Opinion issued October 6, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-11-00513-CV

IN RE BUILD BY OWNER, LLC, Relator

Original Proceeding on Petition for Writ of Mandamus

MEMORANDUM OPINION

Relator, Build by Owner, LLC ("Build by Owner"), filed a petition for writ of mandamus seeking to compel the trial court to vacate its order granting real parties in interest John-Baptist and Ellen Sekumade's motion to transfer venue from Galveston County to Harris County.[1] Build by Owner contends that the trial

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[1] The Honorable Hugo Touchy, Judge of the 122nd District Court of Galveston County, Texas, Respondent. The underlying lawsuit is *Build by Owner, LLC v.*

court abused its discretion in granting the motion because, at a prior hearing before the original trial judge, Build by Owner and Sekumade allegedly entered into a Rule 11 agreement providing that venue would remain in Galveston County because Sekumade sought affirmative relief from the Galveston County trial court on a counterclaim.

We deny the petition for writ of mandamus.

Background

In 2008, Sekumade and Build by Owner entered into a contract for the construction of a house. On June 22, 2009, Build by Owner sued Sekumade for breach of contract, alleging that Sekumade "failed to provide payment for [Build by Owner's] work and reimbursement of labor and materials provided in the construction of [Sekumade's] residence." In his original answer, Sekumade moved to transfer venue from Galveston County to either Brazoria County—where Sekumade resided—or Harris County—where Sekumade signed the contract at issue—and also asserted a counterclaim for breach of contract.

During the course of the litigation, Sekumade served Build by Owner with discovery requests, including requests for admissions, requests for production of documents, and interrogatories. Sekumade also moved for summary judgment on his breach of contract counterclaim, contending, among other things, that Build by

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John-Baptist Sekumade and Ellen Carol Sekumade, No. 09-CV-1019 (122nd Dist. Ct., Galveston County, Tex.).

Owner failed to either fully or substantially perform its contractual obligations. He did not make this motion subject to his motion to transfer venue. Sekumade later amended his pleadings to drop his breach of contract claim and to assert a claim for violation of the Deceptive Trade Practices Act ("DTPA").

On April 22, 2010, after a lengthy discovery battle, the trial court heard argument on Build by Owner's motion for discovery sanctions and motion to strike Sekumade's pleadings. At the beginning of the hearing, the trial court asked the parties which motion they wanted to address first. Sekumade stated, without previous reference to his motion to transfer venue:

> If I may, we filed a Motion to Transfer Venue. We would probably pass that motion because we have filed a counter-suit based on a DTPA claim. So, that probably will be less the Court has to consider.

After the parties and the trial court discussed Build by Owner's discovery-related motions, the trial court asked if there were any other matters to consider. Sekumade said, "As I stated earlier, Your Honor, we had a Motion to Transfer Venue. Because we had filed a DTPA claim, we're going to pass that motion."

Shortly thereafter, the parties and the trial court had the following exchange:

> [Build by Owner]: Second of all, based on Counsel's statement about the motion to transfer, it appears that we've entered into a Rule 11 Agreement in open court on the record that the case is going to be here in Galveston County as the county of mutually agreed venue and jurisdiction before this Honorable Court. So, then, rather than [d]efense counsel saying we're passing the hearing, I think

what he said, based on his DTPA counterclaim, is that he's agreed and has purposefully availed himself that we have a Rule 11 agreement and I would like that clarified.

The Court: Mr. Sekumade, that's the Court's interpretation of that also. Is that incorrect?

Sekumade: In reference to the—

The Court: To the Motion to Transfer Venue, you're essentially waiving that. If you say that "I want the Court to rule on my DTPA case," you're availing this Court of this jurisdiction.

Sekumade: That's correct, Your Honor. That's why I stated—

The Court: So, it is of record, then.

[Build by Owner]: Then that's mutually agreeable.

The next day, the trial court issued an order granting Build by Owner's motion to compel. The court ordered Sekumade to pay $3,000 in attorney's fees to Build by Owner's counsel within thirty days and to fully comply with all outstanding discovery requests within forty-five days or the court would require payment of an additional $10,000 in discovery sanctions and completion of forty hours of community service, and it would strike Sekumade's pleadings. This order did not mention Sekumade's motion to transfer venue.

