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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JASON K. BOUTROS, MD, INC.,

Petitioner,

v.

THE SUPERIOR COURT OF  
LOS ANGELES COUNTY,

Respondent;

SAINT LUKES PASADENA, LLC,

Real Party in Interest.

B288927

(L. A. County Super. Ct.  
No. EC065298)

ORIGINAL PROCEEDING; petition for writ of mandate.

Ralph C. Hofer, Judge. Petition granted.

Law Offices of Vip Bhola and Vip Bhola for Petitioner.

No appearance for Respondent.

Baker Marquart LLP, Ryan G. Baker, and Jaime W.

Marquart for Real Party in Interest.

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Petitioner Jason K. Boutros, MD, Inc. (Dr. Boutros) petitions for a writ of mandate directing the superior court to vacate its March 9, 2018 order denying his motion for relief from waiver of jury trial and to issue an order granting the motion. We issued a stay pending this court's resolution of the petition, and an alternative writ of mandate. Because the respondent court declined to vacate its order, we issued an order to show cause why a writ of mandate should not issue. Because we agree with Dr. Boutros that neither the respondent court nor real party Saint Lukes Pasadena, LLC (Saint Lukes) identified any prejudice that amounts to a serious hardship if he is granted relief from his waiver of jury trial, we grant the petition and direct the superior court to vacate its order denying Dr. Boutros's motion and enter a new and different order granting the motion.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Saint Lukes is the current owner and landlord of a commercial medical building in which Dr. Boutros had been a tenant since March 2000. When Saint Lukes purchased the building in 2003, it offered Dr. Boutros a new lease, but the parties were unable to agree on terms. After Dr. Boutros's five-year lease with the prior owner expired in March 2005, he remained as a month-to-month tenant and continued to pay rent, including periodic rent increases.

In 2013, Saint Lukes proposed a substantial rent increase. Dr. Boutros made a counteroffer and sought lease modifications to reflect the actual square footage of his unit. The parties also discussed Dr. Boutros affiliating with nearby Saint Lukes hospital when it reopened to provide him with additional patients. Negotiations continued for about three years, during which Saint Lukes accepted Dr. Boutros's rent payments and billed him for liquidated damages. In June 2016, Dr. Boutros notified Saint Lukes that he intended to move out. In response,

Saint Lukes returned Dr. Boutros's June 2016 rent check and billed him for over \$300,000.

Saint Lukes filed its complaint for breach of the lease agreement on June 15, 2016. The clerk entered a default against Dr. Boutros on September 16, 2016. The initial case management conference was scheduled for November 14, 2016, but the court continued it to December 14, 2016. In the meantime, the parties executed and lodged a stipulation and proposed order setting aside the default, which the court signed on December 12, 2016 and which was filed on December 14, 2016. The court conducted the initial case management conference on December 14, 2016. On January 18, 2017, Dr. Boutros filed an answer, which included a demand for jury trial.

On November 8, 2017, Dr. Boutros posted jury fees. On November 28, 2017, in preparation for the final status conference, both parties filed their trial documents, which included joint jury instructions. At the December 7, 2017 final status conference, Saint Lukes objected to a jury trial for the first time. The court stated it likely would find a waiver of jury trial because Dr. Boutros's deposit of jury fees was untimely. The court continued the trial to May 14, 2018.

On December 27, 2017, Dr. Boutros filed a motion pursuant to Code of Civil Procedure sections 473 and 631 for relief from waiver of jury trial.<sup>1</sup> Dr. Boutros's counsel provided a declaration stating in relevant part: (1) he understood that jury fees were to be paid within one year of the date Dr. Boutros filed his answer; (2) he deposited jury fees on November 8, 2017, forty days before the original trial date; (3) he and Saint Lukes's counsel worked together to designate joint jury instructions, which were filed on

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<sup>1</sup> All statutory references are to the Code of Civil Procedure unless otherwise indicated.

November 28, 2017; and (4) if he was mistaken and filed the jury fees late, it was due to his own mistake, inadvertence or excusable neglect.

