

**Writ Conditionally Granted in part, Denied in part, and Opinion Filed
November 12, 2020**



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-20-00557-CV

IN RE GLAST, PHILLIPS & MURRAY, P.C., Relator

**Original Proceeding from the 193rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-19-08188**

MEMORANDUM OPINION

Before Justices Schenck, Partida-Kipness, and Nowell
Opinion by Justice Partida-Kipness

In this original proceeding, relator seeks relief from the trial court's January 8, 2020 order severing claims against one defendant and abating all claims in the underlying suit until appeals on a prior, related case have been exhausted. After reviewing relator's petition for writ of mandamus, real parties in interest's response, relator's reply, and the mandamus record, we conclude the relator is entitled to partial relief. We, therefore, conditionally grant in part and deny in part relator's petition.

BACKGROUND

In 2016, relator Glast, Phillips & Murray P.C. (GPM) filed suit against its former clients, Hossein Namdarkhan and Bardia Namdarkhan, seeking recovery of unpaid legal fees (2016 Lawsuit). In 2018, the trial court rendered a final judgment in GPM's favor, awarding GPM \$1,343,097.86 plus contingent attorney's fees on appeal against Hossein and Bardia. Hossein and Bardia appealed. We affirmed the trial court's judgment in April 2020. *See Namdarkhan v. Glast, Phillips & Murray, P.C.*, No. 05-18-00802-CV, 2020 WL 1969507 (Tex. App.—Dallas Apr. 24, 2020, pet. filed) (mem. op.).

While the appeal was pending, GPM filed a second lawsuit in June 2019 against Hossein, his wife Marjaneh Namdarkhan, and two entities they owned—Kid's Depot, Inc. and SMN LLC (2019 Lawsuit). In this second suit, GPM sought to set aside the allegedly fraudulent transfer of assets to Marjaneh or an entity she controlled because, according to GPM, Hossein's "income was insufficient to pay for [GPM's legal] services he had ordered." GPM alleged that Hossein transferred the assets to hinder, delay or defraud GPM in its attempt to collect on the judgment in the 2016 lawsuit. GPM also sought to enjoin Hossein from further disposition of the transferred assets.

Hossein moved to dismiss or stay the 2019 Lawsuit, arguing the lawsuit improperly sought to enforce the prior judgment in violation of the supersedeas bond he posted in that appeal. The trial court dismissed the case without prejudice but

vacated the dismissal order on GPM’s motion to reconsider. As part of its vacatur order, the trial court severed GPM’s claims against Hossein, declaring that any request for relief against Hossein “arising from or related to the [2016 Lawsuit] Judgment including those asserted in this suit must be brought in Cause No. DC-16-00853 [the 2016 Lawsuit].” The trial court also abated the severed claims and the 2019 Lawsuit until all appeals in the 2016 Lawsuit were resolved and the supersedeas bond was “released or canceled.”

GPM moved for reconsideration, complaining the severance was improper. GPM argued that the facts supporting its claim against Hossein were interwoven with those supporting its claims against the remaining defendants, and the trial court no longer had plenary power over the 2016 Lawsuit to consolidate any claims into that suit. GPM also complained the abatement was improper because it was indefinite. The trial court denied the motion on April 9, 2020, and this mandamus proceeding followed.

STANDARD OF REVIEW

Mandamus is an extraordinary remedy, available only when the relator can show the trial judge clearly abused its discretion and there is no adequate remedy by way of appeal. *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). An abuse of discretion occurs when a trial court’s ruling is arbitrary and unreasonable, made without regard for guiding legal principles or supporting evidence. *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 712 (Tex. 2016) (orig.

proceeding); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding) (a clear abuse of discretion occurs when a trial court “reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law”). Similarly, a trial court abuses its discretion when it fails to analyze or apply the law correctly. *In re Nationwide Ins.*, 494 S.W.3d at 712.

ANALYSIS

A. Real Parties’ Threshold Issues

Real parties in interest Hossein, Kid’s Depot, Inc., and SMN LLC (the Namdar¹ Parties or the real parties in interest) raise two threshold matters we must first address before addressing GPM’s petition: jurisdiction and the scope of our review.

They first contend we do not have jurisdiction to address GPM’s petition for mandamus relief as to the trial court’s January 8, 2020 abatement order. According to the Namdar Parties, the trial court’s order was issued “under authority of Texas Rule of Appellate Procedure 24.1(f),” and rule 24.4(a)(4) provides a mechanism by which GPM may seek review of that order. Consequently, mandamus relief is improper. We disagree.

