



## Mitchell v. Superior Court of Los Angeles County

2003 | Cited 0 times | California Court of Appeal | April 17, 2003

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After failing to timely post jury fees, petitioners asked the trial court for relief from the statutory waiver of a jury trial under Code of Civil Procedure section 631, subdivision (e).<sup>1</sup> When such a fundamental constitutional right is threatened, relief from an inadvertent waiver must be granted unless there is a showing of substantial prejudice. (*Johnson-Stovall v. Superior Court* (1993) 17 Cal.App.4th 808, 810-811.) We conclude in this case that the trial court abused its discretion in denying relief from the statutory waiver because real parties in interest did not adequately show that prejudice would result from granting the requested relief and proceeding with a jury trial.

### FACTUAL AND PROCEDURAL HISTORY

In March 2002, Lawrence R. Mitchell, Barbara M. Mitchell, and their minor son Ross Mitchell sued Lai T. Tong and Mai Kim Phu, the sellers of real property the Mitchells purchased in the mid-1990's. The Mitchells alleged the sellers failed to disclose water intrusion and flooding which resulted in extensive mold infestation. The Mitchells also sued a home inspection company (real party in interest Michael Boeger dba Equity Building Inspection), a termite inspection company, and the sellers' brokers. The Mitchells demanded a jury trial.

Because trial was scheduled for March 3, 2003, the Mitchells were required to post their jury fees by February 6, 2003. (See §631, subd. (b).) The fees were not deposited with the trial court until February 26. The next day, February 27, the parties appeared before the trial court on the Mitchells' request to continue the trial in order to finalize tentative settlements reached with three of the defendants. At the hearing, the court informed counsel for the first time that the matter would proceed as a bench trial because jury fees were not posted.

The Mitchells then filed an ex parte application for relief from the statutory waiver of a jury trial. (See §631, subds. (b) & (e).) In support of their application, the Mitchells' counsel, who had recently been retained as co-counsel to try the case, submitted his declaration stating that the failure to timely deposit jury fees was inadvertent because it was due to miscommunication between co-counsel and him. Once counsel became aware of the mistake, jury fees were deposited and accepted by the clerk



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of the court.

The sellers opposed the ex parte application by arguing (1) it was untimely, (2) the Mitchells' waiver of a jury trial was intentional, and (3) they would suffer prejudice because, had they known the trial would be before a jury, they would have enlarged certain trial exhibits. There is no indication in the record that any other party opposed the Mitchells' ex parte application.

The trial court denied the application, and the Mitchells petitioned this court for extraordinary relief. We stayed the trial and notified the parties and the trial court of our intention to grant a peremptory writ in the first instance. We further invited real parties to file an opposition to the petition. After further reviewing the matter, we grant the petition.

### DISCUSSION

#### 1. Controlling Law

Under section 631, subdivision (d)(5), a party in a civil case waives trial by jury by failing to deposit with the clerk advance jury fees within 25 days of the date initially set for trial. Nonetheless, "[t]he court may, in its discretion upon just terms, allow a trial by jury although there may have been a waiver of a trial by jury." (§631, subd. (e).)

"Courts have held that, given the public policy favoring trial by jury, the trial court should grant a motion to be relieved of a jury waiver `unless, and except, where granting such a motion would work serious hardship to the objecting party.' [Citation.] Where doubt exists concerning the propriety of granting relief from such waiver, this doubt, by reason of the constitutional guarantee of right to jury trial (Cal. Const., art. I, § 16), should be resolved in favor of the party requesting trial by jury. [Citation.]" (Gann v. Williams Brothers Realty, Inc. (1991) 231 Cal.App.3d 1698, 1703-1704, italics added.)

"[I]t is well established in cases involving failure to make a request or post fees that there must be prejudice to the party opposing jury trial. In Wharton v. Superior Court (1991) 231 Cal.App.3d 100, 104 . . . , this principle was articulated after review of the applicable decisions: `Where the right to jury is threatened, the crucial focus is whether any prejudice will be suffered by any party or the court if a motion for relief from waiver is granted. [Citations.] A trial court abuses its discretion as a matter of law when ". . . relief has been denied where there has been no prejudice to the other party or to the court from an inadvertent waiver. [Citations.]" ' ' ' (Johnson-Stovall v. Superior Court, supra, 17 Cal.App.4th 808, 810-811; see also Massie v. AAR Western Skyways, Inc. (1992) 4 Cal.App.4th 405, 411-412.) The prejudice that must be shown is prejudice from the granting of relief and not prejudice from undergoing a jury trial. (Gann v. Williams Brothers Realty, Inc., supra, 231 Cal.App.3d at p. 1704.)



