

CONDITIONALLY GRANT and Opinion Filed July 15, 2020



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

No. 05-20-00595-CV

IN RE AHMED ZIDAN, Relator

**Original Proceeding from the 429th Judicial District Court
Collin County, Texas
Trial Court Cause No. 429-02708-2018**

MEMORANDUM OPINION

**Before Justices Bridges, Osborne, and Reichel
Opinion by Justice Osborne**

Relator Ahmed Zidan and his uncle, real party in interest Mohammed (“Alex”) Zidan, have filed competing lawsuits in different counties alleging the other’s mismanagement of their jointly owned companies. Ahmed¹ filed this suit in Collin County before Alex filed suit in Harris County. In this original proceeding, Ahmed challenges the Collin County trial court’s order abating and administratively closing his suit. Although the court did not explicitly make a finding on dominant jurisdiction, the court issued the abatement order after reviewing the parties’ briefing

¹ The parties share a surname and consequently have used first names throughout the record. For clarity, we do the same.

on the issue. We requested a response, which Alex timely filed. Because we conclude that the trial court abused its discretion by abating a case over which it acquired dominant jurisdiction, we conditionally grant the writ.

BACKGROUND

In mid-2014, Ahmed and Alex agreed to form Prime United Petroleum Holding Co., LLC (“Prime United”) in order to franchise and operate Kwik Kar oil-change stores. Ahmed alleges that he provided the initial capital investment, which Alex was to repay. Ahmed also alleges that Alex forced him to agree to make Alex the majority member of Prime United. They later formed two Kwik Kar entities—one in Lake Jackson (Brazoria County) (211 Hwy 332 Kwik Kar, LLC) and another one in Plano (Collin County) (401 Legacy Carwash LLC). The “Industrial Leases” for both stores list Prime United as the landlord.

A. Two Pending Lawsuits in Different Counties

Ahmed sued Alex first. In June 2018, Ahmed filed suit in Collin County, alleging that Alex took advantage of Ahmed in the business relationship and that Alex improperly withdrew funds from the three companies for personal expenditures and to make speculative investments without Ahmed’s consent. Ahmed asserted claims for breach of fiduciary duty, requested a declaratory judgment to clarify the division of shares between Alex and Ahmed, and sought judicial dissolution of the companies. He also requested temporary injunctive relief, seeking to enjoin Alex from taking more company money, interfering with company business, or destroying

company information during the pendency of the lawsuit. He further sought the appointment of a receiver over the Collin County property and the three companies, claiming that it was necessary to protect the company assets from further dissipation.

Ahmed later amended his petition three times. He has now dropped his request for judicial dissolution, and instead of seeking a rehabilitative receiver over all three companies, he seeks, in the alternative, a receiver over real property located in Collin County to preserve the property and to avoid additional damage during the lawsuit.

In August 2018, Alex, in turn, sued Ahmed in Harris County, individually and derivatively on behalf of the three companies. Alex alleged, among other claims, that Ahmed was the one who was using company funds for personal purposes. Alex sought an anti-suit injunction, seeking to enjoin Ahmed from pursuing his suit in Collin County. He argued that the lawsuit should have been brought in Harris County, where he lives and where Prime United is located. He also sought a declaratory judgment as to the parties' relationship to the three companies. He further asserted common law claims of fraud, breach of contract, breach of fiduciary duty and common law duties, tortious interference with contractual relations, and defamation.

1. Proceedings in Harris County

In October 2018, in the Harris County suit, Ahmed filed a motion to transfer venue and plea in abatement. That motion remains pending. Ahmed also filed a motion to dismiss under the Texas Citizens Participation Act ("TCPA"), arguing that

Alex's request for an anti-suit injunction was in response to his exercise of the right of free speech and the right to petition. Because the Harris County court failed to rule on the motion to dismiss within the prescribed statutory period, it was denied by operation of law, *see* TEX. CIV. PRAC. & REM. CODE § 27.008, and Ahmed filed a notice of appeal in March 2019. The case remains on appeal as No. 01-19-00140-CV in the First Court of Appeals, and the underlying proceedings in Harris County are stayed pending appeal.