Approximately one month later, Sekumade again amended his answer, moved to transfer venue to Brazoria or Harris County, and asserted a counterclaim for breach of contract. In response to this motion to transfer venue, Build by Owner argued that, at the April 22, 2010 hearing, it and Sekumade entered into a

Rule 11 agreement providing that venue would remain in Galveston County. In reply, Sekumade argued that proper venue could not be waived pursuant to Civil Practice and Remedies Code section 15.035, the venue provision that governed this dispute, and that Build by Owner never presented any evidence demonstrating that venue was proper in Galveston County or that venue was improper in Brazoria or Harris County. Sekumade also denied that the parties ever entered into a Rule 11 agreement regarding venue at the April 22, 2010 hearing. The trial court explicitly denied Sekumade's motion to transfer venue on August 2, 2010.

After Sekumade failed to pay Build by Owner's counsel within the allotted thirty days after the April 23, 2010 order, Build by Owner moved for enforcement of the order and for the imposition of sanctions on Sekumade for his failure to comply. At a hearing on September 2, 2010, the trial court granted Build by Owner's motion to enforce and ordered Sekumade to pay $13,000 to Build by Owner's counsel by 5:00 p.m. on September 10, 2010, ordered Sekumade to complete forty hours of community service, and struck Sekumade's pleadings.

Sekumade subsequently filed a petition for writ of mandamus in this Court.[2] In addition to complaining about Judge Ellisor's discovery rulings and his actions allegedly preventing Sekumade from filing a motion to compel arbitration, Sekumade also complained that, by making a statement at the April 22, 2010

[2] *See In re John-Baptist Sekumade and Ellen Carol Sekumade*, No. 01-10-00817-CV (Tex. App.—Houston [1st Dist.] Oct. 6, 2011, orig. proceeding) (mem. op.).

hearing that Sekumade waived his motion to transfer venue because he filed a counterclaim, Judge Ellisor "stifled" and "dissuaded" him from pursuing his motion and that Judge Ellisor erroneously denied his motion to transfer venue. In its response to Sekumade's petition for writ of mandamus, Build by Owner informed this Court that Sekumade had filed a civil rights suit against Judge Ellisor and his court coordinator in the Southern District of Texas. As a result, the Administrative Judge of Galveston County transferred the underlying lawsuit, *Build by Owner, LLC v. John-Baptist Sekumade and Ellen Carol Sekumade*, No. 09-CV-1019, from the 122nd District Court of Galveston County to the 56th District Court of Galveston County. The Administrative Judge then transferred the underlying case back to the 122nd District Court, but it appointed another judge, the Honorable Hugo Touchy, to hear the dispute.

On March 10, 2011, this Court issued an order abating Sekumade's petition for writ of mandamus pursuant to Texas Rule of Appellate Procedure 7.2(b) to allow Judge Touchy to reconsider Judge Ellisor's rulings on Sekumade's motion to transfer venue and Build by Owner's motion to compel and motion to strike Sekumade's pleadings. *See* TEX. R. APP. P. 7.2(b); *In re Baylor Med. Ctr. at Garland*, 280 S.W.3d 227, 228 (Tex. 2008) ("Mandamus will not issue against a new judge for what a former one did. . . . As a new judge now presides over the

trial court, [Texas Rule of Appellate Procedure] 7.2 requires abatement of this original proceeding to allow the successor to reconsider the order.").

At the hearing before Judge Touchy, Build by Owner informed the court of Sekumade's two statements from the April 22, 2010 hearing informing Judge Ellisor that he was "passing" his motion to transfer venue because of his DTPA counterclaim and of the Rule 11 agreement discussion. Sekumade argued:

> At no time was I party to any Rule 11 Agreement. The record does not reflect it. All I said was I will pass the motion because the Court was telling me I had forfeited my rights to waive venue. So, as [Build by Owner's counsel] properly read, I passed my motion. I did not waive my right. [Build by Owner's counsel] waived my right for me. He acted as my counsel and came up with a Rule 11 Agreement between himself and the Court and that's how we got to this Rule 11 argument.

