Conditionally Grant Petition for Writ of Mandamus and Opinion Filed December 14, 2009

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-09-00332-CV

BEHRINGER HARVARD ROYAL ISLAND, LLC, BEHRINGER HARVARD HOLDINGS, LLC, BEHRINGER HARVARD RI LENDER, LLC, ROYAL ISLAND PARTNERS, LP, CYPRESS EQUITIES, LLC, CHRISTOPHER C. MAGUIRE, ROYAL ISLAND BAHAMAS, LTD, CYPRESS ROYAL ISLAND GP, LP, CYPRESS ROYAL ISLAND GP, LLC, AND iSTAR FINANCIAL, INC., Appellants

V.

SHANNON B. SKOKOS AND THEODORE C. SKOKOS, Appellee

On Appeal from the 68th Judicial District Court
Dallas County, Texas
Trial Court Cause No. 08-15802-C

MEMORANDUM OPINION

Before Justices O'Neill, Francis, and Lang
Opinion By Justice O'Neill

In this appeal, appellants Behringer Harvard Royal Island, LLC, Behringer Harvard Holdings, LLC, Behringer Harvard RI Lender, LLC, Royal Island Partners, LP, Cypress Equities, LLC, Christopher C. Maguire, Royal Island Bahamas, Ltd, Cypress Royal Island GP, LP, Cypress Royal Island GP, LLC, and iSTAR Financial, Inc. contend the trial court abused its discretion in entering an interlocutory order that requires $10 million of appellants' funds to remain in the court's registry pending trial on the merits. Appellants/Relators Behringer Harvard Royal Island, LLC, Behringer

Harvard Holdings, LLC, and Behringer Harvard RI Lender, LLC have also filed a writ of mandamus complaining of the same order. Because we conclude we do not have jurisdiction over the interlocutory appeal, we dismiss the appeal for want of jurisdiction. However, because we conclude the trial court clearly abused its discretion in entering the order and relators have no adequate remedy at law, we conditionally grant the writ of mandamus.

Appellants are various real estate developers, real estate investors, lenders and related entities associated with a real estate development project to construct a planned resort and residential community on a private island in the Bahamian Islands. The resort, known as Royal Island, was to include shopping, a luxury hotel, marina, golf course, and various other amenities. Royal Island Partners, LP (RIP) was the entity created to develop the project.

In January 2008, the developers marketed the resort to the Skokoses. According to the Skokoses, the developers made numerous material misrepresentations about the project and its financial stability. By doing so, the Stokoses allege, the developers convinced them to purchase four villas on the island at a total price of $17.5 million, one for a personal home and three more for resale. However, for taxation and marketing purposes, the parties agreed that the Skokoses would obtain the villas by investing as a partner in the project. Consequently, the Skokoses were admitted into Royal Island Partners, L.P. as Series X limited partners. As such, they had an interest only in the profits and losses of the four specified villas, not the project as a whole. The Skokoses later decided they wanted an additional lot for the villa that was to be their personal home. Consequently, in the summer of 2008, they invested an additional $2 million in the partnership, raising their total investment to $19.5 million.

According to the Skokoses, the partnership agreement required their funds to remain in an escrow account, to be used solely for the construction of their four villas. The Skokoses later

became concerned about how their funds were being expended and requested an "accounting." The Skokoses discovered that the funds they had wired into an RIP account had been transferred to a Royal Island Bahamas, LLP (RIB) account, which was the operating account for the partnership. The funds were then being expended on infrastructure costs for the project as a whole. The project was also being funded by a $60 million bridge loan. The bridge loan was fully secured. The bridge lenders specifically had a security interest in the RIB operating account.

In the fall of 2008, after the stock market decline, the Skokoses discovered the project was facing serious problems. They allege they had been previously told that the project had sufficient capital and/or capital commitments for completion. They were now told that if the partnership could not raise additional capital, RIP would have to stop work on the project. They also discovered the partnership had defaulted on the bridge loan by failing to meet certain developmental milestones. At least two lenders were threatening foreclosure.

