiff did not specifically plead or pray for permanent injunctive relief:

[T]hroughout the pleading the only requests for court action ask the trial court to declare the parties’ rights under the contract.

* * *

As Fort Worth asserts, its pleadings do not ask for and would not support a permanent injunction. Conversely, the pleadings state a justiciable controversy that may be fully resolved by declaratory judgment.

In re Cont’l Airlines, Inc., 988 S.W.2d at 736, 737. The *Daniel* court did not misstate the facts of that case.

The real parties also contend that *Daniel* should be disregarded because, to the extent the

Daniel court held that the primary purpose of a suit is always injunctive in nature if the only relief sought is declaratory and injunctive, that holding is contrary to cases holding that injunctive relief can be ancillary to declaratory relief in various circumstances. Some of the cases cited by the real parties—and set out above—do indeed hold that the injunctive relief sought was ancillary to the declaratory relief also sought. *See, e.g., Howell*, 143 S.W.3d at 433 (anti-suit injunction ancillary to declaratory relief because it seeks to protect and enforce rights established by the declaratory relief); *In re City of Corpus Christi*, 2012 WL 3755604 at **1, 5 (plaintiff sought only temporary injunctive relief pending final hearing of the declaratory judgment suit); *Flewellen*, 517 S.W.2d at 388 (purpose of suit was to obtain decree concerning right of possession and disposition of cotton, and temporary injunction sought to protect those rights by enjoining defendant from interfering with cotton sale if bank declared party with right of possession and disposition). However, those cases are distinguishable from *Daniel* and from this case because they involved situations in which permanent injunctions were not sought at all or in which a permanent injunction was mentioned as a remedy the plaintiff might seek following final judgment. Moreover, *In re Continental Airlines* supports the principle relators seek to apply here—that injunctive relief is the primary purpose of the lawsuit where, as in this case, the plaintiffs seek a permanent injunction and declaratory relief, do not assert other claims or seek damages, and the case cannot be resolved through declaratory relief alone. *In re Cont'l Airlines, Inc.*, 988 S.W.2d at 737 (“As Fort Worth asserts, its pleadings do not ask for and would not support a permanent injunction. Conversely, the pleadings state a justiciable controversy that may be fully resolved by declaratory judgment.”).

Here, the real parties asserted in their second amended petition for declaratory judgment and application for temporary restraining order, temporary injunction, and permanent injunction, that they were entitled to injunctive relief because of relators’ allegedly unlawful actions in,

among other things, acting as the general partner of the partnership. The real parties sought twelve declarations, each having the affect of declaring Briarwood the general partner and declaring actions taken by relators to act as general partner are invalid, void, and ineffective. The real parties also sought a temporary restraining order and temporary injunction enjoining relators “from taking or permitting any of the following actions” that result in relators acting as general partner:

- a. Holding themselves out as the General Partner of the Partnership, or otherwise purporting to act on the Partnership’s behalf or exercise any management or control over the Partnership;
- b. Maintaining any books or records of the Partnership;
- c. Commencing, prosecuting, defending, or settling any litigation on behalf of the Partnership;
- d. Establishing any bank account on behalf of the Partnership, or otherwise exercising any control over any bank account in which the Partnership has any ownership or beneficial interest;
- e. Taking and holding any real, personal, or mixed property of the Partnership in the name of the Partnership
- f. Improving, building, managing, operating, or otherwise controlling any property of the Partnership;
- g. Taking any action to dispose of, market, or sell any property of the Partnership;
- h. Executing and delivering, on behalf of the Partnership and in the name of the Partnership, any contract, agreement, or other document;
- i. Coordinating any accounting or clerical function of the Partnership and employing accountants, engineers, and other management or service personnel as may from time to time be required to carry on the business of the Partnership;
- j. Filing tax returns and making elections on behalf of the Partnership as provided under the Internal Revenue Code;
- k. Destroying any records of the Partnership or any document or other material that a competent lawyer would believe has potential or actual evidentiary value, or counseling or assisting another person to do any such act; and
- l. Accessing or attempting to access any privileged information of the Partnership.

