

**Petition for Writ of Mandamus in Case No. 14-17-00034-CV Denied and
Petition for Writ of Mandamus in Case No. 14-17-00035-CV Dismissed as
Moot and Memorandum Opinion filed February 7, 2017.**



In The

Fourteenth Court of Appeals

NOS. 14-17-00034-CV and 14-17-00035-CV

IN RE ROBERT PRIMO, Relator

**ORIGINAL PROCEEDING
WRIT OF MANDAMUS
133rd District Court
Harris County, Texas
Trial Court Cause Nos. 2012-68391 & 2012-68391A¹**

MEMORANDUM OPINION

On January 12, 2017, relator Robert Primo filed a petition for writ of mandamus in this court. *See* Tex. Gov't Code Ann. § 22.221 (West 2004); *see also*

¹ On February 22, 2016, the trial court signed an agreed order that consolidated trial court cause no. 2012-68391-A with trial court cause no. cause number 2012-68391. The ruling that is the subject of this mandamus proceeding was issued in consolidated trial court cause no. cause number 2012-68391. Therefore, the original proceeding opened in cause number 14-17-00035-CV with trial court number 2012-68391-A is dismissed as moot.

Tex. R. App. P. 52. In the petition, relator asks this court to compel the Honorable Jaclanel Moore McFarland, presiding judge of the 133rd District Court of Harris County, to (1) vacate her March 7, 2016 oral order denying relator's motion for leave to file his First Supplemental Answer and Counterclaim, and (2) to grant such motion.

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). Although mandamus is not an equitable remedy, its issuance is largely controlled by equitable principles, including the principle that equity aids the diligent and not those who slumber on their rights. *Id.* Therefore, delay alone can provide ample ground to deny mandamus relief. *In re Timberlake*, 501 S.W.3d 105, 107–08 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding); *In re Boehme*, 256 S.W.3d 878, 887 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding). “[D]elaying 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) (per curiam) (orig. proceeding). *See also In re Timberlake*, 501 S.W.3d at 107–08 (denying petition for writ of mandamus because relator failed to offer adequate justification for eleven month delay); *Int’l Awards, Inc. v. Medina*, 900 S.W.2d 934, 935–36 (Tex. App.—Amarillo 1995, orig. proceeding) (denying petition for writ of mandamus because four month delay was not explained; delay alone provides ample ground to deny petition for mandamus relief); *In re Farmers Texas County Mut. Ins. Co.*, No. 13-16-00098-CV, 2016 WL 1211314, at *1–2 (Tex. App.—Corpus Christi Mar. 28,

2016, orig. proceeding) (denying petition for writ of mandamus because relator did not justify its eight month delay in filing its petition for writ of mandamus).

Here, relator delayed for more than nine months after the trial court orally denied his motion before filing his petition for writ of mandamus. The only justification that relator offered for his nine month delay was that he was waiting for the trial court to issue a *written* order denying the motion. Relator's excuse is not valid because no written order was required to seek mandamus relief. A relator may seek mandamus relief from an oral ruling when, as here, the ruling is clearly shown by the record. *See In re Bledsoe*, 41 S.W.3d 807, 811 (Tex. App.—Fort Worth 2001, orig. proceeding). Accordingly, we deny relator's petition for writ of mandamus.

/s/ John Donovan
Justice

Panel consists of Justices Christopher, Jamison, and Donovan (Christopher, J., Dissenting without opinion.).