

CASE NO. 01-18-01028-CV

**IN THE FIRST COURT OF APPEALS
HOUSTON, TEXAS**

IN RE: TEXAS CONSTRUCTION SPECIALISTS, L.L.C.

**REAL PARTIES IN INTEREST RESPONSE TO
RELATOR'S EMERGENCY MOTION FOR STAY**

Robert E. Booth
Texas Bar No. 24040546
MILLS SHIRLEY, L.L.P.
2228 Mechanic St., Suite 400
Galveston, TX 77550
Phone/Fax: 409.761.4001
rbooth@millsshirley.com

**ATTORNEY FOR
REAL PARTIES IN INTEREST**

**CLEAR CREEK POINT, L.P.;
CLEAR CREEK POINT GP, L.L.C.;
ATTICUS REAL ESTATE SER-
VICES, INC.; AND
WB CLEAR CREEK POINT, L.L.C.
(the "CCP Defendants")**

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APPENDIX

- A. Plaintiff's Original Petition (October 25, 2016) [Appx. _001-34]
- B. Docket Control Order (June 19, 2017) [Appx. _035-36]
- C. Joint Agreed Motion for Continuance (October 2, 12017) [Appx. _037-41]
- D. Plaintiff's Motion for Continuance (February 12, 2018) [Appx. _042-45]
- E. Plaintiff's Amended Motion for Continuance (March 19, 2018) [Appx. _046-52]
- F. Emergency Amended Motion to Withdraw as Counsel (April 3, 2018) [Appx. _053-56]
- G. Plaintiff's Emergency Motion for Continuance (April 5, 2018) [Appx. _057-58]
- H. Transcript of Hearing (April 6, 2018) [Appx. _059-90]
- I. Letter from TCS to Court (May 19, 018) [Appx. _091-102]
- J. Second Letter from TCS to Court (June 28, 2018) [Appx. _103-128]
- K. Plaintiff's Petition for Writ of Mandamus (July 2, 2018) [Appx. _129-175]
- L. Order denying TCS's mandamus (August 30, 2018) [Appx. _176]
- M. Notice of Appearance of Counsel (October 5, 2018) [Appx. _177-179]
- N. Plaintiff's Motion for Continuance (October 8, 2018) [Appx. _180-197]
- O. Supplement to Plaintiff's Motion for Continuance (October 26, 2018) [Appx. _198-203]
- P. Hearing Transcript (October 29, 2018) [Appx. _204-236]
- Q. Hearing Transcript (November 5, 2018) [Appx. _237-265]

- R. Motion to Withdraw (November 8, 2018) [Appx. _266-269]
- S. Plaintiff's Supplement to Motion for Continuance and Motion to Withdraw (November 13, 2018)[Appx. _270-274]
- T. Cause No. 14-17-00040-cv; Mark Young v. Bella Palma; Appellee's Request for Judicial Notice (April 23, 2018) [Appx. _275-759]
- U. Defendants' Motion for Protection from Plaintiff's Non-Party Trial Subpoena (October 26, 2018) [Appx. _760-799]

Real Parties in Interest ask the Court to deny Relator's motion for emergency stay.

A. SUMMARY

1. This is the second time Relator (TCS) has utilized mandamus proceedings and a request for an emergency stay to delay trial of this matter. This lawsuit is more than two years old. There have been six different trial settings, including three preferential trial settings. Throughout that time, Relator (TCS) has employed a series of delay tactics to prevent this case from going to trial instead of diligently prosecuting its claims.

2. Relator's current petition for writ of mandamus and accompanying request for an emergency stay is the latest example a delay tactic that has become common in the case (and the many other cases that Relator is involved in). Relator (TCS) continuously shuffles its attorneys to create conflicts and then argues that its new attorneys need more time to familiarize themselves with the case and prepare for trial. To date, Relator (TCS) has been represented by no less than five separate attorneys.

3. When the trial court refuses to indulge Relator's dilatory requests, Relator (TCS) turns to this Court to obtain the delay rightfully denied to it by the trial court. The Real Parties in interest ask that the Court deny Relator's request for an

emergency stay so that this case can finally proceed to trial on November 26, 2018 as currently scheduled (the sixth setting and third preferential setting).

B. BACKGROUND

1. Introduction of the Parties

4. Relator is Texas Construction Specialists, L.L.C. (“TCS”). TCS is the plaintiff in this lawsuit and has sued for alleged nonpayment of invoices and foreclosure of liens related to a construction project.

