Filed 5/18/17 Colonial Medical Group v. Dignity Health CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

COLONIAL MEDICAL GROUP, INC., Plaintiff and Appellant, v. DIGNITY HEALTH, Defendant and Respondent.	A145506 (San Francisco County Super. Ct. No. CGC-10-501647)

Appellant Colonial Medical Group, Inc. (Colonial) challenged an agreement between a hospital run by respondent Dignity Health and a different medical group, claiming that the agreement was illegal and unfair. The trial court sustained the hospital's demurrer to Colonial's complaint, which alleged various business torts, but allowed the action to proceed as a petition for writ of mandate. After extensive discovery and a contested hearing, the trial court ruled against Colonial on the petition. On appeal, Colonial does not challenge the trial court's final ruling on the petition's merits but instead contends that the trial court improperly sustained the demurrer. We disagree and affirm.

I.
FACTUAL AND PROCEDURAL BACKGROUND

Dignity Health operates Mercy Hospitals of Bakersfield (Mercy). Mercy contracts with the California Department of Corrections and Rehabilitation (CDCR) to provide hospital services to prison inmates. Mercy has a 29-bed guarded unit and other guarded

facilities used to treat those inmates. Colonial provided medical services to inmates under a contract with CDCR, but its physicians did not always use Mercy's guarded unit and instead often used an outpatient clinic. CDCR asked Mercy to find another physician group to provide services to inmates.

In April 2009, Mercy's board of directors approved an agreement with Golden Empire Managed Care (GEMCare) for emergency-room services for CDCR inmates (services agreement). Under the services agreement, GEMCare was to provide exclusive coverage to CDCR inmates who presented at the emergency room and were not previously assigned to another physician group (i.e., Colonial). According to its recitals, the agreement was to facilitate the administration of services to inmates; ensure the availability of services; reduce disruptions in Mercy's operations; establish common goals to provide efficient operations and communications between Mercy, GEMCare, and CDCR healthcare providers; simplify scheduling problems; best use Mercy's equipment and facilities; and improve the quality of care by standardizing procedures.

Colonial contends, however, that the services agreement wrongly diverted its patients and physicians to GEMCare. According to the company, the services contract between Mercy and GEMCare included " 'wink-wink' language," and the "evil" in the arrangement was that GEMCare "promised to fully utilize the outpatient clinic in exchange for the contract and the illegal activity of granting [GEMCare] the exclusive" services agreement. (Emphasis omitted.) Colonial goes so far as to say that it "really did not matter what the [services agreement], a lawyer crafted document, said" because the "real agreement . . . was different."

After pursuing an unsuccessful federal antitrust action, Colonial in July 2010 filed a complaint in state court against Mercy and GEMCare for damages and injunctive relief. The complaint alleged causes of action for (1) violations of California's "anti-kickback" statute (Bus. & Prof. Code, §§ 650.01, 650.02), (2) tortious interference with contracts and prospective economic advantage, and (3) unfair competition in violation of Business and Professions Code section 17200 et sequitur. Attached to the complaint were three Mercy flyers providing a number to call when transport was needed to Mercy's guarded

unit. Colonial alleged that the flyers were part of the effort to divert inmate patients from Colonial to GEMCare.

Mercy demurred to the complaint, arguing among other things that Colonial could only challenge the hospital board's approval of the services agreement by petitioning for a writ of mandate under Code of Civil Procedure section 1085.[1] Colonial opposed the demurrer. As for Mercy's argument that the action should proceed by way of writ of mandate, Colonial briefly countered that it was not challenging the type of "legislative action" typically challenged by writ of mandate (quipping that if the services agreement constituted that type of legislation, then "Bonnie and Clyde were great legislators"). Colonial also contended that proceeding by way of writ of mandate would deprive the company of the jury trial it had requested.