At the close of the hearing, the trial court granted Sekumade's motion to transfer venue to Harris County, reasoning that "[Sekumade] never voluntarily waived his plea to transfer the venue willfully."[3]

Standard of Review

Mandamus relief is available only to correct a clear abuse of discretion when there is no adequate remedy by appeal. *In re Odyssey Healthcare, Inc.*, 310 S.W.3d 419, 422 (Tex. 2010) (per curiam); *In re Team Rocket, L.P.*, 256 S.W.3d

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[3] Judge Touchy also granted Build by Owner's motion to compel and ruled that Sekumade had twenty days to comply with all written discovery requests or the court would strike his pleadings. The trial court awarded Build by Owner's counsel $4,000 in attorney's fees to be included in the final judgment. Neither Build by Owner nor Sekumade complain of Judge Touchy's discovery rulings.

257, 259 (Tex. 2008) ("We grant the extraordinary relief of mandamus only when the trial court has clearly abused its discretion and the relator lacks an adequate appellate remedy."). A trial court commits a clear abuse of discretion when its action is "so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *In re CSX Corp.*, 124 S.W.3d 149, 151 (Tex. 2003) (per curiam); *In re Stern*, 321 S.W.3d 828, 837 (Tex. App.—Houston [1st Dist.] 2010, no pet.). A trial court has no discretion in determining what the law is or in applying the law to the particular facts. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135 (Tex. 2004).

Motion to Transfer Venue

Although mandamus review is available to enforce the Civil Practice and Remedies Code's mandatory venue provisions, a party generally may not seek mandamus review of a permissive venue determination.[4] *See* TEX. CIV. PRAC. &

[4] The venue statute applicable here, Civil Practice and Remedies Code section 15.035(b), is a permissive venue provision. TEX. CIV. PRAC. & REM. CODE ANN. § 15.035(b) (Vernon 2002). This statute provides that, "[i]n an action founded on a contractual obligation of the defendant to pay money arising out of or based on a consumer transaction for goods [or] services . . . intended primarily for personal, family, household, or agricultural use, suit by a creditor on or by reason of the obligation may be brought against the defendant either in the county in which the defendant in fact signed the contract or in the county in which the defendant resides when the action is commenced." *Id.* It is undisputed that Sekumade signed the contract in Harris County and that he resided in Brazoria County when Build by Owner filed suit against him. Other than its Rule 11 agreement and general waiver contentions, Build by Owner has not, at any point, presented arguments or evidence for why Galveston County is a county of proper venue under section 15.035(b). *See* TEX. R. CIV. P. 87(2)(a) ("A party who seeks to

REM. CODE ANN. § 15.0642 (Vernon 2002) ("A party may apply for a writ of mandamus with an appellate court to enforce the mandatory venue provisions of [Chapter 15.]"); *In re Mo. Pac. R.R. Co.*, 998 S.W.2d 212, 215–16 (Tex. 1999) ("We reiterated in early 1995 that 'Texas law is quite clear that venue determinations are not reviewable by mandamus.' But a few months later, the Legislature enacted section 15.0642 authorizing parties to seek mandamus 'to enforce the mandatory venue provisions,' along with a timetable for seeking mandamus.") (quoting *Polaris Inv. Mgmt. Corp. v. Abascal*, 892 S.W.2d 860, 862 (Tex. 1995) (per curiam)).

The Texas Supreme Court has held that "venue determinations generally are incidental trial rulings that are correctable on appeal." *Bridgestone/Firestone, Inc. v. Thirteenth Court of Appeals*, 929 S.W.2d 440, 441 (Tex. 1996) (per curiam) (citing *Montalvo v. Fourth Court of Appeals*, 917 S.W.2d 1, 2 (Tex. 1995) (per curiam)); *see In re Masonite Corp.*, 997 S.W.2d 194, 197 (Tex. 1999) ("[V]enue determinations as a rule are not reviewable by mandamus."); *see also In re Team Rocket*, 256 S.W.3d at 261 ("The only remedy afforded by the Legislature when a party loses a venue hearing is to proceed with trial in the transferee county and appeal any judgment from that court on the basis of alleged error in the venue ruling."). "[T]he mere fact that a trial court's erroneous order will result in an

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maintain venue of the action in a particular county . . . has the burden to make proof . . . that venue is maintainable in the county of suit.").

eventual reversal on appeal does not mean that a trial will be a 'waste of judicial resources' . . . . To hold otherwise would mean that virtually any reversible error by a trial court would be a proper subject for mandamus review." *In re City of Irving*, 45 S.W.3d 777, 779 (Tex. App.—Texarkana 2001, orig. proceeding).