5. Real parties in interest include Clear Creek Point, L.P.; Clear Creek Point GP, L.L.C.; Atticus Real Estate Services, Inc.; and WB Clear Creek Point, L.L.C. (Collectively “CCP Parties”). The CCP Parties are defendants in the lawsuit and have filed counterclaims to remove the liens filed by TCS and for all offsets and credits due and owing for TCS’s defective and/or incomplete work.

6. An additional real party in interest is Supreme Dump Truck and Trailers of Houston, LLC (“Supreme Dump Truck”). Supreme Dump Truck is a subcontractor on the underlying construction project who claims to have not been paid by TCS. Supreme Dump Truck has filed a claim against TCS and for money deposited by the CCP Parties into the registry of the trial court.

2. Timeline of Trial Settings and Delays by TCS

7. This is a straightforward contract dispute arising from alleged non-payment of construction invoices. All of the parties, with the exception of TCS, believe that this case can and should be resolved by a short two or three-day jury trial. However, this case has not been resolved because during the past two years TCS has not diligently prosecuted its case. A short timeline reveals why this case remains pending after two years and is on its sixth trial setting:

First Trial Setting: September 11, 2017	
October 25, 2016	TCS initiates this lawsuit. It is represented by attorney Ron Hall. <i>See Appx. Exhibit A.</i>
May 15, 2017	Attorney Jeffrey Oppel makes an appearance as additional counsel for TCS at a hearing on a discovery motion.
June 19, 2017	Court enters new Docket Control Order with new trial date in light of added parties. <i>See Appx. Exhibit B.</i>
Second Trial Setting: November 6, 2017	
October 2, 2017	Joint Agreed Motion for Continuance filed by all parties because of Hurricane Harvey. <i>See Appx. Exhibit C.</i>
Third Trial Setting: April 9, 2018	
February 12, 2018	TCS Motion for Continuance. TCS needs more time for discovery and to prepare for trial. The motion is opposed by all defendants. <i>See Appx. Exhibit D.</i>

March 19, 2019	TCS Amended Motion for Continuance. TCS needs time for discovery and to prepare for trial. The motion is still opposed by all defendants. <i>See</i> Appx. Exhibit E.
April 3, 2018	Emergency Motion to Withdraw filed by TCS attorney, Jeffrey Oppel. Mr. Oppel (who argued a discovery motion and assisted TCS in its settlement negotiations), states that he has not been involved in prosecuting the case for nearly a year and is not prepared to try the case. A continuance of the trial setting is sought to “mitigate the effect” of his withdrawal. TCS’s other attorney, Ron Hall, will remain on the case. <i>See</i> Appx. Exhibit F.
April 5, 2018	TCS Emergency Motion for Continuance. TCS attorney, Ron Hall, has had continuous health problems that have prevented him from preparing the case for trial. <i>See</i> Appx. Exhibit G.
April 6, 2018	Hearing on Jeff Oppel’s motion to withdraw as attorney for TCS. Mr. Oppel says that he been uninvolved in the case and that TCS [Mark Young] “does not want me to be involved in this case.” TCS [Mark Young] states that its other attorney, Ron Hall, is too ill to continue representing TCS and it will need to hire new attorneys. The Court admonishes TCS that this is “an older case” that “shouldn’t still be on this docket”. The Court offers to reset trial to July 23, 2018 so that TCS can retain new attorneys. The Court warns that there will be no more excuses for delay, including vacation conflicts. TCS agrees to the new setting and states, “I’m okay with that, Your honor.” <i>See</i> Appx. Exhibit H.

Fourth Trial Setting: July 23, 2018 (Preferentially Set)	
May 19, 2018	Letter from TCS [Mark Young] to the Court. Despite agreeing to the July 23, 2018 trial setting, TCS is requesting a continuance. TCS claims it needs even more time to retain counsel. <i>See</i> Appx. Exhibit I.
June 28, 2018	Letter from TCS [Mark Young] to the Court. TCS wants to retain attorneys Armando Lopez and Andrew Lemanski. However, both attorneys have a conflict with the upcoming July 23, 2018 trial setting due to planned vacations. Despite the Court's prior warning that it would not continue the case because of vacation conflicts, TCS requests one anyway. A continuance is not granted. <i>See</i> Appx. Exhibit J.
July 2, 2018	TCS files a writ of mandamus. TCS argues the Court abused its discretion by not continuing the July 23, 2018 to accommodate the vacation of attorney Armando Lopez. <i>See</i> Appx. Exhibit K. The Mandamus is filed by Ron Hall, the prior attorney who withdrew because of illness.
August 30, 2018	TCS's mandamus is denied. <i>See</i> Appx. Exhibit L.
Fifth Trial Setting: November 5, 2018 (Preferentially Set)	
October 5, 2018	Appearance of Armando Lopez and Andrew Lemanski, for TCS. <i>See</i> Appx. Exhibit M.

