NUMBER 13-19-00469-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

IN RE ROLAND'S ROOFING CO., INC.

On Petition for Writ of Mandamus.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Hinojosa and Tijerina
Memorandum Opinion by Justice Hinojosa[1]

By petition for writ of mandamus, relator Roland's Roofing Co., Inc. seeks to compel the respondent to rule on its motion to compel arbitration in the underlying subrogation case.[2] We conditionally grant the petition for writ of mandamus.

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[1] *See* TEX. R. APP. P. 52.8(d) ("When granting relief, the court must hand down an opinion as in any other case," but when "denying relief, the court may hand down an opinion but is not required to do so."); *see also id.* R. 47.4 (distinguishing opinions and memorandum opinions).

[2] This original proceeding arises from trial court cause number C-4035-17-E in the 275th District Court of Hidalgo County, Texas, and the respondent is the Honorable Marla Cuellar. *See* TEX. R. APP. P. 52.2.

I. BACKGROUND

On August 30, 2017, Nationwide Mutual Insurance Company (Nationwide) filed a subrogation claim against relator, LS Roofing, LLC, Luis Santisbon, and i3 Group, LLC.[3] According to Nationwide's first amended petition, relator had been retained to replace the metal roof on the IHOP restaurant located at 1900 S. Tenth Street in McAllen, Texas. Nationwide alleged that relator's actions during the construction project caused a fire resulting in significant property damage. Accordingly, Nationwide sought recovery of all sums that it had paid to the insureds pursuant to its policy of insurance on the property. Haidar Properties, LLC (Haidar), the entity that operated the IHOP, filed a petition in intervention, as did Elizabeth Barbara Harms, independent executrix of the estate of Frederick James Harms, who owned the building where Haidar operated the IHOP.

On July 26, 2018,[4] relator filed a "Motion to Compel Arbitration and Motion for a Stay of Discovery and Further Proceedings." On August 2, 2018, Nationwide filed a response to relator's motion to compel arbitration, and on September 4, 2018, Haidar also filed a response to relator's motion to compel arbitration. On September 10, 2018, relator filed a combined reply to the responses filed by Nationwide and Haidar. That same day, LS Roofing, LLC and Santisbon filed a response in opposition to relator's motion to compel arbitration. On September 11, 2018, the presiding judge of the trial court at that

[3] According to its pleadings, Nationwide was a party to a "Master Services Agreement" with i3 Group, LLC, by which i3 Group, LLC agreed to provide roofing services for the benefit of Nationwide's insureds, including Haidar. Through this agreement, Haidar retained the services of relator and LS Roofing LLC to repair the roof of the IHOP. Santisbon is the managing member of LS Roofing, LLC.

[4] The record contains two file-stamped motions to compel dated July 10, 2018 and July 26, 2018. This discrepancy is not material to the resolution of this original proceeding, and we need not address it here. *See* TEX. R. APP. P. 47.4.

time, the Honorable Juan Partida, held a hearing on relator's motion to compel arbitration. At the hearing, Judge Partida deferred ruling on the motion.

On September 21, 2018, relator filed a "First Supplement" in support of its motion to compel arbitration. On September 25, 2018, Haidar filed a response. On December 3, 2018, relator filed a first supplemental reply to Haidar's response to relator's motion to compel arbitration. On December 7, 2018, Judge Partida signed an order granting relator's motion to compel arbitration providing that (1) all parties are compelled to arbitrate all claims, (2) all proceedings are stayed pending arbitration, and (3) all discovery is stayed pending arbitration.

On December 26, 2018, Haidar filed a motion for reconsideration of the trial court's order compelling arbitration. On February 21, 2019, the newly elected judge of the 275th District Court, the Honorable Marla Cuellar, respondent herein, held a hearing on Haidar's motion for reconsideration. At the hearing, the respondent informed counsel that "all the parties should have an opportunity to present their arguments . . . before there is a ruling by the Court." She stated that she wanted to review the transcript from the September 11, 2018 hearing and wanted to provide the parties with "the opportunity to present evidence to the Court regarding the validity" of the contract containing the arbitration clause. The respondent ultimately held that:

> So what the ruling of the Court is going to be as—I'm not saying that I'm not going to reconsider the motion for binding arbitration or your request for arbitration. I'm not going to say that I'm not going to consider that but I'm going to reconsider the order at that time. So, I'm going to set aside the order—Judge Partida's order on binding arbitration. I want to set a DCC. I want to look at the transcript and set a DCC and find out what the issues are. Even if we can come together—we can just sit here in court and what are the issues. How much time do you all need? I don't mind doing that. I don't mind sitting with everyone saying, well, how much time do you need. So that you are able to get what you need to prove your position or not prove

> your position to the court. I want to be able to give everyone that opportunity.