¹ Hossein’s counsel refers to him in this proceeding as Mr. Namdar. Counsel also represents Kid’s Depot, Inc. and SMN LLC. For ease of reference, we will refer to these three real parties in interest collectively as the Namdar Parties. Marjaneh is also a real party in interest. She did not, however, make an appearance in this proceeding.

Although the trial court’s order cites rule 24.1(f) as the rule under which the judgment in the 2016 Lawsuit was superseded, it does not cite the rule as grounds for the abatement. Nor could it. Rule 24.1 provides the mechanisms by which “a judgment debtor may supersede the judgment.” TEX. R. APP. P. 24.1(a). There has been no judgment issued in the underlying case, thus rule 24.1 does not apply. Indeed, the trial court’s order specifically states that the supersedeas in question was filed in the 2016 Lawsuit “before this suit was filed.” Further, rule 24.4(a)(4) concerns review of “the determination whether to permit suspension of enforcement.” TEX. R. APP. P. 24.4(a)(4). That determination was made by the trial court in the 2016 Lawsuit, and GPM’s second amended petition here does not challenge that determination. Consequently, we overrule real parties’ jurisdictional challenge.

The Namdar Parties next challenge the scope of our review in this proceeding. Specifically, they contend we may not consider arguments asserted by GPM for the first time in GPM’s motion to reconsider the January 8, 2020 severance and abatement order because GPM’s mandamus petition does not directly challenge the trial court’s order denying that motion to reconsider. We disagree.

A relator is not required to identify the orders challenged but provide only “a concise description of the respondent’s action from which the relator seeks relief.” TEX. R. APP. P. 52.3(d)(3). Likewise, the petition must “state concisely all issues or points presented for relief,” and “[t]he statement of an issue or point will be treated

as covering every subsidiary question that is fairly included.” TEX. R. APP. P. 52.3(f).

Although the petition does not expressly challenge the order denying GPM’s motion to reconsider, it mentions the denial of the motion, and the mandamus record includes a copy of the order. Indeed, GPM’s complaint regarding the trial court’s severance and abatement order necessarily includes denial of the motion to reconsider that order because the arguments made on reconsideration provided the trial court an additional opportunity and additional bases to rule in GPM’s favor. The trial court denied the motion to reconsider and, thus, overruled the arguments presented in the motion. GPM preserved those arguments for review and, as such, arguments made in GPM’s motion to reconsider are properly before the Court. *See* TEX. R. APP. P. 33.1(a)(1)(A); *see also In re Rowes*, No. 05-14-00606-CV, 2014 WL 2452723, at *1 (Tex. App.—Dallas May 30, 2014, orig. proceeding) (mem. op.) (“A court cannot grant mandamus relief unless the error was raised in the trial court. A party seeking mandamus must direct the Court to where the argument was presented to the trial court.”).

B. GPM’s Issues

In two issues, GPM contends that the trial court abused its discretion in abating GPM’s claims against the remaining defendants for an indefinite time and severing and consolidating its claim against Hossein into the 2016 Lawsuit.

1. Abatement

GPM contends that the trial court erred in abating its claims for an indefinite period of time by conditioning the abatement on the release or cancellation of the supersedeas bond posted in the 2016 Lawsuit. According to GPM, this is contrary to the purpose of a supersedeas bond and could “tie up Relator’s fraudulent transfer action for a virtually interminable period.”

When there is a complete identity of the parties and claims between the prior and subsequent cases, the trial court in the subsequent case must grant a plea in abatement. *Dolenz v. Cont’l Nat. Bank of Ft. Worth*, 620 S.W.2d 572, 575 (Tex. 1981). However, when there is a lack of identity between the cases, as there is here, the trial court has discretion to abate the action “for reasons of comity, convenience and orderly procedure,” and “may look to the practical results to be obtained, dictated by a consideration of the inherent interrelation of the subject matter of the two suits.” *Id.* (quoting *Timon v. Dolan*, 244 S.W.2d 985, 987 (Tex. Civ. App.—San Antonio 1951, no writ)); *Chan v. Sharpe*, No. 02-14-00286-CV, 2015 WL 5722833, at *6 (Tex. App.—Fort Worth Aug. 26, 2015, pet. denied) (mem. op.).