2. Proceedings in Collin County

Meanwhile, on September 4, 2018, Alex filed a "Motion to Quash, Plea to the Jurisdiction and Motion to Dismiss for Lack of Jurisdiction, and Alternatively, Defendant's Motion to Transfer Venue, and Defendant's Special Exceptions, and Alternatively, and Subject to Same, Defendant's Original Answer" in the Collin County suit. In the motion, Alex argued that Collin County lacked jurisdiction and venue was improper because the request for injunction and appointment of receiver needed to be brought in Harris County, where Alex lives and where Prime United is allegedly located. Ahmed disputed that Prime United's Harris County address was its headquarters, claiming that the address was merely used as a convenience for collecting mail.

On December 13, 2019, after a hearing on Alex's motion, the Collin County court denied the plea to the jurisdiction. The court initially signed a January 31, 2020

order allowing limited discovery on venue issues, but later withdrew it and issued a February 14, 2020 ruling that venue was proper in Collin County.

In January 2020, the companies also moved to intervene, and in March 2020, Alex asserted new counterclaims for tortious interference based, in part, on Ahmed's allegedly false report about Alex to the Texas Real Estate Commission. On May 5, 2020, Ahmed filed a motion to dismiss Alex's tortious interference counterclaims under the TCPA, arguing that the report was an exercise of his right of free speech and his right to petition. The hearing on the motion to dismiss was originally scheduled for May 29, and then reset to June 3.

However, the trial court did not hold a hearing on Ahmed's TCPA motion to dismiss. During a May 15, 2020 hearing on Alex's motion to sever and abate his tortious interference counterclaims, the court sua sponte called for briefing on the issue of dominant jurisdiction. In his papers below, Ahmed argued that Collin County acquired dominant jurisdiction because the case was first filed there, venue was proper there, and Ahmed did not act inequitably or file the suit merely to obtain priority. Alex, in turn, argued that the first-filed rule did not apply because venue was mandatory in Harris County and Ahmed lacked a bona fide intent to prosecute the Collin County suit.

After considering the briefing, the court entered a June 1, 2020 order abating and administratively closing the Collin County case. Under the order, the abatement

will continue through final disposition of the Harris County suit, including exhaustion of any appeals.

B. This Mandamus Proceeding

Ahmed has now filed this mandamus proceeding complaining of the Collin County district court's abatement order. He seeks relief on two grounds. First, he argues that the court abused its discretion in abating the case pending resolution of the later-filed Harris County case because dominant jurisdiction lies in Collin County. Second, he argues that the order abating the Collin County case prevents him from having his TCPA motion to dismiss heard by the statutory deadline. He complains that his inability to obtain a hearing will force him to forfeit the TCPA motion.

Alex first responds that the record is insufficient to allow this Court to grant mandamus relief because Ahmed did not include a copy of the hearing transcript from the trial court's reconsideration of the dominant jurisdiction issue. We disagree, because the hearing was not an evidentiary hearing. *See* TEX. R. APP. P. 52.7(a)(2).

Alex also argues that there is dominant jurisdiction in Harris County because (1) a writ of injunction must be tried in Alex's county of residence, and (2) Ahmed's request for a receiver and (3) claims between members of Prime United, a limited liability company, must be tried in the location of Prime United's registered office and principal place of business. We address these arguments below.

ANALYSIS

Generally, to be entitled to mandamus relief, the relator must demonstrate that the trial court clearly abused its discretion and the relator has no adequate remedy by appeal. *In re Lee*, 411 S.W.3d 445, 463 (Tex. 2013) (orig. proceeding); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). When a relator seeks mandamus relief regarding a plea in abatement in a dominant jurisdiction case, however, a relator need only establish a trial court’s abuse of discretion. *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287, 299–300 (Tex. 2016) (orig. proceeding). An abuse of discretion occurs when a trial court acts without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985).

