Conditionally Granted and Opinion Filed June 12, 2018

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-00485-CV

IN RE AVEDIS MARZWANIAN, FIFI MARZWANIAN, AND UMB BANK, N.A., Relators

Original Proceeding from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-09291

MEMORANDUM OPINION

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

In this original proceeding, Avedis Marzwanian, Fifi Marzwanian, and UMB Bank, N.A. seek a writ of mandamus ordering the trial court to vacate an order and writ of execution issued in a suit in which they are not parties. After considering the briefing of the parties and the sworn record, we conditionally grant the writ of mandamus.

On August 2, 2016, X Extreme Construction & Rehab, Inc. filed this suit in Dallas County against Henry James Melton, II, Michael Warden, and H Melton Ventures, LLC seeking to recover the balance owed for construction and rehabilitation services rendered. The petition stated that Melton could be served with process at 817 N. Shore Drive in Highland Village, Texas. Two months later, X Extreme obtained a default judgment against all the defendants jointly and severally in the amount of $205,832.26.

On February 21, 2017, Melton entered into a contract with the Marzwanians for the sale of his house in Highland Village for $1.4 million. The purchase was financed by UMB Bank, N.A. One month later, on March 23, X Extreme filed an abstract of judgment in Denton County where the house is located. A warranty deed conveying the house to the Marzwanians was executed on March 31 and the deed was recorded on April 5.

On April 25, X Extreme filed an application for post-judgment receivership under section 31.002 of the Texas Civil Practice and Remedies Code. In the application, X Extreme stated it recently discovered Melton had sold his homestead and requested a receiver to ensure that Melton did not "hide and transfer all of his assets to avoid judgment." The trial court granted the application and appointed a receiver to take possession of and sell the defendants' leviable assets. The order specified it was not compelling turnover of a homestead or other exempt property, but ordered Melton to deliver to the receiver the total amount received from the sale of the Highland Village house, which was referred to as Melton's "purported homestead." The money was to be held in trust and applied to any homestead Melton purchased within six months of the order. If Melton did not purchase a homestead within six months, the proceeds were to be turned over to X Extreme.

In May 2017, Sam Almsari, who was a law partner of Avedis Marzwanian, began representing Melton in the post-judgment proceedings. Almsari filed a petition for bill of review challenging the underlying default judgment and a motion for rehearing on the post-judgment turnover. Almsari also moved to set aside or dissolve the receivership and to stay or abate the receivership proceedings. Melton did not deliver the proceeds from the sale of the Highland Village house to the receiver and, in October, he filed for bankruptcy.

The following March, the receiver filed a motion seeking a writ of execution for sale of the Highland Village house to satisfy both the judgment against Melton and the costs and fees incurred as expenses of the receivership. The Marzwanians were not given notice of the motion.

The trial court granted the motion the next day and ordered the issuance of a writ of execution for the sale of the house. Although the Marzwanians were not parties to the suit, the writ of execution named them each as a "defendant in execution." A notice was posted on the house declaring it "seized under writ of execution" and stating the house would be sold at a constable's sale on May 1, 2018.

The Marzwanians and UMB filed suit in district court in Denton County against X Extreme and the receiver on April 23, 2018 seeking to quiet title to the property and remove the cloud on the title purportedly created by the judgment lien. The Marwanians and UMB also requested injunctive relief to prevent the constable's sale. Following a hearing, the Denton court granted a temporary restraining order to halt the sale of the house and set a hearing on the application for a temporary injunction for May 8.

On April 30, 2018, the trial court in this suit signed an ex parte order titled "Sua Sponte Order Protecting the Court's Jurisdiction." In the order, the court stated it had received notice the receiver was made the subject of a lawsuit in Denton County. The court further stated it retained jurisdiction to enforce its final judgment and could enjoin interference with the property in the receiver's hands. The trial court then ordered the Marzwanians and UMB to immediately dismiss the Denton County lawsuit and prohibited them from filing any action seeking relief relating to the receiver's enforcement of X Extreme's judgment lien or interfering with any of the receiver's rights or duties in this case.

The Marzwanians and UMB then filed this original proceeding requesting a writ of mandamus ordering the trial court to vacate its sua sponte order and the writ of execution. Relators

contend (1) they have the right to bring a separate action in the county where the property is located to determine the effect, if any, of the purported judgment lien on the Marzwanians' ownership of the house and UMB's lien rights and, (2) until the respective rights of the parties are determined, a writ of execution is improper. In addition, relators contend the sua sponte order is void because the trial court had no jurisdiction over them as non-parties to the suit. We stayed both the sua sponte order and the writ of execution pending resolution of the issues presented.

Generally, mandamus relief lies when the trial court has abused its discretion and the relator has no adequate remedy by appeal. *In re Prudential Ins. Co.,* 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding); *Walker v. Packer,* 827 S.W.2d 833, 839–42 (Tex. 1992) (orig. proceeding). A trial court has no discretion in determining what the law is or in applying the law to the facts, and a clear failure to analyze or apply the law correctly will constitute an abuse of discretion. *See Walker*, 827 S.W.2d at 840. Additionally, mandamus will lie to correct a void order—i.e. an order the trial court had no power or jurisdiction to render. *Urbish v. 127th Judicial Dist. Court,* 708 S.W.2d 429, 431 (Tex. 1986) (orig. proceeding). If an order is void, the relator need not show it does not have an adequate appellate remedy, and mandamus relief is appropriate. *In re Sw. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding).

