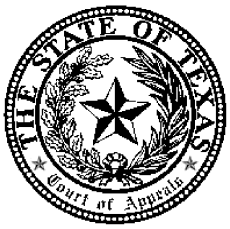
Affirmed and Opinion filed October 18, 2001.



In The

Fourteenth Court of Appeals

NO. 14-01-00626-CV

J. ALAN STANLEY, DAVID H. ZIENTARA, TEXAS CARDIOVASCULAR INSTITUTE OF AMERICA, P.A. MONEY PURCH PENSION PLAN, CLIFFORD M. KITTEN, M.D., OAKS RANCH, L.L.C., DEMETRIUS GIANOPOULOUS, WILLIAM HERBERT FANNING III, BARRY E. EATON, TERENCE M. DOYLE, SUSAN J. DOYLE, TAYLOR M. DOYLE, JEFFREY H. CHARNOV, M.D., ROBERT C. BORDEN, EMANUEL PAUL DESCANT II, M.D., KENNETH M. ALO, M.D., ARDESHIR VARAHRAMI, SOHRAB VARAHRAMI, GEORGE V. SOWERS, JR., EQUITABLE TRUST CO., CUSTODIAN FOR THE IRA OF GEORGE V. SOWERS, EQUITABLE TRUST CO., CUSTODIAN FOR THE IRA OF HOWARD M. SOWERS, WILLIAM M. MORDECAI, BARBARA S. MORDECAI, USA PROPERTY HOLDINGS, L.L.C., WILLIAM TODD MORDECAI, PAUL CARRAWAY, DAVID CARRAWAY, JOANNE M. THURSTON, DONALD BRETT MORTON, DONALD BRETT MORTON, JR., ROBERT S. ANDERSON, RICHARD E. COLLIER JR., M.D., MARK DANNER, JAMES R. DANNER, MICHAEL DANNER, FRANKLIN M. DOUGLIS, M.D., GARY ENGLAND, ROBERT HUSTON, SPARKLE HUSTON, TOMMY LEE, JOSEPH M. PERLMAN, M.D., BRUCE A. PLANT, BRUCE A. PLANT FAMILY TRUST, JOSEPH A. QUECK, CARY STERNICK, FRANK TURNER, ROBERT ZIRL, M.D., JOY ELIZABETH KARGE, OLIVIA QUINTOS, JERRY VERNON EDWARDS, RICHARD S. WILKENFELD, AND MOHAMMAD ATHARI, M.D., Appellants

V.

RON HICKMAN, HARRIS COUNTY CONSTABLE FOR PRECINCT 4, ROBERT MICHAEL CASEY, D/B/A LONE STAR TRANSFER & STORAGE CO., AND C&W TRANSFER & STORAGE, INC., A TEXAS CORPORATION, Appellees

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On Appeal from the 113th District Court
Harris County, Texas
Trial Court Cause No. 01-28837

M E M O R A N D U M O P I N I O N

By interlocutory appeal, appellants, a group of investors, assert that the trial court abused its discretion when it denied their application for a temporary injunction setting aside the June 4, 2001 public sale of 126 vehicles by appellee Ron Hickman, Harris County Constable for Precinct 4. The trial court refused to compel Hickman to accept the non-cash bid that appellants tendered at the June 4, 2001 sale. Finding no abuse of discretion, we affirm the trial court's order denying temporary injunction.

Background

Appellants filed a DTPA lawsuit against Patrick M. MacMillan, individually and d/b/a MacMillan & Company, Ltd. (collectively, "MacMillan"). Appellants also applied for a pre-judgment attachment of 138 vehicles that appellants asserted were owned by MacMillan. Hickman's predecessor-in-office, Constable Moore, directed Lone Star Transfer & Storage Co. to pick up and store these vehicles and their related parts and accessories. Harold Linderholm intervened in the lawsuit. He claimed that 11 of the attached vehicles belonged to him rather than to MacMillan. Lone Star also intervened seeking to have the reasonable and necessary costs of picking up and storing the vehicles taxed as a cost of court in favor of Lone Star. The trial court granted summary judgment in favor of appellants and against MacMillan for $8,411,976.30 in actual damages, $50,000 in attorney's fees,

$2,803,992.10 in prejudgment interest, and postjudgment interest.