On February 13, 2018, Saint Lukes filed an opposition, contending that Dr. Boutros was required but failed to post jury fees “on or before the date scheduled for the initial case management conference in the action.” Although Saint Lukes’s counsel filed a declaration with the opposition, it makes no mention of prejudice and Saint Lukes submitted no other evidence demonstrating it would suffer prejudice if the motion were granted. Nevertheless, Saint Lukes claimed it would be prejudiced if the case were tried to a jury, and identified two reasons. First, even though the parties had lodged proposed jury instructions and other documents consistent with a jury trial, it asserted that because “trial ha[d] already been continued once” and all trial documents were prepared “it would be highly prejudicial and create a serious hardship for Plaintiff” to conduct a jury trial. Next, Saint Lukes argued it would be “highly prejudicial” for a jury to decide what it characterized as complex legal issues concerning a commercial lease and calculate hold-over damages, interest, penalties and operating costs charges. Saint Lukes also argued that a bench trial would benefit both parties and promote judicial economy due to the assertedly nuanced and complex legal issues involved in the case. It included no other explanation of its prejudice argument.

On March 9, 2018, the court heard Dr. Boutros’s motion. In its tentative ruling, the court found Saint Lukes would be prejudiced by a jury trial because the case involved a 100-page lease and there would be many legal questions the court would

need to decide.<sup>2</sup> The court also concluded the waiver was not inadvertent but rather a strategic decision by Dr. Boutros’s counsel to try the case to a jury after the court made several rulings adverse to him.

At the hearing, Dr. Boutros’s counsel asserted that the motion for relief from the waiver was not strategic. Instead, he came into the case when Dr. Boutros was in default and mistakenly believed he had one year from the filing of the answer to post jury fees. Dr. Boutros also argued that Saint Lukes had not identified any serious hardship it would suffer if the case were tried to a jury, and only a “smattering” of paragraphs in the 100-page lease are at issue in the case.

The court concluded there was “some prejudice” because the case concerns “a hundred-page lease on a complicated commercial matter” and the jury, “instead of looking at the lease,” would assess “who is the bad guy. That’s what the trial’s going to be about: who’s the bad guy.” Counsel for Dr. Boutros countered that “juries are called upon to —analyze contracts” and jurors would be guided by the jury instructions. Dr. Boutros’s counsel also argued there would be no prejudice because Saint Lukes’s counsel “actually proposed jury instructions to me. We’ve submitted a joint jury instructions list with our [final status conference] documents.”

Saint Lukes’s counsel argued that “a jury does not know and is unfamiliar with issues such as holdover, . . . operating expenses, . . . cam charges, interest, [and] penalties” and—echoing the trial court—would consider “which party looks like

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<sup>2</sup> According to Dr. Boutros, the lease is only 23 pages long. He does not provide a copy of the lease, but it is not “necessary for a complete understanding of the case and the ruling under review.” (Cal. Rules of Court, rule 8.486, subd. (b)(1)(C).)

the bad guy, and it's completely prejudicial." He also acknowledged, however, that Saint Lukes submitted joint jury trial documents for the final status conference. But he also asserted he brought up the issue of jury trial waiver at the final status conference.

The court observed that a jury trial would require different preparation because Dr. Boutros's credibility would be at issue, and speculated Saint Lukes may have wanted to hire a private investigator to see whether Dr. Boutros had any prior convictions or civil cases involving fraud, or propound interrogatories to learn the identities of persons having knowledge of the contract. Dr. Boutros's counsel agreed there are differences between jury and bench trials, but noted credibility is also an issue in a bench trial. The court stated it would be "one thing" if Dr. Boutros had been a week or two late in posting his fees, but "[i]t's another thing to wait a year and a half, and the litigation proceeds on the assumption that there would be no jury trial— [¶]. . .[¶] [You] get some adverse rulings and then come in and change your mind as you're starting to think about trial as the trial date approaches." Dr. Boutros's counsel stated he was unaware "that there was any problem with a jury trial" until Saint Lukes objected to a jury trial at the final status conference. The court stated it was Dr. Boutros's "responsibility to timely demand a jury trial" and denied the motion.

Dr. Boutros timely filed this petition for writ of mandate, and we directed Saint Lukes to file an opposition by May 8, 2018. On May 7, 2018, the parties filed a joint proposed stipulation to extend the time for Saint Lukes to file its opposition to June 8, 2018. The parties explained that they had agreed to engage in alternative dispute resolution and requested a stay of the trial. We granted the requested extension and issued a temporary stay order.

Saint Lukes failed to file an opposition by the June 8, 2018 deadline or request a further extension. On July 5, 2018, we issued an alternative writ directing the trial court to vacate its order denying petitioner's motion for relief from waiver of a jury trial and issue a new and different order granting same, or show cause why a peremptory writ of mandate ordering it to do so should not issue. On July 18, 2018, the respondent court issued a minute order in response to the alternative writ. The court stated it invited the parties to submit supplemental briefing but they declined to do so. The court concluded it would not vacate its March 9, 2018 order denying Dr. Boutros's motion for relief from jury trial waiver and would not enter a new order granting the motion.