The two issues in contention between the relators and the real parties in interest are: (1) whether an enforceable judgment lien attached to the Highland Village house before it was purchased by the Marzwanians and (2) which court gets to make that determination. Without adjudicating the first issue, the trial judge below issued a writ of execution for the sale of the house to satisfy the judgment rendered against Melton. He then sua sponte issued an order to prevent relators, who are not parties to this suit, from having the lien issue determined in a suit in which they are parties by a court in the county where the property is located. The trial court's actions were improper for several reasons.

First, a trial court generally does not have jurisdiction to render a judgment or order against a respondent unless the record shows proper service of citation on the respondent, an appearance by the respondent, or a written memorandum of waiver at the time the judgment or order was rendered. *See In re Suarez*, 261 S.W.3d 880, 882–83 (Tex. App.—Dallas 2008, orig. proceeding). An order rendered against a respondent over whom the court did not have personal jurisdiction is void. *Id*. at 884; *see also Bennet v. Pol*, No. 09-15-00232-CV, 2016 WL 2941704, at *4 (Tex. App.—Beaumont May 19, 2016, orig. proceeding) (mem. op.).

It is undisputed that none of the relators were parties to this suit. Although the receiver argues a trial court has broad authority to issue writs and injunctions to enforce its judgments and protect its jurisdiction, he cites no authority for the proposition that a trial court can order the sale of purported homestead property owned by non-parties to satisfy a judgment when the non-parties have had no notice or opportunity to be heard. Nor does he cite any authority to support a trial court's ability to render an anti-suit injunction against non-parties to prevent litigation of issues not previously presented to, or determined by, that court.

Even if the trial court had jurisdiction to render the orders, we conclude it abused its discretion in doing so. As stated above, there has been no determination regarding the enforceability of the judgment lien on the Highland Village house. The receiver states he has discovered evidence showing the house may not be protected by the homestead exemption, but until that issue is fully litigated and resolved, a writ of execution is premature and improper.

The receiver contends any litigation regarding the enforceability of the judgment lien on the house must be brought in the court that issued the judgment under section 65.023(b) of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 65.023(b) (West 2015). Section 65.023(b) provides that "a writ of injunction granted to stay proceedings in a suit or execution on a judgment must be tried in the court in which the suit is pending or the

judgment was rendered." *Id*. This section does not apply, however, if the injunctive relief sought is independent of the matters adjudicated by the trial court's judgment. *See Campbell v. Wilder*, 487 S.W.3d 146, 150 (Tex. 2016). Relators do not challenge any aspect of the judgment rendered against Melton. They seek only to have their rights to certain property determined. The fact that the judgment creditor also claims to have an interest in the property does not mandate the suit be brought in the court that issued the judgment. *See Carey v. Looney*, 251 S.W. 1040, 1041 (Tex. 1923).

The receiver further contends this suit must be brought in the Dallas court that appointed him because relators are seeking to disturb his possession, control, and management of receivership property. We note that Melton sold the Highland Village house before the receiver was appointed and, therefore, the house was never a part of the receivership property. Regardless, it has long been the law that a suit seeking to resolve questions of title and liens on receivership property need not be brought in the court that appointed the receiver. *See Campbell v. Wood*, 811 S.W.2d 753, 757 (Tex. App.—Houston [1st Dist.] 1991, no writ); *see also Davis v. Bayless*, 70 F.3d 367, 374 (5th Cir. 1995).

Having concluded the trial court abused its discretion in issuing the sua sponte order and writ of execution, we further conclude relators have no adequate remedy at law. There is no judgment or order resolving the issue of their property rights from which relators can appeal. *See Jack M. Sanders Family Ltd. P'ship v. Roger T. Frindholm Revocable, Living Trust*, 434 S.W.3d 236, 243 (Tex. App.—Houston [1st Dist.] 2014, no pet.) Furthermore, relators have the right to have the issue of their property rights resolved in a court other than the one below. *See Carey*, 251 S.W. at 1041; *Davis*, 70 F.3d at 374. Finally, if the writ of execution on the property were allowed to proceed, relators have no adequate remedy at law to reobtain possession of the property if it is

later determined the judgment lien did not attach. *See In re Tex. Am. Exp., Inc.*, 190 S.W.3d 720, 727 (Tex. App.—Dallas 2005, orig. proceeding).

Relators' petition for writ of mandamus is conditionally granted. We order the trial judge to vacate the portion of the order signed March 26, 2018 that directs issuance and prosecution of the writ of execution and the Sua Sponte Order Protecting the Court's Jurisdiction signed April 30, 2018. We are confident the trial court will comply, and the writ will issue only if it fails to do so.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

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