As we explain below, we conclude that Collin County has dominant jurisdiction over the two inherently interrelated suits. Ahmed filed his suit in Collin County first, venue is proper there, and he did not forfeit the first-filed rule by committing inequitable conduct.

A. Dominant Jurisdiction

When two inherently interrelated suits are pending in two counties, the court in which suit is first filed generally acquires dominant jurisdiction to the exclusion of other courts if venue is proper there. *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d at 294 (citing *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974) (orig. proceeding)); *Gonzalez v. Reliant Energy, Inc.*, 159 S.W.3d 615, 622 (Tex. 2005). This rule flows

from “principles of comity, convenience, and the necessity for an orderly procedure in the trial of contested issues.” *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d at 294.

1. “Inherently Interrelated”

For the first-filed rule to apply, the two suits must be “inherently interrelated.” The compulsory counterclaim rule guides whether two suits are “inherently interrelated.” *Id.* at 292. A counterclaim is compulsory if: (1) it is a claim within the jurisdiction of the court; (2) not the subject of a pending action; (3) which at the time of filing the pleading the pleader has against any opposing party; (4) it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim; and (5) it does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction. *See* TEX. R. CIV. P. 97(a); *In re Tex. Christian Univ.*, 571 S.W.3d 384, 389 (Tex. App.—Dallas 2019, orig. proceeding).

This Court uses a logical relationship test to determine whether counterclaims arise out of the same transaction or occurrence. *Moore v. First Fin. Resolution Enters., Inc.*, 277 S.W.3d 510, 516 (Tex. App.—Dallas 2009, no pet.). The logical relationship test is met when the same facts, which may or may not be disputed, are significant and logically relevant to both claims. *Id.* The exact issues and all the parties do not need to be included in the first action before the second is filed, provided that the claim in the first suit may be amended to bring in all necessary and proper parties and issues by counterclaim. *In re Tex. Christian Univ.*, 571 S.W.3d at 389–90.

Here, we conclude that the two suits are logically related. *See Moore*, 277 S.W.3d at 516. Although each party has a different version of events as to who was responsible for mismanaging the jointly owned companies, the same facts will be dispositive in both suits. Both parties seek a declaratory judgment regarding the disputed ownership interests in the companies, and both parties seek to recover for the other's alleged misappropriation and dissipation of company funds. Consequently, we conclude that the two lawsuits are inherently interrelated. *See id.*

2. Proper Venue

Because the first suit was filed in Collin County, the Collin County court acquired dominant jurisdiction as long as venue is proper there (subject to certain exceptions to the first-filed rule, discussed below). Venue is proper “in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred.” TEX. CIV. PRAC. & REM. CODE § 15.002(a)(1). Here, one of the two Kwik Kar stores has its principal office in Collin County. Because both lawsuits center on business disputes about these stores, we conclude that a substantial portion of the alleged events occurred in Collin County, making venue proper there.

Alex contends that venue is mandatory in Harris County instead. Alex relies on civil practice and remedies code section 65.023(a), a mandatory venue provision that provides that “a writ of injunction against a party who is a resident of this state shall be tried in a district or county court in the county in which the party is domiciled.” TEX. CIV. PRAC. & REM. CODE § 65.023(a). Alex argues that because

Ahmed seeks injunctive relief, the case must be brought in Harris County, where Alex lives. We disagree.

