Conditionally Granted and Opinion Filed July 30, 2020

In the
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00431-CV

IN RE OUTREACH HOUSING CORP., COLONIAL EQUITIES, INC., RICHARD SHAW, AND RICHARD C. RUSCHMAN, Relators

Original Proceeding from the 160th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-18-10026

OPINION

Before Justices Whitehill, Pedersen, III, and Carlyle
Opinion by Justice Carlyle

Relators Outreach Housing Corp., Colonial Equities, Inc., Richard Shaw, and Richard C. Ruschman request that this Court issue a writ of mandamus directing the trial court to vacate a March 20, 2020 order reopening a case and denying their motion to dismiss or stay enforcement of what they characterize as an interlocutory default judgment. We agree with relators and conditionally grant a writ of mandamus directing the trial court to vacate its March 20, 2020 order denying the motion to dismiss or stay.

To prevail, relators must show both an abuse of discretion and that they have no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding).

In 2006, real parties in interest Milo Calder and R. Steven Sanders sued relators Outreach and Colonial but did not sue either Shaw or Ruschman. RPIs obtained an October 20, 2006 default judgment for certain net profits of Outreach and Colonial, attorney's fees, and costs. Default judgments do not enjoy the same presumption of finality that judgments after trial on the merits do. *In re Burlington Coat Factory Warehouse of McAllen, Inc.*, 167 S.W.3d 827, 829 (Tex. 2005) (orig. proceeding). The 2006 judgment failed to address—at least—RPIs' claim for prejudgment interest, meaning the judgment is not final. *Sudderth v. Phillips*, No. 05-02-01039-CV, 2003 WL 1752503, at *1 (Tex. App.—Dallas Apr. 3, 2003, pet. denied) (mem. op). Beyond not disposing of all claims, the judgment also included no Mother Hubbard language. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001). The 2006 default judgment was not final. *See In re Burlington*, 167 S.W.3d at 830 (concluding judgment was not final even though it awarded costs).

In 2017, the trial court granted RPIs' writ of scire facias, reviving the 2006 judgment. *See* TEX. CIV. PRAC. & REM. CODE § 31.006 (governing revival of judgments). The court denied Outreach's and Colonial's motion to dismiss in October 2019, and in December 2019, denied Outreach's and Colonial's motion to

vacate the judgment, which they characterized as interlocutory. They did not attempt to appeal.[1]

In 2018, RPIs filed the current suit against all four relators, seeking an accounting as to Outreach and Colonial and claiming fraudulent transfers and breach of fiduciary duty by Shaw and Ruschman, the respective presidents and majority shareholders of those entities. RPIs' petition in the current suit seeks to enforce the revived 2006 default judgment. Relators moved to dismiss or stay enforcement of the 2006 judgment, the trial court denied the motion, and relators seek mandamus based on that denial.

The trial court abused its discretion by denying that motion to stay because, as we concluded, the 2006 judgment is interlocutory and may not be enforced. *See In re Burlington*, 167 S.W.3d at 831 (interlocutory judgment may not be enforced through execution). Because there is no final judgment in the 2006 case, the trial

[1] Relators could have filed a notice of appeal as to the December 2019 order, and it is possible this Court would have exercised its discretion under Texas Rule of Appellate Procedure 27.2 to abate the appeal and remand the cause to the trial court for entry of a final judgment disposing of all claims, like our sister court did in *Preiss v. Moritz*, 60 S.W.3d 285, 286 (Tex. App.—Austin 2001), *rev'd on other grounds*, 121 S.W.3d 715 (Tex. 2003). But the potential for this Court to have exercised its discretion to not allow the trial court to cure renders this too speculative a basis to support a conclusion that this would qualify as an adequate appellate remedy. *See Cook v. Broussard*, No. 01-19-00483-CV, 2020 WL 1917841, at *3–4 (Tex. App.—Houston [1st Dist.] Apr. 21, 2020, pet. filed) (mem. op.) (concluding court of appeals lacked jurisdiction to consider challenge to interlocutory order and stating "A petition for writ of mandamus—not an unauthorized interlocutory appeal—is the proper procedural device to challenge a trial court's action where a litigant believes the court has clearly abused its discretion . . . and there is no adequate remedy by appeal."); *see also In re State*, No. 08-15-00165-CR, 2015 WL 4133793, at *3 (Tex. App.—El Paso July 8, 2015, orig. proceeding) (not designated for publication) (concluding State's "conditional right to appeal" in event of certain circumstances was "far too speculative and uncertain to constitute an adequate remedy").

court abused its discretion but only by not staying the current litigation seeking to enforce the 2006 interlocutory judgment.[2]

Next, because there is no final judgment from which relators Outreach and Colonial could have appropriately appealed in the 2006 case,[3] and because allowing the current litigation seeking to enforce a non-final judgment would cause relators Outreach and Colonial to lose forever the chance to exercise their right to supersede an adverse judgment during the pendency of an appeal, we conclude they have no adequate remedy by appeal. *See In re Tarrant Cty.*, 16 S.W.3d 914, 918–19 (Tex. App.—Fort Worth 2000, orig. proceeding) (recognizing that where right to supersede adverse judgment would be lost forever, appeal is inadequate remedy); *see also In re Burlington*, 167 S.W.3d at 831 (recognizing there is no adequate remedy by appeal as to trial court's abuse of discretion in permitting execution for interlocutory judgment).

As to Shaw and Ruschman, an appeal is an inadequate remedy if "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) (orig.

[2] Because the trial court never entered a final judgment in the 2006 case, it retains the power to do so. *See In re Panchakarla*, No. 19-0585, 2020 WL 2312204, at *2 (Tex. May 8, 2020) (orig. proceeding) ("We have long recognized that trial courts retain plenary power over their judgments until they become final . . . and during that time, the court may grant a new trial or vacate, modify, correct, or reform the judgment . . . ."); *In re Burlington*, 167 S.W.3d at 831 ("Because the default judgment was interlocutory, the trial court retained jurisdiction to set the judgment aside and order a new trial.").

[3] They might have petitioned this Court for writ of mandamus based on the August 2017 grant of the writ of scire facias. Though service of that grant was returned unexecuted in February 2018, relators resumed litigation in that case in January 2019.

proceeding) (citing *Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992) (orig. proceeding)). Though Shaw and Ruschman were not parties to or mentioned in the 2006 judgment, the fraudulent transfer claims against them alleged in part that they caused "judgment debtors" Outreach and Colonial to transfer assets to them with "intent to hinder, delay, or defraud plaintiffs, the judgment creditors." The motion to dismiss or stay asserted that claims against the defendants, including Shaw and Ruschman, were "predicated on" the 2006 judgment. On this record, we conclude appeal would also be an inadequate remedy as to Shaw and Ruschman. *See id*.

Because both mandamus prongs have been satisfied, we conditionally grant the petition for writ of mandamus based on the trial court's abuse of discretion by denying relators' motion to stay. We direct the trial court to (1) vacate its March 20, 2020 order denying the motion to stay enforcement of the 2006 judgment and (2) grant a stay of enforcement of that judgment pending further proceedings consistent with this opinion. If the trial court fails to do so, the writ will issue.

/Cory L. Carlyle/
CORY L. CARLYLE
JUSTICE

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