

Conditionally granted and Opinion Filed April 6, 2017



In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00791-CV

**IN RE STEVEN SPIRITAS, INDIVIDUALLY AND
AS TRUSTEE OF THE SPIRITAS SF 1999 TRUST, Relator**

**Original Proceeding from the 101st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-08236**

MEMORANDUM OPINION

Before Justices Francis, Evans, and Stoddart
Opinion by Justice Stoddart

The underlying case is a dispute between two equal owners of a Texas limited liability partnership, Spiritas Ranch Enterprises, LLP (SRE), relator Steven Spiritas and real party in interest Susan Davidoff.¹ SRE owns over 700 acres of undeveloped land in Denton County. Spiritas and Davidoff disagree on the future of SRE. Spiritas wants to continue the business of the partnership, but Davidoff wants to sell the land and other partnership assets. In this original proceeding, Spiritas seeks relief from the trial court's order appointing a representative to wind up the partnership and sell partnership property, and the order denying Spiritas's motion to sever the winding-up order to allow for an immediate appeal. We conditionally grant relief in part.

¹ Spiritas and Davidoff are also equal shareholders in a Texas corporation, J. Spiritas Land & Cattle Company (JSLC), which uses the property held by SRE to operate a cattle business.

Procedural History

In July 2013, Spiritas and Davidoff filed competing lawsuits that were ultimately consolidated into the underlying proceeding. Spiritas initially asserted claims against Davidoff for breach of contract, breach of fiduciary duty, and declaratory judgment related to an alleged debt and validity of a lease. Davidoff, in turn, filed suit against Spiritas, asserting claims for breach of fiduciary duty and seeking a declaratory judgment that SRE be wound up. Spiritas later amended his petition to include a declaratory judgment action seeking a declaration that Davidoff's request to wind up SRE constituted an event of withdrawal from the partnership. The parties filed competing motions for summary judgment. Davidoff also filed a motion asking the court to grant her authority to sell the partnership property or, in the alternative, to appoint a receiver to sell the property. In January 2014, the trial court appointed a receiver and denied Davidoff's motion for summary judgment as moot based upon that appointment. The trial court did not hear Spiritas's motions for summary judgment.

A. The First Appeal

Spiritas appealed the interlocutory order appointing the receiver. *Spiritas v. Davidoff*, 459 S.W.3d 224 (Tex. App.—Dallas 2015, no pet.). In that appeal, Spiritas raised two issues: (1) whether the trial court abused its discretion by appointing a receiver, and (2) whether the trial court abused its discretion by concluding that an event requiring a winding up of SRE had occurred and liquidation of its assets was required. *Id.* at 225–26. The panel concluded that the appointment of a receiver was not supported by the record presented and reversed the trial court's order. *Id.* at 234–37. The panel held that sections 11.054, 101.551, and 152.702(a)(3) of the Texas Business Organizations Code do not authorize or provide for the appointment of a receiver. *Id.* at 235. The panel did not reach issue two – whether an event requiring a winding up of SRE had occurred. *Id.* at 237.

B. Proceedings on Remand

On remand, both parties amended their pleadings, and the trial court heard the previously-filed motions for summary judgment, which resulted in two partial summary judgment orders, the February 16, 2016 orders. The first order denied Spiritas's motion for partial summary judgment on Davidoff's breach of contract and tort-based counterclaims. The second denied Spiritas's motion for partial summary judgment on the issue of whether SRE should be wound up, granted Davidoff's competing motion for summary judgment on the same issue, and declared that an event requiring a winding up of SRE had occurred. Those orders did not dispose of all claims and all parties. Davidoff's breach of contract and tort-based counterclaims against Spiritas as well as Spiritas's other claims against Davidoff and her husband remain pending.

After the trial court granted Davidoff partial summary judgment and determined that an event requiring a winding up had occurred, Davidoff filed an "application" to have the court appoint a representative to wind up SRE and sell its real property. On May 12, 2016, the trial court signed an order granting Davidoff's application for a court-supervised winding up of SRE. In that order, the trial court appointed George "Kevin" Buchanan as the "Winding Up Representative" and authorized Buchanan to commence the winding up of SRE within thirty days and to take all steps necessary to complete the winding up process, including the sale of SRE's property. Spiritas sought severance so that he could promptly appeal the winding-up order. The trial court denied the motion for severance.

C. Relief Requested Here

Spiritas contends the May 12, 2016 winding-up order constitutes an order permitting execution of a non-final order. If the winding-up order stands, Spiritas argues that any future appeal of the order would be insufficient to protect his rights and property interests because the

partnership will have been wound up and the property sold by the time the trial court renders a final, appealable judgment. Spiritas asks the Court to grant the petition for writ of mandamus and direct the trial court to vacate its May 12, 2016 winding-up order. Alternatively, Spiritas asks the Court to direct the trial court to either (1) sever the unadjudicated claims and counterclaims from the winding-up orders so those orders can become final and appealable, or (2) vacate the February 16, 2016 order that declared that an event requiring a winding up of SRE had occurred.

Availability of Mandamus Relief

The May 12, 2016 winding-up order may be reviewed in an original proceeding because the order is interlocutory and is not subject to interlocutory appeal. *See In re Reece*, 341 S.W.3d 360, 374 (Tex. 2011) (orig. proceeding) (mandamus is a vehicle for correcting “blatant injustice that otherwise would elude review by the appellate courts.”). To be entitled to mandamus relief, Spiritas must show that the trial court clearly abused its discretion and Spiritas lacks an adequate remedy by appeal. *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding); *In re XTO Energy Inc.*, 471 S.W.3d 126, 136 (Tex. App.—Dallas 2015, no pet.). Moreover, mandamus relief is proper to the extent the winding-up order permits execution before the entry of a final, appealable judgment. *In re City of Lancaster*, 220 S.W.3d 212, 216 (Tex. App.—Dallas 2007, orig. proceeding), *supplemented*, 228 S.W.3d 437 (Tex. App.—Dallas 2007, no pet.) (mandamus relief proper when a party’s right “to supersede an adverse judgment during appeal would be lost forever if execution is permitted prior to the entry of a final, appealable judgment.”).