We set a hearing on the order to show cause for October 19, 2018. Saint Lukes filed a return mainly devoted to Dr. Boutros's undisputed waiver of jury trial. On the key issue of any prejudice it would suffer if the trial court granted relief from that waiver, Saint Lukes simply recites the trial court's findings. Saint Lukes does not explain the purported prejudice except to contend, without any evidentiary support, that it "has been preparing this case for a bench trial for over a year in reliance on Boutros' waiver." Significantly, Saint Lukes does not dispute Dr. Boutros's assertion that the parties prepared and submitted to the trial court joint jury instructions prior to the final status conference. Nor does Saint Lukes dispute that Dr. Boutros's answer included a demand for jury trial.

Dr. Boutros filed a traverse, in which he contends he did not waive his right to a jury trial because he did not make an appearance before November 14, 2016, the date originally set for the initial case management conference. Dr. Boutros also contends that even if the court was correct to find a waiver, neither the court nor Saint Lukes identified any prejudice that

would be caused by granting relief from the waiver. Thus, Dr. Boutros contends, the trial court erred by failing to grant him relief pursuant to section 631 and section 473, subdivision (b).<sup>3</sup>

## DISCUSSION

Section 631, subdivision (c) provides in relevant part that jury fees “shall be due on or before the date scheduled for the initial case management conference in the action, except [¶] . . . [¶] (4) If the party requesting a jury has not appeared before the initial case management conference, or first appeared more than 365 calendar days after the filing of the initial complaint, the fee shall be due at least 25 calendar days before the date initially set for trial.” (§ 631, subd. (c)(4).) A “party waives trial by jury [¶] . . . [¶] (5) By failing to timely pay the fee described in subdivision (b), unless another party on the same side of the case has paid that fee.” (§ 631, subd. (f)(5).)

Dr. Boutros first appeared in this case by submitting to the court his stipulation and proposed order to set aside the default, which the court granted on December 12, 2016.<sup>4</sup> On December 14, 2016, the court conducted the initial case management conference, which it had continued from November 14, 2016. Thus, having made his first appearance prior to the initial case management conference, Dr. Boutros was required to post jury fees prior to December 14, 2016, but did not do so until

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<sup>3</sup> On November 13, 2018, Saint Lukes filed motion to augment the record with copies of previously omitted trial court filings. We granted the motion.

<sup>4</sup> “A defendant who has not yet answered has been held to have made a general appearance—that is, to have conceded the jurisdiction of the court—if he invokes the authority of the court on his behalf, or affirmatively seeks relief.” (*Roy v. Superior Court* (2005) 127 Cal.App.4th 337, 341.)



November 8, 2017. Dr. Boutros’s untimely posting of jury fees resulted in his waiver of a jury trial. (§ 631, subd. (f)(5).)

Dr. Boutros contends the “mandatory relief” provision of section 473, subdivision (b) applies here. It does not. “[S]ection 473, subdivision (b) ‘contains two distinct provisions for relief from default’ [citation]—one makes relief discretionary with the court; the other makes it mandatory. [Citation.] The two provisions differ in several other respects: (1) the mandatory relief provision is narrower in scope insofar as it is only available for defaults, default judgments, and dismissals, while discretionary relief is available for a broader array of orders.” (*Martin Potts & Associates, Inc. v. Corsair, LLC* (2016) 244 Cal.App.4th 432, 438.)<sup>5</sup>

Alternatively, Dr. Boutros contends the trial court abused its discretion by denying his motion pursuant to section 473, subdivision (b) and section 631, subdivision (g) to set aside his waiver and allow the matter to proceed by jury trial. We agree.

“The 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. (g).) The court first must consider whether

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<sup>5</sup> Section 473, subdivision (b), provides in relevant part that the “court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief . . . shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken.” (§ 473, subd. (b).) The “mandatory relief” part of section 473, subdivision (b) that Dr. Boutros relies upon is reserved for occasions when counsel’s mistake, inadvertence, surprise, or neglect results in a default entered by the clerk or a default judgment. (§ 473, subd. (b).)

the waiver was inadvertent. (*Tesoro Del Valle Master Homeowners Assn. v. Griffin* (2011) 200 Cal.App.4th 619, 638 (*Tesoro*).) Here, the trial court rejected Dr. Boutros's counsel's explanation that he misunderstood the deadline to post jury fees, and instead the court believed counsel made a strategic decision to avoid a bench trial because of the court's prior adverse discovery rulings. This conclusion is belied by the fact that the waiver took place on December 14, 2016, before the court made any of those rulings. Moreover, Dr. Boutros filed his answer, which included a jury trial demand, on January 18, 2017, several months before the court denied any of Dr. Boutros's discovery motions. In addition, the parties filed joint jury instructions in November 2017, before Saint Lukes first raised the issue of waiver of a jury trial. For these reasons, the respondent court's conclusion that Dr. Boutros's decision to seek a jury trial was a strategic afterthought is unsupported by the evidence.