The Texas Supreme Court has also held, however, that mandamus review of permissive venue determinations is appropriate in "extraordinary circumstances." *In re Team Rocket*, 256 S.W.3d at 262; *see also In re Masonite Corp.*, 997 S.W.2d at 197 ("But on rare occasions an appellate remedy, generally adequate, may become inadequate because the circumstances are exceptional. Specifically, a trial court's action can be 'with such disregard for guiding principles of law that the harm . . . becomes irreparable.'") (quoting *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 771 (Tex. 1995)); *Bridgestone/Firestone*, 929 S.W.2d at 441 (noting that court had previously granted mandamus relief when trial court failed to afford venue movant reasonable opportunity to supplement venue record). The court has "granted mandamus relief in the context of Rule 87 venue rulings where . . . the trial court made no effort to follow the rule." *In re Team Rocket*, 256 S.W.3d at 262; *see also Woods v. Alvarez*, 925 S.W.2d 119, 122 (Tex. App.—Corpus Christi 1996) (noting that mandamus relief is available when "the trial court fails to follow the procedural requirements of Texas Rule of Civil Procedure 87 concerning each party's right to sufficient notice of the venue hearing"), *overruled on other*

grounds, Bridgestone/Firestone, 929 S.W.2d at 442; *Cone v. Gregory*, 814 S.W.2d 413, 414–15 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding) (listing as exceptions to general rule of no mandamus relief for venue determinations: (1) trial court has mandatory, ministerial duty to transfer, (2) trial court issues a void order on venue, and (3) trial court violates mandatory notice procedure).

In *Team Rocket*, for example, the plaintiffs originally filed suit in Harris County for, among other things, negligence arising out of a fatal plane accident that occurred in Fort Bend County. 256 S.W.3d at 258. Team Rocket moved to transfer venue to Williamson County, its principal place of business, and the trial court granted the motion. *Id.* at 259. The plaintiffs nonsuited and then immediately filed an identical suit in Fort Bend County. *Id.* The Fort Bend County trial court denied Team Rocket's motion to transfer venue to Williamson County. *Id.* The Texas Supreme Court found that "extraordinary circumstances" for granting mandamus review of a non-mandatory venue determination existed, and reasoned that when "a trial court improperly applied the venue statute and issued a ruling that permits a plaintiff to abuse the legal system by refiling his case in county after county, which would inevitably result in considerable expense to taxpayers and defendants, requiring defendants to proceed to trial in the wrong county is not an adequate remedy." *Id.* at 262; *see also In re Masonite Corp.*, 997 S.W.2d at 198 (finding "exceptional circumstances" present when trial court

denied motion to transfer venue to defendant's requested county and "on its own motion" severed claims into sixteen different cases and transferred cases to counties of plaintiffs' residence).

Build by Owner contends that such exceptional circumstances justifying mandamus relief exist in this case because Judge Touchy, in refusing to enforce the parties' Rule 11 agreement on venue, abused his discretion by incorrectly applying Texas Rule of Civil Procedure 87(3)(b), which provides that the trial court shall determine a venue motion "on the basis of the pleadings [and] any stipulations made by and between the parties . . . ." *See* TEX. R. CIV. P. 87(3)(b).

Texas Rule of Civil Procedure 11 provides that,

> Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.

TEX. R. CIV. P. 11. Rule 11 agreements "are contracts relating to litigation." *Trudy's Tex. Star, Inc. v. City of Austin*, 307 S.W.3d 894, 914 (Tex. App.—Austin 2010, no pet.). "The purpose of Rule 11 is to ensure that agreements of counsel affecting the interests of their clients are not left to the fallibility of human recollection and that the agreements themselves do not become sources of controversy." *ExxonMobil Corp. v. Valence Operating Co.*, 174 S.W.3d 303, 309 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). Trial courts have a ministerial duty to enforce valid Rule 11 agreements. *Id.* (citing *EZ Pawn Corp. v. Mancias*,

934 S.W.2d 87, 91 (Tex. 1996) and *Fed. Lanes, Inc. v. City of Houston*, 905 S.W.2d 686, 690 (Tex. App.—Houston [1st Dist.] 1995, writ denied)).

