

Denied and Opinion Filed August 29, 2017.



In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01214-CV

IN RE COMMERCIAL METALS COMPANY, Relator

Original Proceeding from the 101st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-09402

MEMORANDUM OPINION

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

Relator Commercial Metals Company (CMC) and real party in interest FABco, LLC (FABco) provide rebar fabrication services for construction projects in Texas and are direct competitors. In the underlying lawsuit, FABco asserted claims against CMC for breach of a nondisclosure agreement, misappropriation of trade secrets, conversion, business disparagement and fraud. During discovery, FABco sought production of documents CMC contends contain confidential business information subject to the trade secret privilege. In this original proceeding, CMC complains of a protective order authorizing one of FABco's three owners, Mark Paul, to review documents CMC designates as "Confidential Material" or "Confidential—Attorney Eyes Only Material." Under this record, we have determined that CMC is not entitled to the relief requested.

Mandamus Standard

Mandamus relief is available if the relator establishes a clear abuse of discretion for which there is no adequate remedy by appeal. *In re Deere & Co.*, 299 S.W.3d 819, 820 (Tex. 2009) (orig. proceeding) (per curiam). “Generally, the scope of discovery is within the trial court’s discretion, but the trial court must make an effort to impose reasonable discovery limits.” *Id.* (quoting *In re Graco Children’s Prods., Inc.*, 210 S.W.3d 598, 600 (Tex. 2006) (orig. proceeding) (per curiam)). A trial court abuses its discretion if it orders discovery exceeding the scope permitted by the rules. *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003) (orig. proceeding) (per curiam). No adequate appellate remedy exists when the trial court compels production beyond the permissible bounds of discovery. *See In re Weekley Homes, L.P.*, 295 S.W.3d 309, 322 (Tex. 2009) (orig. proceeding).

Applicable Law

Rule of Evidence 507 provides a privilege entitling a party to refuse to disclose its trade secrets “if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.” TEX. R. EVID. 507; *In re Cont’l Gen. Tire, Inc.*, 979 S.W.2d 609, 610 (Tex. 1998). Rule 507 requires a party resisting discovery of trade secrets to first establish that the information sought constitutes a trade secret. *In re Cont’l Gen. Tire, Inc.*, 979 S.W.2d at 610. Once a party resisting discovery establishes that information is a trade secret, the burden shifts to the requesting party to establish that the information is “necessary for a fair adjudication of its claims.” *Id.* at 613. If the requesting party meets that burden, the court should compel disclosure of the information subject to an appropriate protective order. *Id.* The court must weigh the degree of the requesting party’s need for the information against the potential harm of disclosure to the resisting party. *Id.*

Section 134A.006 of the Texas Uniform Trade Secrets Act also specifically permits a trial court to issue protective orders. TEX. CIV. PRAC. & REM. CODE ANN. § 134A.006. Protective orders that permit only certain, designated individuals to initially view documents designated as confidential or require third parties to sign and adhere to a non-disclosure agreement to be able to view the documents have been held to be sufficient to balance the competing interests associated with discovery of trade secrets. *See, e.g., In re Samsung Telecomms. of Am., Inc.*, No. 05-99-01949-CV, 1999 WL 1081387, at *2 (Tex. App.—Dallas Dec. 2, 1999, orig. proceeding) (mem. op., not designated for publication) (protective order requiring non-disclosure agreements was not unreasonable, arbitrary, capricious, or without reference to guiding rules or principles); *see also In re Honza*, 242 S.W.3d 578, 584 (Tex. App.—Waco 2008, orig. proceeding) (trial court appropriately tailored the discovery order to prohibit the unauthorized disclosure of privileged or confidential information by including initial limitation of access to forensic expert only and providing additional provisions requiring adherence to non-disclosure agreements).

Analysis

The protective order at issue here allows the parties to designate materials as “Confidential Material” or “Confidential—Attorney Eyes Only Material.” The protective order provides that “Confidential Material” and “Confidential—Attorney Eyes Only Material” may be disclosed to certain individuals, including the parties’ outside counsel, the court, experts, and mediators. The protective order also permits disclosure of “Confidential Material” and “Confidential—Attorney Eyes Only Material” to three in-house counsel for CMC who are responsible for managing the litigation and Mark Paul, who is one of three part owners of FABco. FABco does not employ in-house counsel. The protective order includes additional protections as a condition of Mark Paul receiving “Confidential-Attorney Eyes Only Material.”

Specifically, Mark Paul is prohibited from directly or indirectly participating in the making of any bids to customers until September 27, 2017. FABco is also required to put into place reasonable protections and restrictions so that no “Confidential-Attorney Eyes Only Material” may be disseminated to anyone at the company other than Mark Paul.

Here, the protective order adequately addressed CMC’s concerns while balancing FABco’s need for Mark Paul to view the materials as a surrogate in-house counsel. On this record, the trial court did not clearly fail to analyze or apply the law correctly, and the discovery order did not exceed the scope permitted by the rules. The trial court, thus, did not abuse its discretion.

Accordingly, we deny relators’ petition for writ of mandamus. *See* TEX. R. APP. P. 52.8(a) (the court must deny the petition if the court determines relator is not entitled to the relief sought).

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/s/Craig Stoddart/
CRAIG STODDART
JUSTICE