Section 65.023's application is limited to suits "in which the relief sought is purely or primarily injunctive." *In re FPWP GP LLC*, No. 05-16-01145-CV, 2017 WL 461355, at *2 (Tex. App.—Dallas Jan. 25, 2017, orig. proceeding) (mem. op.) (quoting *In re Cont'l Airlines*, 988 S.W.2d 733, 736 (Tex. 1998) (orig. proceeding)). Thus, it does not apply when the injunctive relief is ancillary to the other relief sought, as here, where the injunctive relief is requested simply to maintain the status quo pending resolution of the lawsuit. *See In re Ross*, No. 05-18-01052-CV, 2018 WL 6695596, at *1–2 (Tex. App.—Dallas Dec. 20, 2018, orig. proceeding) (mem. op.); *In re FPWP GP LLC*, 2017 WL 461355, at *2–3 (citing cases). Ahmed's request for injunctive relief sought to maintain the status quo during the pendency of the suit by enjoining Alex from taking more company money, interfering with company business, or destroying company information. Accordingly, Ahmed's request for injunctive relief is not the main purpose of the lawsuit but is merely "ancillary to its primary goal of" seeking damages and resolving the parties' business disputes. *In re Fox River Real Estate Holdings, Inc.*, 596 S.W.3d 759, 768 (Tex. 2020) (orig. proceeding).

Alex also argues that venue is mandatory in Harris County because Ahmed has requested a receiver. Again, we disagree. Even if Ahmed's original petition had requested a rehabilitative receiver over all three companies, he later amended his

petition to limit this request to a receiver over real property in Collin County to preserve it during the pendency of the proceedings.² Thus, the request for a receiver is also an ancillary request for relief, *see In re Ameri-Fab, LLC*, No. 05-17-01458-CV, 2018 WL 739791, at *2 (Tex. App.—Dallas Feb. 7, 2018, orig. proceeding) (mem. op.), and accordingly does not implicate mandatory venue provisions.

3. Exceptions to the First-Filed Rule

Because venue is proper in Collin County, and Ahmed’s suit there was filed first, Collin County has dominant jurisdiction over the case unless an exception to the first-filed rule applies. “A plaintiff who filed the first suit may be estopped from asserting the dominant jurisdiction of the first court if it is found that he is guilty of inequitable conduct.” *In re Tex. Christian Univ.*, 571 S.W.3d at 391. Here, Alex argues that Ahmed is guilty of inequitable conduct. Alex insists that Ahmed filed the first-filed suit merely to obtain priority, without a “bona fide intention to prosecute the suit.” *See id.* Pointing to service issues and a ten-month period in which Ahmed

² To the extent Alex argues that sections 11.401 and 11.404 of the Texas Business Organizations Code mandate that a dispute between members of an LLC must be brought in the county of the principal place of business or registered office of Prime United, his reliance on these provisions is misplaced. These provisions concern the appointment of a receiver. After amending the pleadings, Ahmed now seeks a receiver only over real property located in Collin County (and not over Prime United) to preserve the property and avoid additional damage during the lawsuit. Thus, Prime United is no longer implicated by these provisions.

was allegedly inactive in the Collin County suit, Alex contends that Ahmed's neglect of the Collin County case demonstrates his lack of intent to prosecute the suit.

The supreme court has "said that 'the mere physical filing of the petition is not sufficient'" to establish the requisite intent. *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d at 295 (quoting *V.D. Anderson Co. v. Young*, 101 S.W.2d 798, 800–01 (Tex. 1937) (orig. proceeding)). Instead, "the first-filer must exhibit 'actual diligence thereafter in getting out citation and otherwise prosecuting his suit.'" *Id.* (quoting *Reed v. Reed*, 311 S.W.2d 628, 631 (Tex. 1958)).

We conclude, however, that such diligence was exhibited here. In *Reed*, the supreme court held that a first filer who delayed requesting a citation for service of process for fifteen months did not exhibit actual diligence. 311 S.W.2d at 631. Other courts have consistently held that unexplained delays of five to six months establish a lack of actual diligence. *See S. Cty. Mut. Ins. Co. v. Ochoa*, 19 S.W.3d 452, 462 (Tex. App.—Corpus Christi—Edinburg 2000, orig. proceeding) (collecting cases). By contrast, in *Curtis v. Gibbs*, the supreme court held that a delay of 26 days in procuring and serving a citation was not a lack of actual diligence as a matter of law. 511 S.W.2d at 267–68.