October 8, 2018	TCS Motion for Continuance. Although TCS [Mark Young] acknowledge at the April 6, 2018 hearing that Ron Hall was too ill to represent TCS and replacement counsel was needed, TCS now takes the position that Ron Hall was forced to withdraw by the Court. TCS states the Court's actions have "put TCS in a very difficult position". Although TCS previously represented that attorneys Armando Lopez and Andrew Lemanski could try the case if the July 23, 2018 trial setting was moved to avoid a conflict with their vacations, TCS now argues that even more time is needed. <i>See Appx. Exhibit N.</i>
October 26, 2018	Supplement to TCS's Motion for Continuance. TCS's attorney, Andrew Lemanski, asks for a continuance based on a family medical emergency. TCS's other attorney, Armando Lopez, is on a cruise. <i>See Appx. Exhibit O.</i>
October 29, 2018	Pre-trial conference. TCS's attorney Andrew Lemanski states will not try the case on November 5, 2018 because of a family medical issue. TCS's other attorney, Armando Lopez remains but is not ready for trial because he has been on a cruise to Cuba. The Court grants a short continuance. <i>See Appx. Exhibit P.</i>
Sixth Trial Setting: November 26, 2018 (Preferentially Set)	
November 5, 2018	At pre-trial conference TCS requests another continuance. TCS attorney Andrew Lemanski states that he will not be able to try the case at all this year because of a family medical issue. TCS's other attorney, Armando Lopez, remains as counsel but cannot be ready for trial by November 26, 2018 because he has been on a cruise to Cuba and not working on the case. The Court denies the request for continuance. <i>See Appx. Exhibit Q.</i>

November 8, 2018	Motion to withdraw is filed by TCS’s attorneys, Andrew Lemanski and Armando Lopez. The Motion states, “Communications between the attorneys and Plaintiff have broken down and an irreconcilable conflict has developed.” <i>See</i> Appx. Exhibit R.
November 13, 2018	Plaintiff’s Supplement to Motion for Continuance and Motion to Withdraw. TCS’s attorney, Armando Lopez has a family medical emergency. The Motion states, “Requiring the parties to try this case on November 26, 2018 will be meaningless, a waste of time, and a waste of money.” <i>See</i> Appx. Exhibit S.

3. TCS uses these delay tactics in serial filings throughout Texas.

8. The tactics employed by TCS are not unique to this case. To the contrary, TCS (and the individuals behind TCS) are serial filers who have made a practice of leveraging delays with the trial and appellate courts to prejudice their opponents.

9. On April 23, 2018, the Fourteenth District Court of Appeals was urged by Bella Palma, LLC (appellee) to take judicial notice of the extraordinary number of lawsuits generated by Mark Young and the individuals behind TCS and the facts alleged therein. (*See* Appx. Exhibit T.)

10. Indeed, the Youngs have earned the title “serial litigators” after filing dozens of cases in state and federal court. (*See* Appx. Exhibit T at Exhibit 3, p. 2, section 1.2.) Their family has been properly characterized as vexatious litigants for

the last decade (*See* Appx. Exhibit T at Exhibit 19, p. 2–4 (overviewing the dozens of cases and hundreds of “filings, briefs and motions to and appeals to the Fifth Circuit and the United States Supreme Court”)).

11. After reviewing this history, Federal Judge Vanessa D. Gilmore ordered that they be prohibited from filing any further appeals without leave of the Chief Judge of the Southern District of Texas. (*See* Appx. Exhibit T at Exhibit 18.) Likewise, Chief Judge Marvin Isgur found their appeals frivolous and brought in bad faith. (*See* Appx. Exhibit T at Exhibit 19, p. 30–31).

4. The Prejudice to the Other Parties

12. TCS’s delays are not without consequence. The several real parties in interest in this case, including the CCP Parties and Supreme Dump Truck, each have their own claims and defenses waiting to be resolved at trial. For the CCP Parties, the liens filed by TCS on the subject property are causing significant disruption to its business. The liens should have been removed long ago, either by resolution of TCS’s claims or the CCP Parties’ counterclaims. Because of TCS’s refusal to proceed to trial, the liens have been allowed to linger and prevent TCS from continuing with its use and development of the property.