In June 2012, following a stay of the state-court proceeding pending the resolution of the federal action, the trial court agreed with Mercy that Colonial's sole remedy against Mercy was by way of writ of mandate. The court sustained the demurrer without leave to amend, but it allowed Colonial to file a petition for writ of mandate.[2]

Colonial thereafter filed a petition for writ of mandamus and/or prohibition under section 1085. The underlying factual allegations were substantially similar to those in Colonial's original complaint, with the later-filed petition adding allegations post-dating the original complaint regarding the implementation of the services agreement. The petition's two disputed issues, as framed by Colonial through subsequent briefing and

---

[1] All statutory references are to the Code of Civil Procedure unless otherwise specified.

[2] The trial court also ruled on a separate demurrer brought by GEMCare. The court sustained the demurrer (1) without leave to amend with respect to the cause of action for violation of the anti-kickback statutes (as to both GEMCare and Mercy) because there is no right of action for a private litigant to seek relief under any of the relevant statutes and (2) with leave to amend as to the claims for interference with contract and prospective economic advantage, as well as violation of the unfair competition law. The trial court later granted GEMCare's unopposed motion to sever the trial on the amended complaint against it from the trial on the petition for writ of mandate, so that the mandate petition would be tried before Colonial's amended complaint against GEMCare. GEMCare is not a party to this appeal.

argument, were that (1) the services agreement was illegal, and (2) Colonial and its physicians were wrongfully denied notice and an opportunity to be heard before the agreement was approved. Whereas Colonial's original complaint sought compensatory and punitive damages along with unspecified injunctive relief, its petition for writ of mandate asked for a writ commanding Mercy to set aside the services agreement.

The parties engaged in discovery, which apparently included about 18 depositions and the exchange of extensive written materials. In March 2013, the parties submitted case management statements, in which Colonial requested a jury trial and Mercy asserted that there was no right to one. Apparently without first holding a case management conference, the trial court issued a case management order setting the case for a jury trial on March 17, 2014. Mercy thereafter filed an ex parte application requesting an order assigning the matter to a department for a hearing on Colonial's petition and, if necessary, an order "clarifying" that writs of mandate are heard as law-and-motion matters and not as jury trials. The trial court granted the motion over Colonial's objection, set a briefing schedule, and scheduled a hearing.

Around this same time, Colonial filed a motion for leave to file an amended writ petition, seeking to delete allegations that Mercy and GEMCare entered into an exclusive contract, allegations that counsel candidly acknowledged Colonial had learned during discovery were not true. After hearing argument, the trial court denied the motion but noted that the judge who considered the petition would retain the discretion to allow an amendment according to proof. As for its original writ petition, Colonial submitted five declarations and six deposition transcripts in support of it, and Mercy submitted around 30 exhibits in opposition.

On the date that had been scheduled for trial, the trial court instead held a status conference and then scheduled a hearing at which the parties argued preliminary procedural issues. After considering further briefing and argument on those preliminary issues, the court issued an order on "Phase One Issues," as follows:

Amendment of petition: The court ruled that it would "grant an appropriate motion, if and when made, to allow Colonial's petition to conform to the evidence." But

it rejected Colonial's argument that if the company were permitted to amend its petition, the claims would be cognizable as civil claims. Citing *Lewin v. St. Joseph Hospital of Orange* (1978) 82 Cal.App.3d 368 (*Lewin*), the court concluded that "Colonial's challenge to Dignity's arrangement — regardless of whether that arrangement is called a contract, Board decision, policy, implementation of a Board decision, or something else — with GEMCare and the consequent diminution of the ability of Colonial's physicians to provide medical services to CDCR inmates at Mercy Hospital is a quasi-legislative act that can only be legally challenged by way of a section 1085 'traditional' writ of mandate."

Standard of review: The court determined that the legality of the services arrangement was an issue of law that the court would review de novo, with no deference given to Mercy's fact-finding or business judgment. This was a decision favorable to Colonial, because a hospital's managerial decisions generally are set aside only if they are found to be "arbitrary, capricious or entirely lacking in evidentiary support or contrary to established public policy or unlawful or procedurally unfair." (*Lewin*, *supra*, 82 Cal.App.3d at p. 386; see also *Centeno v. Roseville Community Hospital* (1979) 107 Cal.App.3d 62, 72 [reviewing hospital decisions only to determine whether they are unlawful or seriously harmful to public interest].)