Here, only 49 days elapsed between filing suit and requesting a citation. Ahmed also made efforts to effect informal service: he asked Alex to accept informal service on June 29, and again on July 30, before formally serving him on August 9, 2018. *See In re J.B. Hunt Transp., Inc.*, 492 S.W.3d at 296 (noting that attempts to

obtain waivers of personal service are “quintessential acts of prosecuting a suit”). “As a legal matter, where a party has a cause of action, files suit, and immediately takes steps to advance that suit, that party cannot be said to lack the bona fide intent to prosecute its case.” *Id.* at 297. Here, Ahmed responded to the motion to quash, filed a TCPA motion to dismiss, and pursued this original proceeding, among other things. Because Ahmed took immediate steps to effect informal service, obtained a citation when informal service was unsuccessful, and continued to move forward with the case despite some period of inactivity, we conclude Ahmed is not estopped from asserting the dominant jurisdiction of the Collin County court. *See In re Tex. Christian Univ.*, 571 S.W.3d at 391–92. Because Ahmed filed his Collin County suit first, venue is proper there, and no exceptions to the first-filed rule apply, we conclude that Ahmed has shown his entitlement to mandamus relief on the ground that Collin County has dominant jurisdiction.

B. TCPA Motion to Dismiss

The trial court’s abatement order prevented Ahmed from securing a timely hearing on his motion to dismiss under the TCPA.³ Ahmed filed his motion on May 5, 2020, and obtained settings for a hearing on the motion on May 29 and June 3, 2020, before the trial court abated the proceedings by order of June 1, 2020. Ahmed’s

³ As we have explained, Ahmed also filed a TCPA motion to dismiss in the Harris County suit. That motion was denied by operation of law and is currently on appeal in the First District Court of Appeals. Here, we discuss only Ahmed’s TCPA motion to dismiss Alex’s tortious interference counterclaim filed in Collin County.

60-day deadline would have expired on July 6, 2020, had the trial court not abated the suit. *See* TEX. CIV. PRAC. & REM. CODE § 27.004(a).

“TCPA dismissal motions must be heard and resolved on an expedited basis.” *In re Herbert*, No. 05-19-01126-CV, 2019 WL 4509222, at *2 (Tex. App.—Dallas Sept. 19, 2019, orig. proceeding) (mem. op.). A TCPA movant forfeits the motion if it fails to request and obtain a timely hearing. *Id.* “[T]he trial court must set a TCPA motion to dismiss for hearing within the applicable statutory deadline . . . if the movant makes reasonable efforts to obtain a timely hearing.” *Id.* Mandamus will issue to correct a trial court’s refusal to do so. *Id.* at *3.

We have also concluded that mandamus is appropriate where a trial court’s erroneous abatement effectively denies a plaintiff “any other method of challenging the court’s action for an indefinite period of time during which the cause of action remains in a suspended state.” *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.). We explained that even when an abatement is not indefinite, if it denies a party the right to proceed within a reasonable time, the party has no adequate remedy by appeal and mandamus may issue. *See id.* We conclude that Ahmed has shown his entitlement to mandamus relief. *See In re Herbert*, 2019 WL 4509222, at *2–3.

We further conclude that the trial court’s erroneous abatement of the suit constitutes “good cause” under TCPA section 27.004(a) for extending the 60-day

deadline to hear Ahmed’s motion to dismiss. Section 27.004(a) provides that “in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).” TEX. CIV. PRAC. & REM. CODE § 27.004(a). Consequently, the trial court must hear Ahmed’s motion no later than 90 days after May 5, 2020.

CONCLUSION

We conditionally grant Ahmed’s petition. We direct the trial court to vacate its order of June 1, 2020, abating Ahmed’s Collin County suit. We further direct the trial court to reinstate the case on its regular docket for further proceedings including timely disposition of Ahmed’s TCPA motion to dismiss.

/Leslie Osborne/
LESLIE OSBORNE
JUSTICE

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