

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

TRICOAST BUILDERS,
INC.

Appellant,

v.

NATHANIEL
FONNEGRA,

Respondent

S273368

After a Published Opinion by the Court of Appeal
Second Appellate District, Division Two
Appellate Court Case No. B303300

Appeal from the Los Angeles County Superior Court
Hon. Melvin D. Sandvig
Superior Court No. PC056615

ANSWER TO PETITION FOR REVIEW

Eric Bensamochan, Esq.
State Bar No. 255482
9025 Wilshire Blvd. Ste. 215
Beverly Hills, CA 90211
Phone: 818-574-5740
E-mail: eric@eblawfirm.us
Attorney for Respondent

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I. INTRODUCTION

This case involves a construction dispute for a residential property. Respondent's home was destroyed by fire, and he hired TriCoast Builders Inc. (TriCoast or Appellant) to build a new home. Respondent was unhappy with the work and fired TriCoast. Appellant filed a complaint in the Los Angeles Superior Court for damages and to enforce a mechanic's lien.

After four years of litigation, the matter came to trial. TriCoast had never posted the required jury fees. When Respondent decided to waive his right to a jury, the matter proceeded to a bench trial. The court found for the Respondent, and judgment was entered. In a 2-1 decision, the Court of Appeal, Second District – Division Two, affirmed. The decision focuses on the plain language of the statute requiring the deposit of jury fees and held that TriCoast bears the burden of affirmatively demonstrating error by the trial court.

The Court of Appeal decision breaks no new ground, and the dissent suggests a standard of prejudice that negates the controlling statute. Indeed, if Appellant is correct in its Petition, there will be no need for any party to post jury fees before the start of trial.

Code of Civil Procedure §631(g) means what it says. The denial of a motion for relief from a jury waiver must be judged against an abuse of discretion standard. Appellant did not meet its burden. The Court of Appeal decision is sound, and this Petition should be denied.

II. ISSUE PRESENTED

Is the Court of Appeal decision correct that the waiver of the right to a jury trial by a party's failure to post jury fees is to be reviewed under an abuse of discretion standard?

III. STATEMENT OF FACTS

A. Factual Background

The operative complaint at the time of trial was plaintiff's second amended complaint. TriCoast sought recovery on six causes of action, including breach of contract, foreclosure of mechanic's lien, an equitable claim for the value of labor and materials furnished, and various theories of tortious interference. (See Clerk's Transcript ["CT"] at pp. 065-095). The Complaint names six defendants. (CT at 065). Ultimately, only two defendants would remain on the morning the case was called for trial. (See Minute Order of September 23, 2019; CT at 096).

B. Trial Court Proceedings

The case was litigated extensively. The Superior Court docket runs sixteen pages. (CT 002-017). The other defendants, each of whom played a role in the financing of the construction (CT at 040, 044-047) prevailed either by demurrer or summary judgment. (CT at 011-013).

On the morning scheduled for trial, Whitehouse Construction settled for \$5,000. (CT at 097). Fonnegra was the only remaining defendant and decided to waive a jury trial. Although plaintiff had litigated the case for four years, it had never posted jury fees. Fonnegra's counsel pointed this out and moved that the case proceed to a bench trial pursuant to Code of Civil Procedure sec. 631(d). (Reporter's Transcript ["RT"] September 23, 2019, p. 2, lns. 2-11).

TriCoast offered to post jury fees on the day of trial. That offer was deemed untimely. [RT at 2]. TriCoast then made an oral motion for relief from its jury waiver. (Ibid) That was also denied. The trial court instructed

TriCoast that he could seek writ review of the ruling. (Ibid) Appellant did not do so.

There was then a discussion of witness scheduling. (RT at 3-4). The court indicated it would begin the bench trial immediately, eliminating any witness scheduling issues. (Id at p. 4, lns. 9-16).

The trial court prepared a minute order for each of the seven days of the bench trial. (CT at 099-112). At the conclusion of evidence, the court found for Fonnegra and ordered that he prepare a Statement of Decision. (CT at 111-112). The Statement of Decision was submitted promptly by Fonnegra and signed the same day (CT at 138-139).

TriCoast filed a motion for new trial that was denied. (CT 149-60). An appeal followed.

C. The Court of Appeal Decision

TriCoast argued on appeal that the trial court abused its discretion by denying relief from the jury trial waiver pursuant to CCP §631(g). (See Appellant's Opening Brief, pp. 10-12). The Court of Appeal held that appellant "bears the burden of affirmatively demonstrating error by the trial court" and had failed to carry that burden. (Slip opinion, p. 14). The decision pointed to several factors that tended to support the trial court's decision, including: (1) eliminating witness scheduling issues; (2) delay; and (3) prejudice to the court or its calendar. (Slip opinion, pp. 4-5). The decision also faulted appellant for failing to seek writ relief and cited authority that: "A party who fails to seek writ review of an order denying relief from jury waiver under section 631 must demonstrate actual prejudice when challenging such an order after the trial has been concluded. *Byram v. Superior Court* (1977) 231 Cal.App.3d 648, 654." (Slip opinion, p. 6).