The respondent expressly stated that she wanted to examine the contract and make an "informed" decision on arbitration. In response to a query from counsel, she orally affirmed that she was setting aside the December 7, 2018 order compelling arbitration.

On April 9, 2019, relator filed a "Motion to Enforce Court's Order of December 7, 2018." Relator contended that the opposing parties were "delaying enforcement" of Judge Partida's order compelling arbitration and were merely "seeking a second bite of the apple." Relator asserted that the opposing parties were "injecting error" into the proceedings, citing precedent that motions to compel arbitration "should be resolved without delay." Relator provided a chronology of relevant events and requested that the respondent "avoid further delay" and enforce the order compelling arbitration.

On May 13, 2019, Haidar filed a response to relator's motion to enforce, arguing that the motion was "frivolous" and arguing that the respondent had clearly ruled that she was setting aside the order compelling arbitration.

On May 14, 2019, the respondent held an expedited hearing on relator's motion to enforce the order compelling arbitration. At the hearing, the respondent indicated that she would review the transcripts of the prior hearings on this matter and then was "either going to sign this order or I am going to set it." At the hearing, the respondent verbally indicated that she would issue a ruling that day. That same day, the respondent signed an "Order Granting Plaintiff's Motion for Reconsideration and Order Setting Aside Order Granting Defendant Roland's Motion to Compel Arbitration." This order states:

> **IT IS THEREFORE ORDERED,** that the Court after having reconsidered its prior decision, is of the opinion that Intervenor/Plaintiff has shown good cause, insofar as to setting aside this Court's Order of December 7th, 2018,

> granting Defendant Roland's Motion to Compel Arbitration, and therefore, orders that said order on Defendant's Motion to Compel is hereby set aside, and has no effect here forth on this matter.

Subsequently, Nationwide filed a notice of intention to take the deposition of Tim Ellis, and on June 18, 2019, relator filed a motion to quash that deposition on grounds that it constituted improper pre-arbitration discovery. Relator's motion to quash detailed the chronology of the case and contended that Ellis's deposition was not necessary for the respondent to determine arbitrability.

On September 26, 2019, relator filed this original proceeding. By two issues, relator contends that (1) the respondent abused her discretion by refusing to rule on relator's motion to compel arbitration, and (2) relator lacks an adequate remedy by appeal. The Court requested that the real parties in interest—Haidar; Harms; Nationwide; LS Roofing, LLC; and Santisbon—or any others whose interest would be directly affected by the relief sought, file a response to the petition for writ of mandamus within a specified period. *See* TEX. R. APP. P. 52.2, 52.4, 52.8. Real parties in interest LS Roofing, LLC and Santisbon filed a response stating that they have settled their pending claims and "take no position" on relator's petition for writ of mandamus. The remaining real parties in interest have neither filed responses to the petition for writ of mandamus nor requested additional time to respond.

II. STANDARD FOR MANDAMUS RELIEF

Mandamus is appropriate when the relator demonstrates that the trial court clearly abused its discretion and the relator has no adequate remedy by appeal. *In re Reece*, 341 S.W.3d 360, 364 (Tex. 2011) (orig. proceeding); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). The relator has the burden of

establishing both prerequisites to mandamus relief, and this burden is a heavy one. *In re CSX Corp*., 124 S.W.3d 149, 151 (Tex. 2003) (orig. proceeding). A trial court clearly abuses its discretion if it reaches a decision that is so arbitrary and unreasonable that it amounts to a clear and prejudicial error of law or if it clearly fails to analyze the law correctly or apply the law correctly to the facts. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (per curiam). The adequacy of an appellate remedy must be determined by balancing the benefits of mandamus review against the detriments. *In re Team Rocket, L.P*., 256 S.W.3d 257, 262 (Tex. 2008) (orig. proceeding). We evaluate the benefits and detriments of mandamus review and consider whether mandamus will preserve important substantive and procedural rights from impairment or loss. *In re Prudential Ins. Co. of Am*., 148 S.W.3d at 136.