Trial by jury is a “‘right so fundamental and sacred to the citizen whether guaranteed by the Constitution or provided by statute, [and] should be jealously guarded by the courts.’” (*Wharton v. Superior Court* (1991) 231 Cal.App.3d 100, 103 (*Wharton*).) Because a jury trial is a fundamental right, the trial court must consider prejudice before it is denied. (*Tesoro, supra*, 200 Cal.App.4th at p. 638; *Wharton, supra*, 231 Cal.App.3d at p. 104 [“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.”].) “The prejudice which must be shown from granting relief from the waiver is prejudice from the granting of relief and not prejudice from the jury trial.” (*Gann v. Williams Brothers Realty, Inc.* (1991) 231 Cal.App.3d 1698, 1704 (*Gann*).) Given the public policy favoring trial by jury, the trial court should grant a motion to be relieved of a jury waiver unless it finds that granting the motion “‘would

work serious hardship to the objecting party.’ ” (*Id.*, at p. 1703.) Any doubt should be resolved in favor of trial by jury. (*Id.* at pp. 1703–1704.) “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.]’ ” (*Wharton, supra*, 231 Cal.App.3d at p. 104.)

Here, the respondent court found prejudice because it concluded certain, supposedly complex lease issues were better suited to a bench trial than a jury trial. The court also was concerned that a jury would disregard the lease and simply decide “who’s the bad guy” in “what you might call a morality play.” These concerns, however, are inconsistent with juries’ cherished status in American courts. “Our system of justice entrusts jurors—ordinary citizens who need not have any training in the law—with profoundly important determinations. Jurors decide not only civil matters, where the financial consequences may be great, but also criminal cases, where the liberty or perhaps life of the defendant hangs in the balance. Our abiding faith in the jury system is founded on longstanding tradition reflected in constitutional text, [citation], and is supported by sound considerations of justice and democratic theory. The jury system long has been a guarantor of fairness, a bulwark against tyranny, and a source of civic values.” (*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 473 (dis. opn. of O’Connor, J.).) Thus, “We have always trusted juries to sort through complex facts in various areas of law.” (*United States v. Booker* (2005) 543 U.S. 220, 289 (Stevens, J., dissenting in part).

Similarly, in rejecting the contention that “evidence presented to the jury was too extensive and complicated,” our high court stated: “ ‘Objection, this is too complicated,’ has yet to

be recognized as a valid statutory ground. Juries frequently evaluate complex cases.” (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 382.) This is because “[w]e credit jurors with intelligence and common sense [citation] and do not assume that these virtues will abandon them when presented with a court’s instructions.” (*People v. Coddington* (2000) 23 Cal.4th 529, 594, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

In any event, the trial court’s concerns are not the types of prejudice that properly can be used to deny relief from waiver of a jury trial. (*Gann, supra*, 231 Cal.App.3d at p. 1704.) The respondent court also held that allowing a jury trial would prejudice Saint Luke’s discovery and trial preparation. The undisputed evidence shows, however, that *both* parties anticipated and prepared for a jury trial, having filed joint jury instructions before Saint Luke first raised the issue of waiver at the final status conference. Accordingly, there was no showing of any prejudice let alone serious hardship to Saint Luke if the case were tried to a jury, and therefore the trial court abused its discretion by denying Dr. Boutros’s motion for relief from waiver of jury trial. (*Wharton, supra*, 231 Cal.App.3d at p. 104.)

## DISPOSITION

The petition for writ of mandate is granted. Let a peremptory writ of mandate issue, directing the trial court to vacate its March 9, 2018 order denying Petitioner's motion for relief from waiver of jury trial and to issue a new and different order granting same. Petitioner is entitled to recover costs on appeal.

NOT TO BE PUBLISHED.

CURREY, J.\*

We concur:

ROTHSCHILD, P. J.

BENDIX, J.

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\* Judge of the Superior Court of Los Angeles County, assigned by the Chief Justice, pursuant to article VI, section 6 of the California Constitution.