The real parties also state in their second amended petition that they “further seek a permanent

injunction after trial on the merits.” The permanent injunction sought here, however, goes beyond the injunctions sought in the cases relied on by the real parties because the real parties in this case seek to enforce the trial court’s declarations *permanently* and to *permanently* enjoin relators from certain actions, whereas the plaintiffs in the cases relied on by the real parties sought to prevent future lawsuits contrary to the rights declared or sought only temporary injunctive relief. *See, e.g., Howell*, 143 S.W.3d at 433 (anti-suit injunction to prevent the defendants from filing future lawsuits contrary to the rights declared by the trial court); *In re City of Corpus Christi*, 2012 WL 3755604 at **1, 5 (sought only temporary injunctive relief pending final hearing); *Flewellen*, 517 S.W.2d at 388 (sought temporary injunctive relief preventing defendant from interfering with bank’s cotton sale if bank declared owner with right of possession and disposition of the cotton).

Further, the analysis of the *In re Daniel* court applies here. Like General Shelters in *Daniel*, the real parties in interest argued to the trial court that their primary objective was to enforce the partnership agreement by declaring that FPWP is not general partner and cannot act on behalf of the partnership. But by doing so, they were also seeking a means to stop FPWP from acting as general partner and to stop relators from taking actions on behalf of the partnership. By granting the requested declaratory relief, the trial court would enjoin FPWP from acting as general partner by naming Briarwood general partner and declaring relators’ prior acts ineffective, void, and invalid. An injunction is another means to that same end. In either event, the real parties in interest were seeking to stop relators from taking actions on behalf of the partnership. Therefore, we conclude the primary purpose of the lawsuit is injunctive. *See In re Daniel*, 2006 WL 2361350, at *3.

One additional question we must address concerns the relevance of a recent opinion from the Houston Fourteenth Court of Appeals in the lawsuit brought by the real parties in interest in

Harris County. See *In re Second Street Properties LLC, et al.*, No. 14–16–00390–CV, 2016 WL 7436649 (Tex. App.—Houston [14th Dist.] Dec. 22, 2016, orig. proceeding) (mem. op.) (per curiam). In that proceeding, Second Street Properties LLC, Briarwood Capital Corporation, and H. Walker Royall filed a petition for writ of mandamus that sought to compel the Harris County trial court to vacate its order denying their motion to abate. The court of appeals concluded that “[b]ecause the Dallas County and Harris County suits are inherently interrelated and the Dallas County suit was filed first, the Dallas County court has dominant jurisdiction,” such that the Harris County suit must be abated. *Id.* at *6. The court also expressly noted, however, that it was not considering Freeport’s argument that the Harris County court’s denial of the plea in abatement was proper because the Dallas County suit was filed in an improper venue and should be transferred to Harris County. *Id.* at *5. The venue issue was not presented to or determined by the Harris County court, and the court of appeals noted that the venue issue should be determined by the Dallas court:

Moreover, the Partnership has filed a motion in the Dallas County court to transfer venue to Harris County. The issue of proper venue should be determined first by the Dallas court, not this Court or the Harris County court. See *Curtis v. Gibbs*, 511 S.W.2d 263, 268 (Tex. 1974) (orig. proceeding) (court with dominant jurisdiction has exclusive jurisdiction to determine venue).

Id. at *5. Thus, the court of appeals’ opinion does not address the issue presented to this Court—whether the case must be considered primarily injunctive in nature and must be tried in the county where the defendants reside where the plaintiff requests only declaratory relief and permanent injunctive relief. The Houston court’s *Second Properties* opinion is, thus, irrelevant to this proceeding.

In sum, we conclude that the primary purpose of the lawsuit is injunctive, the proceeding is subject to the mandatory venue provision of section 65.023 of the civil practice and remedies code, and, therefore, the trial court abused its discretion by denying relators’ motion to transfer

venue. Accordingly, we conditionally grant relators' petition for writ of mandamus. We direct the trial court to issue an order vacating its September 6, 2016 order denying relators' motion to transfer venue, granting the motion to transfer venue, and transferring the case to Harris County. A writ will issue only in the event the trial court fails to issue the orders as directed herein within fifteen days of the date of this opinion. Because we assume the trial court will comply with this opinion, we direct our clerk not to issue the writ of mandamus unless information is received that the district court has not so complied. We lift the stay imposed by this Court on November 18, 2016 so the trial court may issue the orders as directed herein.

/s/ Lana Myers
LANA MYERS
JUSTICE

161145F.P05