13. In addition, TCS’s continuous “emergency” filings at the eleventh-hour have caused the parties to incur significant expense. This case is now on its

sixth trial setting, including its fourth preferential trial setting. While the CCP Parties and Supreme Dump Truck have incurred the expense of preparing for trial multiple times, TCS has filed strategic emergency motions that render that preparation moot. By way of example, when the parties were on their fourth trial setting (and first preferential setting) scheduled for July 23, 2018, TCS waited until minutes before the scheduled pre-trial conference to file a petition for a writ of mandamus challenging the trial court's refusal to grant another continuance. The other parties' time and efforts preparing for trial were obviated by TCS's last-minute filing. The time denied to TCS by the trial court was instead obtained by the temporary stay provided by the Court during review of the petition (which was ultimately denied).

14. Now, the parties are once again approaching trial. Once again, the CCP parties and Supreme Dump Truck have expended the necessary time and effort to prepare their respective claims for trial. Once again, TCS seeks to render that time and effort wasted by avoiding trial yet again.

C. ARGUMENT AND AUTHORITIES

1. Rule 52.10(b) should not be used for delay.

15. TCS requests a stay of the trial court proceeding pending resolution of its petition for mandamus pursuant to Texas Rule of Appellate Procedure 52.10(b). The purpose of Rule 52 is to provide "just relief", not to obtain delay denied by the

trial court at the expense of the other litigants. *See* Tex. R. App. P. 52.10(b). Indeed, the Texas Supreme Court has cautioned against the harm caused by a stay that is not warranted by compelling circumstances. *See, Coal. of Cities for Affordable Util. Rates v. Third Court of Appeals*, 787 S.W.2d 946, 947 (Tex. 1990) (“For a court of appeals to stay proceedings in the trial court while it considers an interlocutory appeal increases delay and expense and should not be done absent compelling circumstances, circumstances lacking in this case.”)

16. TCS is not utilizing Rule 52 to obtain just relief, but to obtain yet another delay of this case at the expense of the other parties. Any compelling argument TCS’s may have for a stay is belied by its history of using “emergency” motions in this case and others to obtain delays. TCS should not be allowed to do so yet again.

2. TCS is improperly seeking the remedy of mandamus to force an unjustified continuance.

17. TCS is improperly seeking the extraordinary remedy of mandamus in order to force the trial court into granting a continuance of the preferential trial setting even though it is not entitled to such relief. TCS seeks a continuance because its current counsel (the same counsel TCS filed a previous mandamus to bring into the case *See* Appx. Exhibit K.) wants to withdraw. (*See* Appx. Exhibit R.) However, these are the third and fourth lawyers withdrawing from representing TCS while requesting a continuance. (*See* Appx. Exhibits F and G).

18. In general, absence of counsel is not good cause for a continuance, but the trial court has the discretion to allow a continuance if good cause is shown. *R.M. Dudley Const. Co. v. Dawson*, 258 S.W.3d 694, 701 (Tex.App.—Waco 2008, pet. denied) (citing TEX. R. CIV. P. 253); see *Rehabilitation Facility at Austin, Inc. v. Cooper*, 962 S.W.2d 151, 155 (Tex.App.—Austin 1998, no pet.) (citing *State v. Crank*, 666 S.W.2d 91, 94 (Tex.1984)). When the ground for the continuance is the withdrawal of counsel, movants must show that the failure to be represented at trial was not due to their own fault or negligence. *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986); *Crank*, 666 S.W.2d at 94.

19. The Court should refuse to issue a stay because TCS is at fault for its failure to be represented at trial. At the April 6, 2018 hearing, the trial court continued the trial setting by 108 days in response to the TCS's prior attorneys withdrawing from representation. In granting the continuance, the trial court reset the case for a setting agreed to by TCS. See Appx. Exhibit H at pp. 23–24. In addition, the trial court warned TCS that the new trial date was a preferential setting “and there’s not going to be no excuses, no vacation letters, none of that stuff.” *Id.* at p. 24.

20. Despite the trial court’s instructions, TCS waited until the last minute to retain lawyers whose planned vacations conflicted with the trial date. See Appx. Exhibits I and J. True to its word, the trial court refused to grant another continuance

to accommodate TCS's vacations. To work around the trial court, TCS filed its petition for writ of mandamus and request for emergency stay. *See* Appx. Exhibit K. Now, the same lawyers who TCS mandamusd the trial court to get into this case have additional conflicts and are asking to withdraw.

21. TCS should not be allowed to once again use this Court to excuse its refusal to heed the trial court's instructions regarding conflicts. The continued delay harms the Real Parties in Interest, by preventing them from moving forward with the development of the property that is the subject of the underlying suit. The extraordinary remedy sought by TCS should be denied and the parties ordered to trial on July 23, 2018.

22. If TCS is unhappy with the outcome of the trial, it may request the Court to consider the merits of the original proceeding at the conclusion of the trial.