Applicable Law

A party has a right to suspend enforcement of a judgment pending appeal. TEX. R. APP. P. 24.1. That right may be lost if the trial court allows enforcement of an interlocutory order

disposing of certain claims before all of the parties' claims have been adjudicated and a final judgment has been signed. *In re Tarrant County*, 16 S.W.3d 914, 918–19 (Tex. App.—Fort Worth 2000, orig. proceeding). Accordingly, mandamus relief is an available remedy to vacate an order that allows execution to issue before a final judgment has been entered. *In re Burlington Coat Factory Warehouse of McAllen, Inc.*, 167 S.W.3d 827, 828, 831 (Tex. 2005) (orig. proceeding) (trial court abused its discretion by permitting execution on interlocutory judgment); *see also In re Renz*, No. 03-15-00207-CV, 2015 WL 5315693, at *2 (Tex. App.—Austin Sept. 10, 2015, orig. proceeding) (mem. op.) (conditionally granting writ and directing trial court to vacate interlocutory orders requiring the estate to immediately transfer certain assets and pay the trust's attorney's fees); *In re El Caballero Ranch, Inc.*, No. 04-14-00584-CV, 2014 WL 6687242, at *3 (Tex. App.—San Antonio Nov. 26, 2014, orig. proceeding) (mem. op.) (concluding that trial court abused its direction by permitting party to use and maintain claimed easement before final determination of all claims and entry of final, appealable judgment); *In re Khan*, No. 09-13-00382-CV, 2013 WL 5434624, at *1 (Tex. App.—Beaumont Sept. 26, 2013, orig. proceeding) (mem. op.) (concluding that trial court abused its discretion by ordering compliance with agreement to transfer ownership through partial summary judgment before final judgment was signed).

Analysis

In the February 16, 2016 summary judgment order, the court granted Davidoff's motion for summary judgment and denied Spiritas's motion for partial summary judgment, both of which addressed the issue of whether SRE should be wound up. The order constitutes a declaration that an event requiring the winding up of SRE has occurred and SRE should be wound up. The May 12, 2016 winding-up order appoints a representative to begin winding up SRE and sell its real property. In other words, the winding-up order permits execution of a non-

final order because it puts into immediate effect the February 16, 2016 order declaring that an event requiring the winding up of SRE had occurred. But neither order is a final, appealable judgment because the orders do not dispose of all parties and all claims. Davidoff's breach of contract and tort-based counterclaims against Spiritas, as well as Spiritas's other claims against Davidoff and her husband, remain pending. A court abuses its discretion by allowing the execution of a non-final order. *See e.g., In re Burlington Coat Factory Warehouse of McAllen, Inc.*, 167 S.W.3d at 828, 831. The trial court abused its discretion here by issuing the May 12, 2016 winding-up order because that order constitutes an execution order prior to final judgment that is improper as a matter of law. Spiritas lacks an adequate remedy by appeal because if SRE is wound up and the property sold in the interim, Spiritas's property rights and purported right to continue the business will be lost forever. Spiritas has established his right to mandamus relief from the May 12, 2016 winding-up order. We conditionally grant the writ and order the trial court to vacate the May 12, 2016 winding-up order.

We deny the petition as to Spiritas's alternative requests for relief because such relief would not be proper in the context of an original proceeding. Mandamus will generally not issue to order a court to grant severance because the trial court is vested with broad discretion in determining whether a severance should be granted. TEX. R. CIV. P. 41 ("[a]ny claim against a party may be severed and proceeded with separately.") (emphasis added); *In re Texas Tech Univ. Health Scis. Ctr.*, 2 S.W.3d 27, 29 (Tex. App.—Amarillo 1999, orig. proceeding); *Cooke v. Millard*, 854 S.W.2d 134, 135 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding). The controlling reasons to allow a severance are to avoid prejudice, do justice, and promote convenience. *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 693 (Tex. 2007). By ordering the vacatur of the winding-up order, the Court has rendered the request for severance moot at this time and cured any potential for prejudice from the prior denial of severance. As for

Spiritas's alterative request for vacatur of the February 16, 2016 order, mandamus relief is not available to review and vacate that order because it is a partial summary judgment order that is not reviewable through mandamus. *See e.g., In re Thompson*, No. 05-99-00251-CV, 1999 WL 80713, at *1 (Tex. App.—Dallas Feb. 22, 1999, orig. proceeding) (mem. op.) (denying petition seeking review of three partial summary judgment orders and noting that “Relator clearly has an adequate remedy at law.”); *In re Reynolds*, No. 14-10-00951-CV, 2010 WL 3872100, at *2 (Tex. App.—Houston [14th Dist.] Oct. 5, 2010, orig. proceeding) (mem. op.) (partial summary judgment not reviewable on mandamus because adequate remedy available by appeal once order becomes final) (citing *In re Dynamic Health*, 32 S.W.3d 876, 881 (Tex. App.—Texarkana 2000, orig. proceeding)).

Conclusion

Accordingly, we conditionally grant the writ in part. We order the trial court to issue a written ruling vacating the May 12, 2016 winding-up order within fifteen (15) days of the date of this opinion. A writ will issue only if the trial court fails to comply with this opinion and the order of this date.

/Craig Stoddart/
CRAIG STODDART
JUSTICE

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