Conditionally Granted and Opinion Filed August 24, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00315-CV

IN RE DENNIS TOPLETZ, INDIVIDUALLY & AS HEIR OF HAROLD TOPLETZ D/B/A TOPLETZ INVESTMENTS; CASEY TOPLETZ; VICKIE TOPLETZ; STEVEN TOPLETZ; MONARCH DEVELOPMENT CORPORATION; AND MARVIN L. LEVIN, INDIVIDUALLY AND IN HIS CAPACITY AS THE EXECUTOR OF THE ESTATE OF JACK TOPLETZ, Relators

Original Proceeding from the 193rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-13993

MEMORANDUM OPINION

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

In this original proceeding, relators seek a writ ordering the trial court to vacate its order limiting the depositions of each of six intervenors to thirty minutes each. 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). A clear failure by the trial court to analyze or apply the law correctly constitutes an abuse of discretion. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992); *In re Tex. Am. Express, Inc.*, 190 S.W.3d 720, 724 (Tex. App.—Dallas 2005, orig. proceeding). We conditionally grant the writ.

Background

The City of Dallas brought the underlying proceeding, alleging that certain residential properties owned by relators violate the City's Code. Six tenants intervened and sought class status to pursue claims under the Texas Property Code and the Deceptive Trade Practices Act. To obtain discovery to oppose the intervenors' proposed class certification, relators noticed the depositions of the six intervenors who seek to become class representatives under Rule 42(a) of the Texas Rules of Civil Procedure. Relators limited the notices to issues regarding certification. The intervenors moved to quash and for a protective order, but did not request the depositions be limited in time. Rather, intervenors argued the depositions should not take place at all. Relators moved to compel the depositions. At the hearing, intervenors presented no evidence or argument to support a determination that limiting the time permitted for each deposition was necessary to protect intervenors from harm or undue burden. Nonetheless, the trial court granted intervenors' motion for protective order and initially limited each deposition to fifteen minutes. Relators sought reconsideration of the order, and the trial court ultimately extended the time limit to thirty minutes for each deposition.

Applicable Law

A trial judge may exercise discretion in the granting of a protective order and in controlling the nature and form of discovery, but that discretion is not without bounds. *In re Collins*, 286 S.W.3d 911, 918 (Tex. 2009). A party seeking a protective order must show particular, specific, and demonstrable injury by facts sufficient to justify a protective order. *Id.*; *Blankinship v. Brown*, 399 S.W.3d 303, 312 (Tex. App.—Dallas 2013, pet. denied). But the party may not simply make conclusory allegations that the requested discovery is unduly burdensome or unnecessarily harassing. *In re Alford Chevrolet–Geo*, 997 S.W.2d 173, 181 (Tex. 1999) (orig. proceeding). A trial court abuses its discretion by limiting discovery in the absence

of some evidence supporting the request for a protective order. *In Matter of Issuance of Subpoenas Depositions of Bennett*, 502 S.W.3d 373, 377 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (citing *In re Alford Chevrolet–Geo*, 997 S.W.2d at 181).

Where, as here, the discovery sought is pre-class certification discovery, it is generally within the trial court's discretion to schedule discovery and decide whether and how much discovery is warranted to determine any certification questions. *Id.* at 182. Factors in determining the scope of precertification discovery include the importance, benefit, burden, expense, and time needed to produce the proposed discovery. *Id.* (citing TEX. R. CIV. P. 192.4). Other factors include whether the individual claims are large enough to be worth pursuing if the class is not certified, and if so, whether the proposed discovery would relate to those individual claims. *Id.* In some cases, the class certification decision can be made primarily on the basis of the pleadings, postponing and potentially eliminating the need for class wide discovery. *Id.* "In many cases, however, discovery is needed to establish commonality of issues, typicality of claims, or predominance of common questions of law or fact over individual questions." *Id.* A trial court may not, however, restrict pre-class certification discovery in a manner that deprives a party of the ability to discover "facts essential to class determination." *Id*. at 184. Further, the party resisting pre-class certification discovery, not the party seeking the discovery, bears the burden to show a need for limited discovery. *Id.* at 184–85.

Analysis

Here, relators seek to depose the six intervenors who are putative class members. Relators seek the depositions to discover information to use in defense of intervenors' planned motion for class certification, such as information to defeat arguments that the class meets the class requirements set out in Rule 42 and that the intervenors meet the qualifications to act as class representatives. Relators limited the deposition notices to issues regarding certification and

maintain that the certification issues cannot be addressed with each intervenor in a thirty-minute deposition. They argue that thirty minutes would allow counsel time to gather only basic background information and not information on the merits of class certification. Rule 199.5(c) provides for a maximum deposition length of six hours per witness in a case. Although it seems unlikely these depositions will take six hours each, the record includes no evidence or even argument regarding how a deposition of any length would cause intervenors to suffer harm or subject them to undue burden. Under this record, intervenors did not meet their burden of proof to obtain time limits on the depositions. *See, e.g.*, *In re Alford Chevrolet–Geo*, 997 S.W.2d at 184 (general allegations of burden and harassment insufficient to meet "basic requirements for limiting the scope of discovery under the rules of civil procedure. *See* TEX. R. CIV. P. 192.4, 192.6). The trial court abused its discretion by limiting the depositions to thirty minutes each. Relators lack an adequate remedy by appeal because the order severely compromises relators' ability to present its case on the issue of class certification.

Accordingly, we conditionally grant the petition for writ of mandamus. We order the trial court to make written rulings within fifteen (15) days of the date of this opinion vacating the trial court's the March 22, 2017 order and ordering that relators may depose each of the six intervenors for up to six hours as permitted by Rule 199.5(c). A writ will issue only if the trial court fails to comply with this opinion and the order of this date.

/s/Craig Stoddart/
CRAIG STODDART
JUSTICE

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