"[I]t is not sufficient that a party's consent to a Rule 11 agreement may have been given at one time; consent must exist at the time that judgment is rendered." *Id.*; *see also Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995) ("[C]onsent must exist at the very moment the court undertakes to make the agreement the judgment of the court."). A party may revoke his consent to a Rule 11 agreement at any time before rendition of judgment. *ExxonMobil*, 174 S.W.3d at 309. "A court is not precluded from enforcing a Rule 11 agreement once it has been repudiated by one of the parties, but an action to enforce a Rule 11 agreement to which consent has been withdrawn must be based on proper pleading and proof." *Id.*; *see also Padilla*, 907 S.W.2d at 462 ("An action to enforce a settlement agreement [pursuant to Rule 11], where consent is withdrawn, must be based on proper pleading and proof."). If a party revokes his consent to a Rule 11 agreement, the opposing party may attempt to enforce the Rule 11 agreement under contract law. *ExxonMobil*, 174 S.W.3d at 309; *see Staley v. Herblin*, 188 S.W.3d 334, 336 (Tex. App.—Dallas 2006, pet. denied) ("[W]here consent [to a Rule 11 agreement] has been withdrawn, a court may not render judgment on the settlement agreement, but may enforce it only as a written contract. Accordingly, the party seeking enforcement must pursue a separate breach of contract claim which is

subject to the normal rules of pleading and proof."); *see also Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656, 658 (Tex. 1996) (per curiam) (holding same).

If fact issues are raised or a party has withdrawn consent, "the only method available for enforcing a [Rule 11] agreement is through summary judgment or trial." *Staley*, 188 S.W.3d at 336. The non-breaching party should raise its claim to enforce the disputed agreement "through an amended pleading or counterclaim asserting breach of contract." *Id.*; *see also Padilla*, 907 S.W.2d at 462 (approving of Padilla's counterclaim seeking enforcement of Rule 11 agreement); *Baylor College of Med. v. Camberg*, 247 S.W.3d 342, 348 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) ("[N]othing in the record indicates that Baylor employed a proper procedure for enforcing a Rule 11 settlement agreement once the parties proffered differing interpretations of the agreement. For example, Baylor did not file a motion for summary judgment seeking interpretation of the Rule 11 agreement."). "To allow enforcement of a disputed [Rule 11] agreement simply on motion and hearing would deprive a party of the right to be confronted by appropriate pleadings, assert defenses, conduct discovery, and submit contested fact issues to a judge or jury." *Staley*, 188 S.W.3d at 336–37.

Build by Owner contends that it and Sekumade entered into an enforceable Rule 11 agreement at the April 22, 2010 hearing before Judge Ellisor that venue would remain in Galveston County. Sekumade contends that a Rule 11 agreement

never existed between the parties and that, if one did so exist, he revoked his consent by filing a second motion to transfer venue and informing Judge Ellisor that he did not consent to venue in Galveston County.

Even if Build by Owner and Sekumade entered into a Rule 11 agreement at the April 22, 2010 hearing agreeing that venue was proper in Galveston County, Sekumade revoked his consent to this agreement before either Judge Ellisor or Judge Touchy ruled on his venue motion. The trial court issued an order on April 23, 2010, solely relating to discovery sanctions against Sekumade; the order did not reference Sekumade's motion to transfer venue or any alleged Rule 11 agreement on venue. On May 28, 2010, Sekumade filed a second motion to transfer venue, seeking to transfer the case to Brazoria or Harris County. After Build by Owner responded to the venue motion and argued that the trial court should deny the motion based on the purported Rule 11 agreement, Sekumade argued, among other things, that he did not enter into a Rule 11 agreement on venue at the April 22, 2010 hearing. Sekumade repeatedly argued that venue was proper in Brazoria or Harris County, not Galveston County.

Judge Ellisor denied Sekumade's venue motion on August 2, 2010. Sekumade then sought mandamus relief from this ruling, among other rulings, in this Court. After the Administrative Judge of Galveston County assigned Judge Touchy to hear the underlying dispute, we abated Sekumade's mandamus petition

for Judge Touchy to reconsider Judge Ellisor's rulings on the discovery sanctions issue and Sekumade's venue motion. *See* TEX. R. APP. P. 7.2(b). Judge Touchy ultimately agreed that Sekumade did not "voluntarily waive[] his plea to transfer the venue willfully" and transferred venue to Harris County on April 11, 2011.

Build by Owner never filed an amended pleading, counterclaim for breach of contract, or motion to enforce the Rule 11 agreement.