“A trial court abuses its discretion when it arbitrarily abates a civil case for an indefinite period of time.” *In re Catapult Realty Capital, L.L.C.*, No. 05-19-00109-CV, 2020 WL 831611, at *9 (Tex. App.—Dallas Feb. 20, 2020, orig. proceeding) (mem. op.) (citing *In re Immobiliere Jeuness Estalissement*, 422 S.W.3d 909, 914 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding), and *In re Gore*, 251

S.W.3d 696, 699 (Tex. App.—San Antonio 2007, orig. proceeding)). Parties in a civil case “are entitled to full discovery within a reasonable time, to develop their claims and defenses, and to have the case tried.” *In re Gore*, 251 S.W.3d at 699 (citing *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941–42 (Tex. 1998) (orig. proceeding)). An indefinite abatement threatens this right because memories inevitably fade, and evidence may be lost or corrupted with the passage of time. *In re Colonial Pipeline Co.*, 968 S.W.2d at 941. Even when an abatement is not truly “indefinite,” mandamus may still lie “if it completely curtails the prosecution of an entire case and denies another party the right to proceed with full discovery or to resolution within a reasonable time.” *In re Catapult Realty Capital, L.L.C.*, 2020 WL 831611, at *9. However, when the claims at issue depend on the successful outcome of one or more other claims, a trial court does not abuse its discretion in abating the dependent claims at issue until predicate claims are resolved. *See Chan*, 2015 WL 5722833, at *6.

The appellate court in *Chan* addressed the severance and abatement of fraudulent transfer claims on facts similar to those at issue here. Chan sued his former employer for wrongful termination. *Id.* at *1. As a shareholder in the enterprise, Chan sought unpaid dividends, lost wages, lost benefits, and the value of his initial capital contribution. *Id.* He later added fraudulent transfer claims. *Id.* The trial court severed and abated the fraudulent transfer claims and granted summary judgment to defendants on the remaining claims. *Id.* The court of appeals

held that the trial court did not err in severing and abating the fraudulent transfer claims because they were not premised on any of the same facts underlying Chan's other claims. *Id.* at *6. As to abatement, the court specifically found, "[T]he trial court could have reasonably concluded that the parties should not have to spend time and incur expenses conducting discovery on claims that, as pleaded, appear to hinge in part on a successful outcome on one or more of the other claims." *Id.*

Just as Chan's fraudulent transfer claims were dependent on the success of his other claims, GPM's fraudulent transfer claims hinge on whether the Namdar Parties and Marjaneh owe GPM a debt or obligation from the judgment in the 2016 Lawsuit. Thus, the trial court abated GPM's claims until the appeals from that judgment have been resolved. Given GPM's fraudulent transfer claim are dependent on a successful outcome in the 2016 Lawsuit, the trial court did not abuse its discretion in abating these claims until appeals in the 2016 Lawsuit have been resolved. *See id.*

GPM also complains that the abatement order is indefinite, or at least unreasonably long, because it remains in effect until all appeals in the 2016 Lawsuit are resolved and the supersedeas bond is released or canceled. GPM contends that if the judgment remains undisturbed, it is possible that the bond will never be released or canceled other than by payment, and that the surety could resist payment, thus requiring more litigation. GPM further complains that if the judgment is reversed, its fraudulent transfer claim would have to await the outcome of the retrial. GPM overstates these concerns.

We affirmed the 2016 Lawsuit judgment on April 24, 2020, and a petition for review is pending in the supreme court. If the supreme court were to grant review and reverse, GPM would no longer have a viable fraudulent transfer claim and retrial would be its only path to success. Only if the supreme court declines to take up the case or affirms the judgment would GPM's speculative assertion that the surety might resist payment become relevant. Thus, it is premature to declare the abatement indefinite on that ground. Accordingly, we overrule GPM's first issue.

2. Severance

In its second issue, GPM contends that the trial court abused its discretion in severing the fraudulent transfer claims and consolidating them into the 2016 Lawsuit. According to GPM, this was an abuse of discretion because the trial court no longer has plenary jurisdiction over the 2016 Lawsuit. We note, however, that the trial court's severance order does not consolidate the fraudulent transfer claims into the 2016 Lawsuit but merely orders "[a]ny requests for relief . . . arising from or related to the [2016 Lawsuit] Judgment including those asserted in this suit must be brought in Cause No. DC-16-00853 [the 2016 Lawsuit]." Regardless, GPM's misstatement of the trial court's order does not affect our analysis.