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In exercising its discretion, the trial court may consider delay in rescheduling jury trial, lack of funds, timeliness of the request, and prejudice to the litigants. (*Gann v. Williams Brothers Realty, Inc.*, supra, 231 Cal.App.3d at p. 1704.) A court does not abuse its discretion where any reasonable factors supporting denial of relief can be found, even if a reviewing court, as a question of first impression, might take a different view. (*Ibid.*)

### 2. Application of the Law to the Present Case

As noted, in support of the Mitchells' ex parte application, their counsel explained that he had only recently been retained as co-counsel to try the case, and the failure to timely deposit the \$150 in jury fees was inadvertent because it was due to miscommunication between himself and co-counsel. The record supports this explanation because co-counsel made his first appearance in the case just three weeks before jury fees were due. While counsel's declaration could have been more specific, it was sufficient to establish inadvertent waiver.

The sellers argue the trial court was correct in denying a jury trial because the Mitchells' waiver was intentional and the result of their litigation strategy to settle the litigation and forego trial preparation. To support this argument, the sellers point to intense efforts by the Mitchells' counsel during the month before trial to coordinate mediation and settlement conferences, and conduct discovery. They also point to counsel's failure to serve the Mitchells' exhibit and witness list until February 27, 2003, nine days after the list was required to be filed. We reject the sellers' characterization of the record. While the record indicates Mitchells' counsel was dilatory in filing their exhibit and witness list, there is no suggestion in the record that the failure to post jury fees was anything but an inadvertent mistake.

The sellers further argue for the first time that they sufficiently demonstrated prejudice because if they had known trial would be before a jury, they would have filed jury instructions and certain motions in limine. The sellers did not raise these issues with the trial court. Accordingly, the argument is waived. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846; *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316.) Even now, the sellers fail to discuss the specific motions they would have filed or demonstrate that submission of jury instructions in a rather straightforward case would have been onerous.<sup>2</sup> Absent a more specific explanation of how the omitted motions or jury instructions would have impacted the sellers' defense, there is no showing of prejudice. (See *Johnson-Stovall v. Superior Court*, supra, 17 Cal.App.4th at pp. 811-812 [trial court abused discretion in denying relief of waiver of jury trial where defendants did not specifically explain how prejudice would result from failure to prepare exhibit blow ups and file motions in limine].)

The sellers also contend the trial correctly denied the motion because granting relief would have prejudiced the court by delaying the trial. But there is no indication in the record that the trial court articulated any inconvenience to it or found that the Mitchells were "trifling with justice." (See *Simmons v. Prudential Ins. Co.* (1981) 123 Cal.App.3d 833, 839.) To the extent granting relief would



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have necessitated some minor delay so that a jury panel could be ordered, we conclude such a delay would be insignificant in comparison to protection of the fundamental constitutional right of jury trial. (See *Byram v. Superior Court* (1977) 74 Cal.App.3d 648, 654 [trial by jury is an inviolate right and a fundamental part of our system of jurisprudence].)

Finally, both the sellers and the home inspection company argue the Mitchells' ex parte application was correctly denied because it was untimely under rule 379(b) of the California Rules of Court. A practical application of the rule compels us to reject this contention. Under rule 379(b), opposing parties must be given notice of an ex parte application by 10:00 a.m. of the court day before the ex parte appearance. The record reflects that the Mitchells' facsimile notice was sent to the sellers' counsel at 10:04 a.m. on Friday, February 28, 2003, and advised that the ex parte hearing would take place on Monday, March 3, 2003. The facsimile notice to counsel for the home inspection company was sent at 10:10 a.m. the same day. Thus, real parties are complaining at most of a four- and ten-minute delay in notice. There can be no question in this case that the Mitchells substantially complied with rule 379(b).

Real parties' untimeliness argument borders on the frivolous for another reason: the ex parte hearing in fact took place three days after real parties were given notice. Not only did real parties have ample opportunity to present written and oral argument, at least the sellers in fact submitted written opposition. (See *Eliceche v. Federal Land Bank Assn.* (2002) 103 Cal.App.4th 1349, 1372-1373 [no prejudice results from failure to comply with rule 379 where opposing party had opportunity to present opposition]; *Israni v. Superior Court* (2001) 88 Cal.App.4th 621, 634 [no loss of due process is suffered for failure to comply with rule 379 where opposing party received actual notice and had opportunity to argue].)

### DISPOSITION

We followed the procedures and gave the notice described in *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, at pages 177- 183. No factual issues are disputed, the legal error is clear, and the matter should be expedited. Accordingly, a peremptory writ in the first instance is appropriate. (Code Civ. Proc., §1088; *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1222-1223; *Ng v. Superior Court* (1992) 4 Cal.4th 29, 35.)

The Mitchells' petition is granted. Let a peremptory writ of mandate issue directing the respondent trial court to (1) vacate its order of March 3, 2003, denying relief for the Mitchells' statutory waiver of jury trial, and (2) issue a new order granting the requested relief. The order granting relief may be on "just terms," including, without limitation, the imposition of costs. The Mitchells are awarded their costs on this writ proceeding.

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We concur:

COOPER, P. J.

BOLAND, J.

1. All statutory citations are to the Code of Civil Procedure.
2. The record indicates that as of February 18, 2003, the date of the final status conference, the case was to proceed as a jury trial. Other defendants did file jury instructions and the sellers filed a number of motions in limine. Thus, the sellers' failure to specify the particular motions or jury instructions that would have been submitted is particularly notable.

