LEIGH ANN SCHELL AND MCGREADY L. RICHESON	*	**NO. 2018-C-0239**
	*	
VERSUS		**COURT OF APPEAL**
	*	
KUCHLER POLK SCHELL WEINER & RICHESON, L.L.C.	*	**FOURTH CIRCUIT**
		STATE OF LOUISIANA

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APPLICATION FOR WRITS DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2017-03122, DIVISION "F"
Honorable Christopher J. Bruno, Judge

* * * * * *

Judge Rosemary Ledet

* * * * * *

(Court composed of Judge Rosemary Ledet, Judge Sandra Cabrina Jenkins, Judge Paula A. Brown)

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WRIT GRANTED, JUDGMENT REVERSED, REMANDED WITH INSTRUCTIONS; AND MOTION TO STAY DENIED AS MOOT

MARCH 23, 2018

The Relator—Kuchler Polk Weiner, L.L.C., formerly known as Kuchler Polk Schell Weiner & Richeson, L.L.C. ("Kuchler")—seeks review of the trial court's March 15, 2018 ruling, denying its Motion to Continue Trial, to Reset as Jury Trial, and to Issue Jury Bond (the "Motion to Continue"). We grant the Relator's writ; reverse the trial court's ruling denying the Relator's motion to reset the matter as jury trial; remand with instructions; and deny the Relator's motion to stay as moot.

FACTUAL AND PROCEDURAL BACKGROUND

On April 3, 2017, Leigh Ann Schell and McGready Richeson ("Respondents") commenced this suit against Kuchler. On June 12, 2017, Kuchler answered the suit. In its answer, Kuchler included a jury demand, "pray[ing] for trial by jury on all issues, so triable, in this matter." At the time of filing its answer, Kuchler paid the filing fee for an answer with a jury trial.[1]

On January 24, 2018, the trial court held a pre-trial conference to select a trial date. At the pre-trial conference, attorneys for both parties and the trial judge signed a pre-trial notice stating that "[t]he trial date in this matter is scheduled for the 21st day of May, 2018, at 9:00 A.M., before a Judge" (the "Pre-Trial Notice"). Thereafter, Kuchler's counsel called to the trial court judge's attention an alleged error in setting the matter for a judge trial. To correct the error, Kuchler filed the

[1] The receipt dated June 13, 2017, reflects that Kuchler paid $780.00 for "Request for Trial by Jury."

Motion to Continue, seeking, among other things, to have the matter reset as a jury trial.

In its Motion to Continue, Kuchler alleged that at no time after filing its answer did Kuchler either waive its right to a jury trial or authorize any attorney to waive its right to a jury trial. In support, Kuchler presented an affidavit from Kuchler's managing partner and its authorized representative, Monique Weiner, who attested as follows:

- Kuchler Polk Weiner, LLC never authorized, instructed, or directed anyone on its behalf to waive a trial by jury.
- Any scheduling of this matter for a bench trial was not the result of any explicit intent by Kuchler Polk Weiner, LLC to waive or forego a jury trial in this matter.
- Defendant [Kuchler] has never and does not waive its right to a jury trial, and reiterates its demand for a jury trial as requested in its answer.

Following a hearing, the trial court denied the motion. This writ application followed.

DISCUSSION

A party may obtain a jury trial by taking two steps: (i) filing a pleading demanding trial by jury; and (ii) posting a bond "in the amount and within the time set by the court pursuant to Article 1734." La. C.C.P. art. 1733(A). "A motion to withdraw a demand for a trial by jury shall be in writing." La. C.C.P. art. 1733(B).

We frame the issue presented as whether the trial court erred in finding that Kuchler waived its right to a jury trial as a result of its attorney signing the Pre-Trial Notice.[2] We addressed a similar waiver issue in *Revel v. Telecheck Louisiana*, 581 So.2d 405 (La. App. 4th Cir. 1991).

In *Revel*, the plaintiff filed a motion and order requesting a jury trial. The trial court judge signed a jury order; and the plaintiff paid the jury fee. Thereafter, a pre-trial conference was held at which the matter was set for a judge trial. An attorney named Darla D'Amico attended the pre-trial conference representing the plaintiff and signed the pre-trial order. After the pre-trial conference, the plaintiff retained a new attorney, who filed a motion to continue the trial given that the trial date fell during a non-jury week. The trial court granted the motion and reinstated the jury. In response, the defendants file a motion to strike the jury, which the trial court granted.

Seeking review of the trial court's ruling granting the motion to strike the jury, the plaintiff in *Revel* filed a writ application with this court. Attached to the plaintiff's writ application was an uncontested affidavit attesting that the plaintiff "never hired Darla D'Amico to represent her in this matter and that she did not authorize Darla D'Amico or any other person to waive her right to jury trial." *Revel*, 581 So.2d at 406-07. Finding the plaintiff's argument that she did not waive the jury persuasive, this court granted the writ and reversed the trial court. In so finding, this court reasoned as follows:

> On the waiver issue, the defendant cites *Brumfield v. Brumfield,* 178 So.2d 379 (La. App. 1st Cir.), *writ ref'd* 248 La. 435, 179 So.2d 274 (1965), for the proposition that a client is bound by actions taken by his attorney on his behalf. *Id*. at 384. In that case, a plaintiff's new attorney sought to relieve the client of the effect of a waiver made by a former attorney. In denying the plaintiff's claim, the court noted the significance of the fact that "counsel does not contend plaintiff's former attorney acted without authority in waiving the effect of the

[2] We find this to be a legal issue, which we review *de novo*. *See Felix v. Safeway Ins. Co*., 15-0701, pp. 7-8 (La. App. 4 Cir. 12/16/15), 183 So.3d 627, 632 (stating that "the relevant facts here are undisputed; and the questions presented are purely legal").

