

DENY; and Opinion Filed March 29, 2018.



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

No. 05-18-00327-CV

IN RE KIRK FETTERMAN, Relator

**Original Proceeding from the 429th Judicial District Court
Collin County, Texas
Trial Court Cause No. 429-53400-2012**

MEMORANDUM OPINION

Before Justices Lang-Miers, Fillmore, and Stoddart
Opinion by Justice Lang-Miers

Before the Court is relator's March 27, 2018 petition for writ of mandamus in which he seeks a writ directing the trial court to vacate its May 30, 2017 order granting a new trial and enter judgment on the jury verdict. We deny the relief requested.

A writ of mandamus issues to correct a clear abuse of discretion when no adequate remedy by appeal exists. *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992) (orig. proceeding). Mandamus is an extraordinary remedy, not issued as a matter of right, but at the discretion of the court. *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding). Although mandamus is not an equitable remedy, its issuance is largely controlled by equitable principles. *Id.* One such principle is that “equity aids the diligent and not those who slumber on their rights.” *Id.* Thus, delaying the filing of a petition for mandamus relief may waive the right to mandamus unless the relator can justify the delay. *In re Int’l Profit Assocs., Inc.*, 274 S.W.3d 672, 676 (Tex. 2009) (orig. proceeding).

“Two essential elements of laches are (1) unreasonable delay by one having legal or equitable rights in asserting them; and (2) a good faith change of position by another to his detriment because of the delay.” *Rogers v. Ricane Enters.*, 772 S.W.2d 76, 80 (Tex. 1989). A delay of only a few months can constitute laches and result in denial of mandamus relief. *See Rivera*, 858 S.W.2d at 366 (four months); *In re Pendragon Transp. LLC*, 423 S.W.3d 537, 540 (Tex. App.—Dallas 2014, orig. proceeding) (six month delay and filed less than two weeks before trial); *Int’l Awards, Inc. v. Medina*, 900 S.W.2d 934, 936 (Tex. App.—Amarillo 1995, orig. proceeding) (delay of four months and until eve of trial); *Furr’s Supermarkets, Inc. v. Mulanax*, 897 S.W.2d 442, 443 (Tex. App.—El Paso 1995, no writ) (four months); *Bailey v. Baker*, 696 S.W.2d 255, 256 (Tex. App.—Houston [14th Dist.] 1985, orig. proceeding) (four-month delay, no explanation for delay, and filed two weeks prior to trial).

Here, relator waited nearly ten months to seek mandamus relief, he offers no explanation for the delay, and the underlying case is set for trial in ten weeks. We conclude relator’s unexplained delay bars his right to complain of the new trial order through an original proceeding. Accordingly, we deny relator’s petition for writ of mandamus.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

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