Because Sekumade revoked any consent to the purported Rule 11 agreement before Judge Touchy ruled on his motion to transfer venue, consent did not exist at the time the trial court decided the issue, and, therefore, the court could not have rendered an agreed decision on venue. *See Padilla*, 907 S.W.2d at 461 (holding that, for agreed judgment, "consent must exist at the very moment the court undertakes to make the agreement the judgment of the court"); *ExxonMobil*, 174 S.W.3d at 309 ("[I]t is not sufficient that a party's consent to a Rule 11 agreement may have been given at one time; consent must exist at the time that judgment is rendered."). Although a trial court may not render an agreed judgment when one party has withdrawn his consent to a Rule 11 agreement, the trial court may still enforce the agreement as a binding contract, but only upon "proper pleading and proof." *See Padilla*, 907 S.W.2d at 462; *ExxonMobil*, 174 S.W.3d at 309. The party seeking to enforce the Rule 11 agreement must file a separate breach of contract claim, and the alleged breaching party must be afforded the opportunity to

assert defenses, conduct discovery, and submit contested fact issues, if any, to a judge or jury. *See Staley*, 188 S.W.3d at 336–37; *see also ExxonMobil*, 174 S.W.3d at 309 ("In such a case [when a party withdraws consent to a Rule 11 agreement], a party may seek to enforce the agreement under contract law."). Because Build by Owner never attempted to enforce the Rule 11 agreement by pursuing a separate breach of contract claim, we conclude that the trial court did not abuse its discretion in refusing to enforce the disputed agreement. *See Camberg*, 247 S.W.3d at 348 (holding that party seeking enforcement of Rule 11 agreement did not employ "proper procedure" for enforcing when parties offered different interpretations of agreement).

We hold, therefore, that Build by Owner has not established that this case involves the "extraordinary circumstances" necessary to depart from the general rule that permissive venue determinations are not reviewable by mandamus. *See In re Team Rocket*, 256 S.W.3d at 262.

Build by Owner further contends that mandamus review of Judge Touchy's venue ruling is appropriate because "[t]his Court is already exercising its mandamus jurisdiction based on [Sekumade's] petition challenging Judge Ellisor's rulings on his motion for sanctions and motion for transfer of venue" and cites the Texas Supreme Court's decision in *General Motors Corp. v. Gayle*, 951 S.W.2d 469 (Tex. 1997), for the proposition that an appellate court may review an issue on

mandamus that may ordinarily be reviewable only on appeal—such as an incidental trial ruling—if the court is already addressing another issue for which mandamus review is appropriate. In *Gayle*, the court noted that two of the issues presented—denial of a jury trial and denial of a motion for continuance—were generally not appropriate for mandamus review because parties had an adequate appellate remedy, but it held that that particular case presented "special circumstances" because mandamus review was appropriate for another issue that had been presented to the court. *Id.* at 477. The court concluded that "the interests of judicial economy dictate that [it] should also remedy the trial court's denial of the right of jury trial by mandamus." *Id.*

This case, however, does not present such special circumstances. Judge Touchy's rulings on Build by Owner's discovery motions and Sekumade's venue motion vacated Judge Ellisor's initial rulings. Thus, Sekumade's original petition for writ of mandamus is moot. *See In re Baylor Med. Ctr.*, 280 S.W.3d at 228. Because the parties have presented no other issue that is proper for us to review by mandamus, we will not exercise our mandamus jurisdiction to review Judge Touchy's venue ruling.[5]

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[5] Build by Owner also contends that we should vacate Judge Touchy's venue ruling because Sekumade waived his venue motion on two grounds: (1) Sekumade failed to obtain a hearing on his motion within a reasonable time, and (2) Sekumade pursued counterclaims and dispositive motions before the trial court heard his venue motion. Build by Owner, however, cites no authority for the proposition

Conclusion

We deny the petition for writ of mandamus.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Higley, and Massengale.

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that no adequate appellate remedy exists for addressing these contentions, and that, therefore, mandamus relief is appropriate. *See Toliver v. Dallas Fort Worth Hosp. Council*, 198 S.W.3d 444, 446–48 (Tex. App.—Dallas 2006, no pet.) (addressing on ordinary appeal whether defendant waived motion to transfer venue); *Carlile v. RLS Legal Solutions, Inc.*, 138 S.W.3d 403, 406 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (addressing same). We therefore decline to address these arguments on mandamus review.