3. Alternatively, the Court should require a bond.

23. Although the Real Parties in Interest request that the Court deny TCS's request for a stay of trial, in the alternative, the Court should condition the stay upon the filing of a bond.

24. Texas Rule of Appellate Procedure 52.10(b) states, "As a condition of granting temporary relief, the court may require a bond to protect the parties who will be affected by the relief. Unless vacated or modified, an order granting

temporary relief is effective until the case is finally decided.”

25. The CCP Parties and Supreme Dump Truck have followed the trial court’s instructions and incurred the time and expense of preparing for trial multiple times. That includes preparing the several out-of-town witnesses subpoenaed for trial by TCS. *See* Appx. Exhibit U. For the current preferential trial setting, the real-parties in interest (and the non-party witnesses) have worked around the holiday schedule to make sure they are prepared to proceed for trial on November 26, 2018. Another stay of trial would result in a substantial cost and harm. Accordingly, should the Court grant a stay, it should be conditioned upon a bond of no less than \$15,000.00 to protect the CCP Parties.

D. REQUEST FOR RELIEF

26. For these reasons, CCP Defendants ask the Court to deny Relator TCS’s motion for an emergency stay. In the alternative, the Court should condition the stay upon a bond in the amount of \$15,000.00 to protect the CCP Defendants.

Respectfully submitted,

MILLS SHIRLEY L.L.P.

By:  _____
Robert E. Booth

Texas Bar No. 24040546
rbooth@millsshirley.com

Kelly M. Haas
Texas Bar No. 24059874
khaas@millsshirley.com
2228 Mechanic St., Suite 400
Galveston, TX 77550
Tel./Fax: 409.761.4001

JACKSON WALKER, LLP

By: */s/ Jason Johns* _____
Jason Johns

Texas Bar No. 24041191
jjohns@jw.com
1401 McKinney, Suite 1900
Houston, Texas 77010
Phone: 713.752.4202
Fax: 713.308.4102

ATTORNEYS FOR REAL PARTIES IN INTEREST

Clear Creek Point, L.P.; Atticus Real Estate Services, Inc.; Clear Creek Point GP, L.L.C.; WB Clear Creek Point, L.L.C.

CERTIFICATE OF SERVICE

By my signature below, I certify that I served a copy of the foregoing document on the following parties by **efile.txcourts.gov** on **November 19, 2018**:

Plaintiff Texas Construction Specialists, LLC through its attorneys:

Andrew E. Lemanski (andylemanski@yahoo.com)

Armando Lopez (a.h.@sbcglobal.net)

Peter Kelly (pkelly@texasappeals.com)

Dana Levy (dlevy@texasappeals.com)

Defendant Supreme Dump Trucks and Trailers of Houston, LLC, through its attorney:

John K. George (jkgatty@att.net)

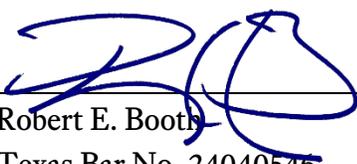
Third Party Defendant Clear Creek Point, L.P., through its attorney:

Robert Booth (rbooth@millsshirley.com)

Jason Johns (jjohns@jw.com)

Judge Michelle Slaughter, 405th District Court

Judge Michelle Slaughter (dana.winston@co.galveston.tx.us)


Robert E. Booth
Texas Bar No. 24040546

**UNSWORN DECLARATION OF ROBERT E. BOOTH
PURSUANT TO TEXAS RULE OF APPELLATE PROCEDURE
52.3(k)(1)(A)**

1. “My name is **Robert E. Booth**. I am over the age of 18, have never been convicted of a felony or a crime involving moral turpitude and am otherwise fully competent to make this affidavit.

2. I am an attorney licensed within the state of Texas and I am a partner practicing law with the firm Mills Shirley L.L.P. in Galveston Texas. I am counsel of record for Real Parties in Interest, Clear Creek Point, L.P.; Atticus Real Estate Services, Inc.; Clear Creek Point GP, L.L.C.; and WB Clear Creek Point, L.L.C. (“CCP Defendants”). As such, I am a custodian of records for litigation documents in this case.

3. All the documents included in the Appendix to CCP Defendants’ Response to Relator’s Emergency Motion for Stay are a true and correct copies.”

JURAT

My name is Robert E. Booth. My date of birth is October 4, 1978. My address is 2228 Mechanic Street, Suite 400, Galveston, Texas 77550, United States of America. I declare under penalty of perjury that the foregoing is true and correct.

Executed in Galveston County, State of Texas, on the 19th day of November 2018.



Robert E. Booth