After trial of the two interventions, the trial court granted final judgment, disposing of all claims, as follows: (1) the court entered judgment against MacMillan based on the previous summary judgment; (2) the court ruled in Linderholm's favor on his intervention, dissolving the writ of attachment and awarding him possession of his 11 vehicles; (3) the court found that the reasonable and necessary costs of picking up and storing the 138 vehicles seized under the writ of attachment during the case was $402,679.26; (4) the court found that, as between Lone Star and appellants, the $402,679.26 should be taxed against appellants and in favor of Lone Star as court costs under Texas Rule of Civil Procedure 141 because appellants had represented to the court that MacMillan owned all 138 vehicles, even though Linderholm owned 11 of them, and because the reasonable value of the vehicles seized under the writ of attachment requested by appellants was substantially less than the reasonable and necessary costs of picking up and storing these vehicles; (5) the court ordered appellants' attachment lien in 126 of the cars foreclosed and ordered these vehicles sold by Hickman in the manner provided by law for writs of execution; and (6) the court ordered that, in distributing the proceeds from the sale, Hickman should pay the first $402,679.26 to Lone Star and that, if the proceeds were less than this amount, the difference should be taxed as a cost of court to appellants.

On June 4, 2001, Hickman held a public sale of these 126 vehicles, as ordered by the final judgment. At the temporary-injunction hearing, appellants' counsel testified as follows: (1) that he tendered a partial assignment of appellants' judgment to the constable, (2) that this assignment is Exhibit C to appellants' petition, (3) that appellants tendered no cash amount as part of their bid, and (4) that appellants tendered no amount towards payment of any court costs.[1] Hickman refused to accept appellants' bid and sold the vehicles

[1] The "Partial Assignment of Judgment" attached to appellants' original petition states that appellants tender a check "in the amount of $774.59, payable to the order of the Constable, as costs taxed on the execution"; however, appellants did not offer this document or a copy of any alleged check for $774.59 into evidence at the temporary-injunction hearing.

to Lone Star. On June 5, 2001, appellants filed this lawsuit against Hickman, Lone Star, and C&W Transfer & Storage, Inc., a Texas corporation, seeking a temporary restraining order, temporary injunction, and declaratory relief setting aside the June 4, 2001 sale and requiring Hickman to accept the non-cash bid that appellants tendered on June 4, 2001.

Issue Presented on Appeal

In one issue, appellants challenge the trial court's denial of their application for a temporary injunction. We can sustain this issue only if we find an abuse of the trial court's discretion to deny injunctive relief. *City of Houston v. Southwestern Bell Tel. Co.*, 263 S.W.2d 169, 171 (Tex. Civ. App.—Galveston 1953, writ ref'd). An abuse of discretion in denying injunctive relief arises only when the record reflects that the findings of the trial court necessary to sustain its order are not supported by some evidence of a substantial and probative character. *Id.*

No Abuse of Discretion

The trial court exercised its discretion to set the amount of court costs and, as between appellants and Lone Star, the trial court elected to assess court costs against appellants under Rule 141, which states that "[t]he court may, for good cause, to be stated on the record, adjudge the costs otherwise than as provided by law or these rules." TEX. R. CIV. P. 141; *see Rogers v. Walmart Stores, Inc.*, 686 S.W.2d 599, 601 (Tex. 1985); *State v. Castle Hills Forest, Inc.*, 842 S.W.2d 370, 373 (Tex. App.—San Antonio 1992, writ denied); *Granville v. Sheriff of Fayette County*, 342 S.W.2d 464, 466 (Tex. Civ. App.—Austin 1961, no writ). The trial court apparently found that Lone Star is an innocent storage facility that incurred substantial storage expenses as a result of the writ of attachment obtained by appellants. The trial court's judgment requires that the proceeds of the sale be paid to Lone Star before appellants.

To make a valid bid, appellants, at a minimum, had to tender cash payment of the costs, which were at least $774.58 based on the direct costs of the sale. *See Texas Building*

& Mortgage Co. v. Morris, 123 S.W.2d 365, 368-69 (Tex. Civ. App.—Beaumont 1938, writ dism'd). At the temporary-injunction hearing, the trial court heard evidence of a substantial and probative character that would support a finding that appellants tendered no cash payment of costs as part of their bid at the June 4, 2001 sale. Appellants' counsel testified that appellants tendered no cash amount as part of their bid. Furthermore, the trial court's judgment did not indicate that appellants could bid by tendering a written assignment of part of their judgment against MacMillan, yet this is how appellants attempted to bid. The record reflects that the findings necessary to sustain the trial court's order are supported by some evidence of a substantial and probative character. Therefore, the trial court did not abuse its discretion in denying injunctive relief. *See City of Houston*, 263 S.W.2d at 171.

We overrule the sole issue presented on appeal and affirm the trial court's order denying appellants' application for a temporary injunction.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed October 18, 2001.
Panel consists of Justices Anderson, Hudson, and Frost.
Do Not Publish — TEX. R. APP. P. 47.3(b).