III. Failure to Rule

Consideration of a motion that is properly filed and before the trial court is a ministerial act, and mandamus may issue to compel the trial court to act. *See Eli Lilly & Co. v. Marshall*, 829 S.W.2d 157, 158 (Tex. 1992) (orig. proceeding); *In re Henry*, 525 S.W.3d 381, 381 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding) (per curiam); *In re Greater McAllen Star Props., Inc.*, 444 S.W.3d 743, 748 (Tex. App.—Corpus Christi–Edinburg 2014, orig. proceeding); *In re Blakeney*, 254 S.W.3d 659, 661 (Tex. App.—Texarkana 2008, orig. proceeding). There is no adequate remedy at law for a trial court's failure to rule because "[f]undamental requirements of due process mandate an opportunity to be heard." *See In re Christensen*, 39 S.W.3d 250, 251 (Tex. App.—Amarillo 2000, orig. proceeding) (citing *Creel v. Dist. Atty. for Medina Cty*., 818 S.W.2d 45, 46 (Tex. 1991)); *see also In re First Mercury Ins. Co*., No. 13-13-00469-CV, 2013 WL

6056665, at *3 (Tex. App.—Corpus Christi–Edinburg Nov. 13, 2013, orig. proceeding) (mem. op.).

To obtain mandamus relief for the trial court's refusal to rule on a motion, a relator must establish: (1) the motion was properly filed and has been pending for a reasonable time; (2) the relator requested a ruling on the motion; and (3) the trial court refused to rule. *See In re Greater McAllen Star Props., Inc.*, 444 S.W.3d at 748; *In re Craig*, 426 S.W.3d 106, 106 (Tex. App.—Houston [1st Dist.] 2012, orig. proceeding) (per curiam); *In re Chavez*, 62 S.W.3d 225, 228 (Tex. App.—Amarillo 2001, orig. proceeding). The relator must show that the trial court received, was aware of, and was asked to rule on the motion. *In re Blakeney*, 254 S.W.3d at 661; *In re Villarreal*, 96 S.W.3d 708, 710 (Tex. App.—Amarillo 2003, orig. proceeding).

The trial court has a reasonable time within which to perform its ministerial duty. *See In re Foster*, 503 S.W.3d 606, 607 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding) (per curiam); *In re Greater McAllen Star Props., Inc.*, 444 S.W.3d at 748; *In re Blakeney*, 254 S.W.3d at 661; *In re Shredder Co.*, 225 S.W.3d 676, 679 (Tex. App.—El Paso 2006, orig. proceeding). Whether a reasonable time for the trial court to act has lapsed is dependent upon the circumstances of each case. *See In re Blakeney*, 254 S.W.3d at 662; *In re Chavez*, 62 S.W.3d at 228.

The test for determining what time period is reasonable is not subject to exact formulation, and no "bright line" separates a reasonable time period from an unreasonable one. *See In re Greater McAllen Star Props., Inc.*, 444 S.W.3d at 748; *In re Blakeney,* 254 S.W.3d at 661; *In re Chavez*, 62 S.W.3d at 228. We examine a "myriad" of criteria, including the trial court's actual knowledge of the motion, its overt refusal to act, the state

of the court's docket, and the existence of other judicial and administrative matters which must be addressed first. *See In re Greater McAllen Star Props., Inc.*, 444 S.W.3d at 748–49; *In re Blakeney,* 254 S.W.3d at 661; *In re Chavez*, 62 S.W.3d at 228–29. Courts have applied the foregoing tenets to grant mandamus relief concerning various disparate periods of delay. *See In re Mesa Petroleum Partners, LP*, 538 S.W.3d 153, 159 (Tex. App.—El Paso 2017, orig. proceeding) (granting relief for a delay of more than eight months in rendering a final judgment); *In re ReadyOne Indus., Inc.*, 463 S.W.3d 623, 624 (Tex. App.—El Paso 2015, orig. proceeding) (granting relief for a delay of more than seven months in ruling on a motion to compel arbitration); *In re Shredder Co.,* 225 S.W.3d at 679–80 (granting relief for a delay of more than six months in ruling on a motion to compel arbitration); *In re Greenwell*, 160 S.W.3d 286, 288 (Tex. App.—Texarkana 2005, orig. proceeding) (granting relief for a six-month delay in ruling on a motion for partial summary judgment); *In re Kleven*, 100 S.W.3d 643, 644–45 (Tex. App.—Texarkana 2003, orig. proceeding) (granting relief for delays of more than three and five months on motions for discovery, sanctions, and for a trial setting); *City of Galveston v. Gray*, 93 S.W.3d 587, 592 (Tex. App.—Houston [14th Dist.] 2002, orig. proceeding) (granting relief for a thirteen-month delay in ruling on a plea to the jurisdiction); *In re Mission Consol. Indep. Sch. Dist.*, 990 S.W.2d 459, 461 (Tex. App.—Corpus Christi–Edinburg 1999, orig. proceeding) (granting relief for a seven-month delay in ruling on a "no evidence" motion for summary judgment); *In re Ramirez*, 994 S.W.2d 682, 684 (Tex. App.—San Antonio 1998, orig. proceeding) (granting relief for a delay of eighteen months in ruling on a motion for default judgment); *Kissam v. Williamson*, 545 S.W.2d 265, 266–67 (Tex. App.—Tyler 1976, orig.

proceeding) (per curiam) (granting relief for a thirteen-month delay in ruling on a petition for incorporation).