"Any claim against a party may be severed and proceeded with separately." TEX. R. CIV. P. 41; *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 693 (Tex. 2007). "A claim is properly severable if (1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject

of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues.” *Duenez*, 237 S.W.3d at 693 (quoting *Guar. Fed. Sav. Bank v. Horseshoe Op. Co.*, 793 S.W.2d 652, 658 (Tex. 1990)). “[A]voiding prejudice, doing justice, and increasing convenience are the controlling reasons to allow a severance.” *Id.*

GPM alleged in its second amended petition that all defendants were involved in the same scheme to fraudulently transfer assets to avoid paying for the legal services at issue in the 2016 Lawsuit. Specifically, GPM alleged that Hossein “transferred all of his interest in Defendant Kid’s Depot and/or caused Defendant Kid’s Depot to transfer all of its assets, by converting that entity to a limited liability company and changing its name to SMN LLC.” GPM further alleged that “Defendants Namdar [Hossein], Kid’s Depot, and/or SMN transferred to Defendant Marjaneh, or an entity she controls, an interest in Kid’s Depot and/or SMN by approximately March 2017.” Thus, GPM asserted fraudulent transfer claims against all defendants. Given that GPM’s fraudulent transfer claim against Hossein involves the same facts and issues as the fraudulent transfer claims against Marjaneh and the two entities owned by them, the claim against Hossein was not properly severable. *See Duenez*, 793 S.W.3d at 693. The trial court effectively severed a party, instead of a cause of action, and abused its discretion by doing so. *See Nicor Expl. Co. v. Florida Gas Transmission Co.*, 911 S.W.2d 479, 482 (Tex. App.—Corpus Christi 1995, writ denied) (trial court abused its discretion in severing one party’s contract

claim from another party's contract claim based on the same contract because severing the party would not "do justice, avoid prejudice and further convenience").

Moreover, a fraudulent transfer claim must be brought as a separate lawsuit and cannot be part of a post-judgment remedy. *See Kennedy v. Hudnall*, 249 S.W.3d 520, 525 (Tex. App.—Texarkana 2008) (noting that section 24.008(a) of the Texas Uniform Fraudulent Transfers Act (TUFTA) permits creditors to bring "an action for relief against a transfer or obligation" and "since no action for relief was filed independently of the original suit in which the money judgment was granted, it must not be an action under Section 24.008(a)").² Given that GPM could not bring its fraudulent transfer claims in the 2016 Lawsuit, the trial court improperly required GPM to do so.

Namdar Parties contend the trial court did not err in severing GPM's claim against Hossein because he is not a necessary party to the fraudulent transfer claim. According to Namdar Parties, "Nothing in Chapter 24 of the Business and Commerce Code requires that the transferor be made a party to such a proceeding." We disagree.

² According to real parties, *Kennedy* suggests that GPM might seek to levy property under section 24.008(b) once a fraudulent transfer has been found and the transfer set aside, and that it may seek such relief in the 2016 Lawsuit. But that part of the *Kennedy* decision addressed "an order incident to execution and levy under" section 24.008(b), not subsection (a). *Kennedy*, 249 S.W.3d at 525. GPM's second amended petition echoes the language of section 24.008(a), thus making it clear that GPM is seeking relief under subsection (a), which requires an independent lawsuit. TEX. BUS. & COM. CODE § 24.008(a).

Under the circumstances, alleged transferor debtor Hossein is an indispensable party because the second amended petition specifically seeks injunctive relief against him as a result of the fraudulent transfer. *See In re Texas Educ. Agency*, 442 S.W.3d 753, 755 (Tex. App.—Austin 2014, orig. proceeding) (noting that a petition seeking injunctive relief should name as party defendants all those against whom the injunction must run and whose interests will be injuriously affected in order to make it effective). Specifically, the second amended petition expressly asks for “an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property,” under section 24.008(a) of TUFTA. *See* TEX. BUS. & COM. CODE § 24.008(a)(3)(A) (including an injunction against further disposition among the remedies available to a creditor).

Namdar Parties also rely on the out-of-state case, *Canty v. Otto*, No. CV095028152S, 2010 WL 797206 (Conn. Super. Ct. Feb. 4, 2010), to argue a transferor is not a necessary party. *Canty* is unpersuasive, however, because the sole relief sought was to make some of the transferred assets available to the creditor, without depriving the debtor of any assets in which he continued to have an interest. *Id.* at *5–6. No additional injunctive relief was sought against the transferor. *Id.* By contrast, GPM seeks return of the allegedly fraudulently transferred assets and injunctive relief against Hossein under TUFTA.