The dissent disagreed that the record supported the trial court's decision. (Slip opinion, dissent p. 6). It also pointed to cases suggesting Respondent should have been required to show prejudice. (Ibid at p. 4-5), while agreeing that Appellant had not shown prejudice. (Ibid at p. 4, fn. 3).

The pending Petition for Review followed.

IV. ARGUMENT

A. The Tri-Coast Decision Correctly Found That the Trial Court Did Not Abuse Its Discretion

The California Constitution states that “[t]rial by jury is an inviolate right and shall be secured to all,” but “[i]n a civil cause a jury may be waived by the consent of the parties expressed as a matter of statute.” (Cal. Const., art. I, §16). A party waives the right to a jury trial by failing to make a timely deposit of jury fees under section 631 (f)(5). A court accordingly may refuse a jury trial if the required fee deposit is not made. Such a waiver does not deny a constitutional right. *Still v. Plaza Marina Commercial Corp.* (1971) 21 Cal.App.3d 378, 388.

Section 631(g) provides: “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.” The Court of Appeal pointed to settled authority that review of a decision to deny relief under 631(g) is subject to the usual abuse of discretion standard. (Slip opinion at pp. 5-6). “As with all actions by a trial court within the exercise of its discretion, as long as there exists a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be here set aside, even if, as a question of first impression, we might feel inclined to take a different view from that of

the court below as to the propriety of its action.” *Gonzales v. Nork* (1978) 20 Cal.ed 500, 507.

The *TriCoast* decision concedes that the record from the trial court is thin. It nevertheless points out that the court proceeded with a bench trial to accommodate witness scheduling. (Slip opinion, p. 4). The dissent argues that this “supposed inference is unsubstantiated.” (Slip opinion, dissent p. 6). This difference of opinion, however, does not affect the core of the decision: “We accordingly presume that the trial court’s order denying TriCoast’s request for relief from jury waiver is correct, indulging all intendments for relief from jury waiver is correct, indulging all intendments and presumptions in favor of the order, and drawing all reasonable inferences from the facts to support the order.” (Slip opinion, p. 14, quoting *Denham v. Superior Court*, (1970) 2 Cal.3d 557, 564).

This fact specific fight over the trial Court’s abuse of discretion does not warrant Supreme Court review under Rule of Court 8.500.

B. The Dissent’s Position That Respondent Must Demonstrate Prejudice is Contrary to the Statute

The *TriCoast* decision cites a string of cases that require prejudice be shown by an appellant who failed to seek writ review of an order denying relief from jury waiver. It quotes *Byram*, supra: “Defendants cannot play ‘Heads I win, Tails you lose’ with the trial court. Reversal of the trial court’s refusal to allow a jury trial after a trial to the court would require reversal of the judgment and a new trial. It is then reasonable to require a showing of actual prejudice on the record to overcome the presumption that a fair trial was had, and prejudice will not be presumed from the fact that trial was to the court or to a jury.” (Slip opinion, p. 6 citing *Byram* at 653). There

is a real world practicality in this analysis that minimizes the double investment of judicial resources in a case that is tried twice.

The dissent not only rejects this, but goes much further and would require Respondent to show actual prejudice. (Slip opinion, dissent p. 6). The dissent argues: “I understand the majority’s concern about the waste of judicial resources in sending this back for a new trial. But the right to a jury trial is “inviolable” in California, and the failure to conduct one when a party who has that right requests one is reversible error per se.” (Ibid p. 7, citing *Valley Crest Landscape Development, Inc. v. Mission Pools of Escondido, Inc.* (2015) 238 Cal.App.4th 468, 493. Respectfully, there is no doubt that TriCoast waived its right to a jury trial. There is also no doubt that Appellant’s motion for relief under section 631(g) must be judged on an abuse of discretion standard. Or at least that is what the statute plainly says.

The *TriCoast* decision points that “prejudice to the parties is just one of several factors the trial court may consider in exercising [its] discretion.” (Slip opinion, p. 14 citing *Gann v. Williams Brothers Realty, Inc.* (1991) 231 Cal.App.3d 1698, 1704.) The opinion also does a thorough job distinguishing the cases relied upon by the dissent (and in the Petition), especially *Mackovska v. Viewcrest Road Properties LLC* (2019) 40 Cal.App.5th 1. (Slip opinion, p. 10). Again, these are factually precise distinctions which belie the suggestion that *TriCoast* and *Mackovska* are so at odds that this Supreme Court must step in to settle disputed law.

The record from the trial court is clear that TriCoast missed the opportunity to post jury fees for four years. Even the dissent concedes that TriCoast waived its right to a jury. Sound public policy and a clear statute gave the trial court discretion in addressing the motion for relief from the

waiver. The suggestion that Respondent must prove an overlay of prejudice before the trial court on exercise its discretion is NOT found anywhere in CCP 631.

V. CONCLUSION

The TriCoast decision supports both the language of the statute and existing case law. There is no need for Supreme Court review

Respectfully Submitted,

/s/Eric Bensamochan_____

Eric Bensamochan, Esq.
Attorney for Petitioners
Alfred Productions, Inc., and
John Luessenhop

VI. CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 2867 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By /s/Eric Bensamochan

Eric Bensamochan

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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FONNEGRA**

Case Number: **S273368**

Lower Court Case Number: **B303300**

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