In considering the alleged period of delay, we note that the trial court has broad discretion in managing its docket, but that discretion is not unlimited. *See In re Allied Chem. Corp*., 227 S.W.3d 652, 654 (Tex. 2007) (orig. proceeding); *Clanton v. Clark*, 639 S.W.2d 929, 931 (Tex. 1982); *In re Blakeney*, 254 S.W.3d at 663; *Ho v. Univ. of Tex. at Arlington*, 984 S.W.3d 672, 694–95 (Tex. App.—Amarillo 1998, pet. denied).

IV. ANALYSIS

We examine the specific circumstances of this case to determine whether a reasonable time has elapsed. *See In re Blakeney*, 254 S.W.3d at 662. Relator filed its motion to compel arbitration more than fourteen months ago, and Judge Partida granted that motion more than ten months ago. The respondent verbally granted reconsideration of the order compelling arbitration on February 21, 2019 and signed a written order on May 14, 2019 stating that the "order on Defendant's Motion to Compel is hereby set aside" and "has no effect here forth on this matter." The May 14, 2019 order neither grants nor denies relator's motion to compel arbitration. Based on the record, the respondent has issued no other rulings pertaining to arbitrability since that time, and the parties opposing arbitration have attempted to institute discovery which allegedly goes to the merits of the case. Thus, we have a period of delay spanning from February 21, 2019 until the present, a period of more than seven months, without a ruling granting or denying relator's motion to compel arbitration. The respondent is aware of the motion to compel arbitration, relator has requested a ruling, and the respondent has indicated her intention to rule on the

motion but has not done so. *See In re Greater McAllen Star Props., Inc.*, 444 S.W.3d at 748; *In re Chavez*, 62 S.W.3d at 228.

The motion at issue in this original proceeding is a motion to compel arbitration. Arbitration is intended to provide a lower-cost, expedited means to resolve disputes. *In re Poly–Am., L.P.*, 262 S.W.3d 337, 347 (Tex. 2008) (orig. proceeding). Motions to compel arbitration should be resolved "without delay." *In re Houston Pipe Line Co.*, 311 S.W.3d 449, 451 (Tex. 2009) (orig. proceeding) (per curiam); *see Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 268–69 (Tex. 1992) (orig. proceeding) (stating that "the main benefits of arbitration lie in expedited and less expensive disposition of a dispute"). Accordingly, we conclude that the necessity for a prompt ruling is particularly important in cases concerning motions to compel arbitration. In this regard, we note that the El Paso Court of Appeals has granted mandamus relief for delays of six and seven months in ruling on motions to compel arbitration. *See In re ReadyOne Indus., Inc.*, 463 S.W.3d at 624 (seven months); *In re Shredder Co.,* 225 S.W.3d at 679–80 (six months).

Based on these circumstances, we conclude that relator has established that the respondent abused her discretion by failing to rule on the motion to compel arbitration. *See In re Greater McAllen Star Props., Inc.*, 444 S.W.3d at 748; *In re Craig*, 426 S.W.3d at 106; *see also In re ReadyOne Indus., Inc.*, 463 S.W.3d at 624; *In re Shredder Co.,* 225 S.W.3d at 679–80. We further conclude that relator lacks an adequate remedy by appeal. *See In re Greater McAllen Star Props., Inc.*, 444 S.W.3d at 748; *see also In re Houston Pipe Line Co*., 311 S.W.3d at 452 (concluding that the trial court abused its discretion by allowing overbroad discovery on the merits rather than ruling on arbitrability); *In re Heritage Bldg. Sys., Inc*., 185 S.W.3d 539, 543 (Tex. App.—Beaumont 2006, orig.

proceeding) (per curiam) (concluding that the trial court abused its discretion by ordering mediation rather than ruling on arbitrability). Accordingly, we sustain the issues presented in this original proceeding.

V. CONCLUSION

The Court, having examined and fully considered the petition for writ of mandamus, the lack of a response on the merits, and the applicable law, is of the opinion that relator has met its burden to obtain relief. We conditionally grant the petition for writ of mandamus. The writ will issue only if the respondent fails to rule on the motion to compel arbitration without further delay.

LETICIA HINOJOSA
Justice

Delivered and filed the
23rd day of October, 2019.