Because GPM seeks to enjoin Hossein under TUFTA from further disposition of the assets allegedly transferred, we conclude that Hossein is a necessary party to

GPM's fraudulent transfer claims, and the trial court abused its discretion in severing GPM's claim against him. See *In re Nationwide Ins.*, 494 S.W.3d at 712.

Having determined that the trial court abused its discretion in severing GPM's fraudulent transfer claim against Hossein, we must now determine whether GPM has an adequate remedy by appeal. See *In re Prudential Ins.*, 148 S.W.3d at 135–36. Appeal is an inadequate remedy “where a party's ability to present a viable claim or defense at trial is either completely vitiated or severely compromised.” *In re Garza*, 544 S.W.3d 836, 840 (Tex. 2018) (citing *Walker*, 827 S.W.2d at 843). “No specific definition captures the essence of or circumscribes what comprises an ‘adequate’ remedy; the term is ‘a proxy for the careful balance of jurisprudential considerations,’ and its meaning ‘depends heavily on the circumstances presented.’” *Id.* (quoting *In re Prudential Ins.*, 148 S.W.3d at 136–37).

Here, the trial court's order at issue is interlocutory because it severed and abated GPM's claims. GPM, therefore, does not have an immediate appellate remedy, and “mandamus is the appropriate avenue by which to seek review.” *Beckham Group, P.C. v. Snyder*, 315 S.W.3d 244, 245 (Tex. App.—Dallas 2010, no pet.). The question remains, however, if a later appeal provides GPM an adequate remedy. We conclude it does not.

GPM has “a substantial right to present the complete set of intertwined facts and issues germane to his claims, to one factfinder, in one proceeding, rather than in two separate suits that are all but foreordained to generate, collectively, a decision

destined to fail in the appellate process.” *Jones v. Ray*, 886 S.W.2d 817, 822 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding) (op. on reh’g). With one or more defendants missing from each case, the denial of that right may “skew the progress and entire conduct of the proceedings—with the resultant potential to affect the outcome of the litigation profoundly, and to compromise the presentation of the parties’ respective claims or defenses in ways unlikely to be apparent in the appellate record.” *Id.*

Furthermore, the trial court’s order requires GPM to bring its claim against Hossein in the 2016 Lawsuit. As previously discussed, however, GPM could not bring its claim in that suit because a fraudulent transfer claim must be brought independently of the original suit in which the money judgment was granted. *See* TEX. BUS. & COM. CODE § 24.008(a). Moreover, judgment in the 2016 Lawsuit has been issued and appeal from that judgment is already underway. Thus, GPM cannot fulfill the trial court’s order as to the severed claim and has no means by which to appeal it. Accordingly, we sustain GPM’s second issue.³

³ In its second amended petition, GPM added a request for injunctive relief against Hossein under rules of appellate procedure 24.1(e) and 24.2(d), and civil practice and remedies code section 52.006. GPM’s mandamus petition does not seek relief from the trial court’s order with respect to this request. Regardless, these provisions concern a trial court’s ability to issue post-judgment orders to protect the judgment creditor’s interests during the pendency of appeal. *See* TEX. R. APP. P. 24 (Suspension of Enforcement of Judgment Pending Appeal in Civil Cases); TEX. CIV. PRAC. & REM. CODE § 52.006 (Amount of Security for Money Judgment). Thus, any request for relief tied to the pending appeal in the 2016 Lawsuit should be resolved by the court that issued that judgment.

CONCLUSION

We conclude the trial court did not abuse its discretion in abating GPM's fraudulent transfer claims until the appeals in the 2016 Lawsuit have been resolved. However, GPM's fraudulent transfer claim against Hossein is not severable because it involves the same facts and issues as the fraudulent transfer claims against the other defendants. The trial court, therefore, abused its discretion in severing this claim and GPM lacks an adequate appellate remedy.

Accordingly, we conditionally grant GPM's petition for writ of mandamus in part and direct the trial court to vacate that portion of its January 8, 2020 order severing GPM's fraudulent transfer claim against Hossein. In all other respects, we deny GPM's petition. The writ will issue only if the trial court fails to comply.

/Robbie Partida-Kipness/
ROBBIE PARTIDA-KIPNESS
JUSTICE

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