> rule and consenting to trial before respondent Judge." That pronouncement of the court indicates that a different result would be required if, as here, the plaintiff proves that his attorney acted without authority.
>
> Because the trial court judgment striking the jury trial is contrary to the law which protects the right to jury trial as a fundamental right, it was manifestly erroneous under the circumstances. The judgment is hereby reversed.

Id. at 407.

In their opposition to the writ application, Respondents attempt to distinguish *Revel* from the facts of this case on two grounds. First, they emphasize that, in *Revel*, there was a court order setting a jury bond; whereas, here the trial court did not set a jury bond since the case was set for a bench trial. We find this to be a distinction without a difference. At the hearing on the Motion to Continue, the trial court noted that, in his division, he uses a cash bond and that "[i]f I am reversed, [Kuchler] will file [its] bond before the 30 days which is April 21st."[3] Indeed, Kuchler brought the waiver issue to the trial court's attention in enough time to have a bond posted and paid.[4]

The second ground on which Respondents attempt to distinguish *Revel* from this case is that, in *Revel*, the plaintiff submitted an affidavit attesting that she never hired the attorney who attended the pre-trial conference, Ms. D'Amico. In contrast, Respondents emphasize that Kuchler does not dispute that it hired the Chehardy, Sherman, Williams, Murray, Recile, Stakelum & Hayes, L.L.P., law

[3] *See* La. C.C.P. art. 1734.1 (providing that "[w]hen the case has been set for trial, the court may order, in lieu of the bond required in Article 1734, a deposit for costs, which shall be a specific cash amount, and the court shall fix the time for making the deposit, which shall be no later than thirty days prior to trial").

[4] Kuchler also attempted to post a bond, but the clerk of court would not accept it because a jury bond had not been set.

firm and that the firm was authorized to represent it in this case. Rather, Kuchler's affidavit states that it never authorized anyone to waive the jury trial. Respondent's reliance on this ground to distinguish *Revel* is misplaced.

In *Revel*, this court expressly enumerated the principle that when a plaintiff proves that his attorney acted without authority, there is no valid waiver of the right to a jury trial. *Revel*, 581 So.2d at 407; *see also Rainone v. Exxon Corp.*, 93-2008, p. 8 (La. App. 1 Cir.1/13/95), 654 So.2d 707, 711 (observing that "[a] waiver of one's right to a jury trial may not bind plaintiff, even if it is signed by plaintiff's attorney, if plaintiff did not authorize the waiver") (citing *Revel*, *supra*). Applying that principle here, we find there was no valid waiver. Kuchler produced an uncontested affidavit establishing that it never consented to its attorney's waiver of its right to a jury and that it never waived its right. A pre-trial notice cannot trump a timely request for a jury trial.

Respondents additionally assert that they will be prejudiced if we grant the writ. Respondents' argument is that their counsel "has staffed the case as a non-jury case and would have to reallocate staff and incur additional expenses if the case were to be reset at a later date for a jury trial." We find Respondents' prejudice argument unpersuasive for two reasons. First, our ruling does not change the trial date; the only change is the trier-of-fact from a judge to a jury. Indeed, the trial court judge, at the hearing on the Motion to Continue, stated that, regardless of the trier-of-fact, the trial in this case would be held on May 21, 2018. The trial court judge explained that his division does not have "jury judge months."

Second, Respondents' argument that they would be prejudiced by a change in the trier-of-fact from a judge to a jury is insufficient to overcome Kuchler's right to a timely requested jury trial. Indeed, our holding is consistent with the following general principles regarding a party's fundamental right to a jury trial:

> Because the right to trial by jury is considered fundamental in Louisiana law, courts should "indulge every presumption against waiver, loss or forfeiture thereof." *Duplantis v. U.S. Fidelity & Guaranty Insurance Corp*., 342 So.2d 1142, 1143 (La. App. 1st Cir. 1977); *Arlington v. McCarty*, 136 So.2d 119, 121 (La.App.3d Cir. 1961). In fact, the courts have recognized "the absolute and inviolate right of a party to a juridical cause to a trial by jury, except as limited by law and provided the requisite procedural forms are fulfilled." *Scott v. Hardware Mutual Insurance Co*., 207 So.2d 817, 818 (La. App. 1st Cir. 1968). Thus, when a party makes timely application for a jury trial and pays the requisite cash deposit,[5] his right to trial by jury cannot be violated. *Parish v. Holland*, 166 La. 24, 116 So. 580, 581 (1928).

Revel, 581 So.2d at 407.

DECREE

For the foregoing reasons, the Relator's writ is granted. The trial court's ruling is reversed insofar as it denies the Relator's motion to reset the matter as a jury trial. On remand, the trial court is instructed to allow the Relator to post a cash bond within thirty days of the date of the trial. The Relator's motion to stay is denied as moot.

WRIT GRANTED, JUDGMENT REVERSED, REMANDED WITH INSTRUCTIONS; AND MOTION TO STAY DENIED AS MOOT

[5] As discussed elsewhere in this opinion, the requirement of posting a bond is not at issue in this writ application.