



Fourth Court of Appeals
San Antonio, Texas

DISSENTING OPINION

No. 04-16-00469-CV

IN RE Howard Kerry **GARNER**,

Original Mandamus Proceeding¹

PER CURIAM

Dissenting Opinion by: Rebeca C. Martinez, Justice

Sitting: Karen Angelini, Justice
Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: August 24, 2016

Because I believe the trial court clearly abused its discretion in denying the relator's right to a jury trial, and that the relator has no adequate remedy by appeal, I respectfully dissent from denial of the petition for writ of mandamus.

BACKGROUND

This mandamus petition arises from a dispute between the relator, Howard Kerry Garner, and the real parties in interest, Mike Weeks, Linda Weeks, and Weeks Environmental, LLC (collectively, the "Weekses"). Garner alleges the Weekses agreed to give Garner a 20 percent equity stake in Weeks Environmental, a company that operates a waste disposal facility, in return for Garner's assistance in locating property for the waste facility and his aid in obtaining

¹ This proceeding arises out of Cause No. 13-03-11919-DCVAJA, styled *Mike Weeks, Linda Weeks and Weeks Environmental, LLC v. Howard Kerry Garner*, pending in the 365th Judicial District Court, Dimmit County, Texas, the Honorable Amado J. Abascal, III presiding.

the necessary permits for the facility. Both parties filed separate lawsuits in Dimmit County, which were consolidated by the trial court.

On March 27, 2015, the trial court set a November 13, 2015 trial date. The parties agreed to jointly move for a continuance of the trial date. They filed an “Agreed Motion for Continuance and Motion for Special Setting” on October 1, 2015. The motion stated, “the parties anticipate the trial in this matter will last 4-5 days including jury selection.” The trial court granted the motion and reset the trial date to April 20, 2016, with a “preferential setting.” On March 2, 2016, the parties filed another “Agreed Motion for Continuance and Motion for Special Setting” which requested a continuance until August 2016. This case involves multiple litigants, fact witnesses, and expert witnesses who reside outside of Dimmit County. In order to efficiently manage the court’s time and the schedules of the various witnesses, the parties requested a special setting. The motion again stated that the parties anticipated trial would “last 4-5 days including jury selection.” The trial court granted the agreed motion and reset the trial date to August 2, 2016.

On July 7, 2016, less than thirty days before trial, Garner paid the jury fee. The Weekses objected to Garner’s payment of the jury fee as untimely and asked the trial court to conduct a bench trial instead. After hearings on July 22 and July 25, 2016, the trial court ruled that the trial would be a bench trial.

ANALYSIS

I believe the trial court abused its discretion by denying Garner his right to a jury trial. Although Garner paid the jury fee five days late, the record shows that permitting Garner to exercise his right to a jury trial would not have interfered with the trial court’s docket, delayed the trial, or caused injury to the Weekses. *See Gen. Motors Corp. v. Gayle*, 951 S.W.2d 469,

476 (Tex. 1997).

Texas Rule of Civil Procedure 216 provides: “No jury trial shall be had in any civil suit, unless a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance.” TEX. R. CIV. P. 216(a). Subsection (b) requires that the jury fee be deposited with the clerk of the court “within the time for making a written request for a jury trial.” TEX. R. CIV. P. 216(b). In spite of the Rule’s mandatory language, courts generally construe the rule as being discretionary with the judge. *See Gayle*, 951 S.W.2d at 476; *see also Dawson v. Jarvis*, 627 S.W.2d 444, 446 (Tex. App.—Houston [1st Dist.] 1981, writ ref’d n.r.e.). The Texas Supreme Court has held that, even absent timely compliance with Rule 216, “a trial court should accord the right to jury trial if it can be done without interfering with the court’s docket, delaying the trial, or injuring the opposing party.” *Gayle*, 951 S.W.2d at 476.

The three factors stated in *Gayle* have been established in this case. *See id.* (no interference with court docket, no trial delay, and no injury to opposing party). The record shows that, at all times, the parties and the trial court anticipated having a jury trial in this case. The parties’ two agreed motions for continuance stated estimates for the number of days needed for trial, and expressly stated the estimates included “jury selection.” The trial court granted the motions and its orders provided special trial settings. At the telephonic hearing on July 22, the trial court acknowledged that it could still assemble a venire for jury selection on August 2 and had adequate time set aside for either a bench or a jury trial. The trial judge stated on the record that a jury trial on August 2 would not interfere with the court’s docket, nor would it delay the trial, provided the trial took place in the number of days estimated by the parties in their agreed motions for continuance, i.e., “4-5 days including jury selection.” Finally, there is nothing in the record to support a finding that conducting a jury trial would cause injury to the Weekses,

particularly in view of the fact that they agreed to the two motions for continuance citing the need for a trial setting that allowed “4-5 days, including jury selection.” Indeed, any misappraisal of the length of trial worked against both parties. Yet, requiring Garner to overcome a newly asserted “injury,” i.e., a longer trial with a jury than with a bench trial, resulted in prejudice to Garner’s right to a jury trial in this case.

The agreed special settings that included anticipated jury selection distinguishes this case from those cited by the Weekses. The trial court approved an *agreed* special trial setting, with time for jury selection, for August 2, 2016; hence, Garner satisfied his burden to demonstrate that granting his request for a jury trial caused no interference with the court calendar, delay of trial, or injury to the Weekses. A trial court commits a clear abuse of discretion when it denies a party the right to a jury when setting the case for a jury trial would not interfere with the trial court’s docket, would not delay the trial, and would not injure the opposing parties. *Id.* The record here shows the trial court clearly abused its discretion in denying Garner the right to a jury trial.

Rebeca C. Martinez, Justice