In December 2008, the Skokoses filed suit and sought a temporary restraining order and temporary injunction requiring appellants to deposit $19.5 million of funds allegedly belonging to the Skokoses into the court's registry. Following a hearing on the TRO, the trial court ordered appellants to deposit $19.5 million into the registry of the court. Later, at the hearing on the temporary injunction, the evidence showed that the Skokoses' initial $19.5 million was transferred from the RIP account into the RIB operating account. Most of those funds were then spent on infrastructure costs for the project as a whole. However, when suit was filed, there was about $20 million in the RIB account. The source of these funds, which were deposited into the court's registry pursuant to the TRO, was a recent funding of the bridge loan.

Following the hearing, the trial court entered a "temporary injunction" order which contains two components. First, it required $10 million of the $19.5 million previously deposited into the

registry to remain there until trial on the merits.[1] The order also enjoined appellants from "encumbering, pledging, transferring, removing, or seeking the removal, transfer or other disposition" of that same $10 million. Appellants assert this interlocutory appeal is authorized because they are appealing a temporary injunction. However, the portion of the order that purports to grant injunctive relief has no legal effect because appellants have no control over the $10 million, which is in the court's registry. We conclude that portion of the order is moot. *Faddoul, Glasheen & Valles v. Oaxaca*, 52 S.W.3d 209, 212 (Tex. App.–El Paso 2001, no writ)(order enjoining a defendant from "transferring, spending, encumbering, or impairing" certain funds was moot because funds were deposited into the court's registry.). Thus, the only portion of the order that has any legal effect is the portion that requires $10 million to remain in the court's registry pending trial on the merits.

In *McQuade v. E.D. Sys. Corp.*, 570 S.W. 2d 33, 33 (Tex. Civ. App. –Dallas 1978, no writ), the trial court entered an order that required the defendant to deliver funds to the sheriff pending resolution of a breach of contract suit. The purpose of the writ was to ensure sufficient funds were kept in the State for satisfaction of any judgment the plaintiff might obtain pending resolution of the case. *Id.* at 35. We held the order was a writ of attachment and was not a temporary injunction. *Id.* at 34-35. Because no interlocutory appeal lies from a pretrial writ of attachment, we dismissed the appeal for want of jurisdiction. Other courts have likewise held that orders that require funds be deposited into the registry of the court are not granting injunctive relief and no interlocutory appeal lies from such orders *See Structured Cap. Res. Corp. v. Arctic Cold Storage*, LLC, 237 S.W.3d 890, 894 (Tex. App.–Tyler 2007, no writ); *Faddoul,* 52 S.W.3d at 212; *Diana Rivera & Assoc.*, 986

[1] It is unclear why the trial court released $9.5 million.

S.W.2d 795, 798 (Tex. App. Corpus Christi 1999, writ denied). We conclude the appealed from order does not grant injunctive relief. Because there is no authority for an interlocutory appeal from the order, we dismiss the appeal for want of jurisdiction.

Relators have also filed a petition for writ of mandamus complaining of the trial court's order. To be entitled to mandamus relief, a relator must generally show both (1) the trial court clearly abused its discretion, and (2) it has no adequate remedy at law. *In re Prudential Insurance Co. of Am.*, 148 S.W.3d 124, 135-35 (Tex. 2004). A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law or if it clearly fails to correctly analyze or apply the law. *In re Cerberus Capital Mgmt., L.L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (original proceeding). A trial court has no discretion in determining what the law is or in applying the law to undisputed facts. *Prudential*, 148 S.W.3d at 135.

Whether an appellate remedy is "adequate" so as to preclude mandamus review depends heavily on the circumstances presented and is better guided by general principles than by simple rules. *Id.* at 137. The word "adequate" is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts. *Id.* at 136.

By requiring relators to deposit funds in the registry, the trial court has effectively attached their property. *Cf. Sharman v. Schuble*, 846 S.W.2d 574, 575 (Tex. App.–Houston [14th Dist.] 1993, no pet.) (trial court's order requiring funds be deposited in court's registry constituted improper writ of attachment); *see also MBank New Braunfels, N.A., v. FDIC*, 721 F. Supp. 120, 126 (N.D. Tex. 1989) (plaintiff seeking "injunction" requiring deposit of money in court's registry was in nature of attachment and must satisfy requirements of attachment), superceded by statute on other grounds as noted in *Senior Unsecured Creditors Comm. of First RepublicBank Corp. v. FDIC*, 749 F.Supp. 758

(N.D. Tex. 1990). To be entitled to an attachment, the applicant must comply with the provisions of the Texas Civil Practice and Remedies Code applicable to attachments. *Cf. MBank New Braunfels, N.A.*, 721 F. Supp. at 126. Pre-judgment attachment is a particularly harsh and oppressive remedy. *Carpenter v. Carpenter*, 476 S.W.2d 469, 470 (Tex. Civ. App.–Dallas 1972, no writ); *In re Argyll Equities, L.L.C.*, 227 S.W.3d 268, 271 (Tex. App. –San Antonio 2007, no pet.). Consequently, the statutes and rules governing this remedy must be strictly followed. *Carpenter*, 476 S.W.2d at 470; *Argyll Equities*, 227 S.W.3d at 271.

The Skokoses did not file an application for a writ of attachment or purport to meet the requirements of such a writ. Rather, the only basis for the trial court's order is the Skokoses petition for a temporary injunction. A litigant cannot avoid the strict requirements of a writ of attachment by calling it by another name. Under these circumstances, we conclude the Skokoses and the trial court did not strictly comply with chapter 61 of the civil practice and remedies code and rule 592 of the rules of civil procedure which concern the requirements for issuance of writs of attachment. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 61.001-61.082. (Vernon 2008); TEX. R. CIV. P. 592. Because these provisions were not strictly followed, the trial court clearly abused its discretion in ordering that $10 million remain in the registry of the court. *See Harper v. Powell*, 821 S.W.2d 456, 458 (Tex. App.–Corpus Christi 1992, no writ); *Lane v. Baker*, 601 S.W.2d 143, 145 (Tex. Civ. App.–Waco 1980, no writ).

In reaching this conclusion, we recognize that a trial court does have some inherent authority, without implicating the attachment statutes, to order a defendant to deposit funds into the court's registry. *See Castillega v. Camero*, 414 S.W.2d 431, 433 (Tex. 1967); *N. Cypress Med. Ctr. Op. Co. v. St. Laurent*, 14-09-00204, 2009 WL 2365587, *6 (Tex. App.–Houston [14th Dist.] 2009, no writ). However, this authority arises when there is a dispute about a particular fund. *See Castillega*, 414

S.W.2d at 431. Specifically, if a plaintiff can show a dispute about a fund and show the fund is in danger of being depleted, the trial court can order the fund be deposited in the court's registry. *See Castillega*, 414 S.W.2d at 433-34. In this case, the Skokoses did not direct the trial court and have not directed this court to any evidence that it had an ownership interest in the particular fund the trial court ordered deposited in the court's registry. To the contrary, the evidence showed that, at the time suit was filed, the majority of the Skokoses' funds had already been used to pay for infrastructure costs for the project as a whole. The actual funds that were in RIB's operating account at the time of the trial court's order were proceeds from the bridge loan that had just been funded. Not insignificantly, the lenders had a security interest in these funds. The Skokoses' investment, on the other hand, was not secured. *Cf. Frederick Leyland & Co. v. Webster Bros. & Co.*, 283 S.W. 332, 335 (Tex. Civ. App.–Dallas 1926, writ dism'd) (prejudgment attachment denied debtor asserting unsecured liquidated claim for damages). We conclude a trial court does not have authority - beyond the purview of the attachment statutes - to order that funds be deposited in the court's registry to generally secure payment of a possible future judgment. Thus, the trial court clearly abused its discretion in requiring relators to deposit the funds in the court's registry.

We further conclude relators do not have an adequate remedy at law. The effect of the trial court's order is to improperly deny the partnership access to $10 million of its capital. The evidence showed the partnership needs the funds to continue the development of the project to allow the partnership to meet current obligations, and to attempt to raise additional capital for the project. Consequently, withholding the partnership's access to the funds will further jeopardize the project. We conclude relators do not have an adequate remedy at law. *See Argyll,* 227 S.W.3d at 273. Therefore, we conditionally grant the petition for writ of mandamus. We direct the trial court,

within thirty days of the date of this order, to vacate its order requiring the funds remain in the court's registry. A writ will issue only in the event the trial court fails to do so.

MICHAEL J. O'NEILL
JUSTICE

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