Scope of admissible evidence: The court granted "broad leeway to Colonial in seeking to prove" its claim that Mercy engaged in an illegal kickback scheme. In doing so, it rejected Mercy's argument that evidence was inadmissible if it arose after Mercy's board approved the services agreement or if it contradicted the information relied on by the board. (Cf. *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 578 [extra-record evidence admissible in actions challenging quasi-legislative decisions only where evidence existed before agency made decision and it was not possible in the exercise of reasonable diligence to present the evidence to the agency before the decision was made]; *Pitts v. Perluss* (1962) 58 Cal.2d 824, 833 [judicial review of quasi-legislative action limited to examination of proceedings before officer to determine whether action was arbitrary, capricious, or entirely lacking in evidentiary support].)

Nature of proceedings: Finally, after "reviewing the mountain of evidentiary material submitted by the parties," the court declined to permit live testimony or to empanel a jury, and instead elected to proceed to the merits of the dispute as a law-and-motion matter without live testimony or a jury. The court noted, "While there are factual disputes—specifically on the issue of the existence of the alleged kickback scheme—after reviewing the evidentiary submissions, I think it very unlikely that the decision-making process will be aided by live testimony. In this regard, I note that Colonial has not identified any particular testimony by any particular witness that it believes has not been adequately presented in writing, nor could I identify any such testimony." The court also rejected Colonial's claim that it had a constitutional right to a jury trial in a mandamus proceeding, citing *Hutchison v. Reclamation Dist. No. 1619* (1927) 81 Cal.App. 427, 434.

The court scheduled a hearing for the parties to argue the merits of their submissions ("phase two" of the proceedings). A hearing, which was characterized as "an extended law and motion oral argument," was held over three days in November 2014.

The trial court issued a 10-page order on phase two issues on March 3, 2015. It agreed with Colonial that its burden of proof was by the preponderance of the evidence, and not by clear-and-convincing evidence as Mercy claimed, yet another ruling that was favorable to Colonial. On the merits, however, the court denied Colonial's petition for a writ of mandate. It found that (1) Colonial failed to prove that Mercy and GEMCare entered into an agreement that granted GEMCare physicians the right to admit prison inmates as inpatients in return for GEMCare physicians providing outpatient services for inmates at the medically guarded outpatient facility; (2) even if such an agreement existed, it did not violate the statutes upon which Colonial relied because Mercy had shown that it acted legitimately, and "not contrary to the medical judgment of any of the inmates' physicians, the medical needs of any of the inmates or the expressed wishes of" the CDCR; and (3) Mercy was not legally required to provide Colonial with notice or the opportunity to be heard before its board approved the services agreement. The court

specifically rejected Colonial's claim that the services agreement was "simply a 'cover' for an unwritten illegal 'kickback' scheme." In its appeal, Colonial does not attack any of the trial court's factual findings.

Colonial timely appealed from the judgment on the denial of the writ of mandate.

II.
DISCUSSION

A. The Trial Court Did Not Commit Reversible Error in Requiring Colonial to Proceed by way of a Petition for a Writ of Mandate.

Colonial contends that the trial court committed reversible error when it ruled on Mercy's demurrer that Colonial could only proceed by way of a petition for writ of mandate. We cannot agree, particularly in light of the unusual procedural posture of this case.

We begin with an overview of the law governing a challenge to a decision made by a hospital board. "[C]haracterization of [such] a decision as either adjudicative or quasi-legislative has a significant impact on the applicable standard of review." (*Major v. Memorial Hospitals Assn.* (1999) 71 Cal.App.4th 1380, 1398.) Where a hospital board makes a quasi-judicial decision that affects a fundamental, vested right, a trial court reviews the decision under administrative mandate (section 1094.5) for substantial evidence. (*Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 678 & fn. 11.) By contrast, where a hospital board makes a quasi-legislative decision, a trial court reviews the decision under traditional mandate (§ 1085) and is limited to examining whether the action taken was arbitrary, capricious, or entirely lacking in evidentiary support. (*Lewin*, *supra*, 82 Cal.App.3d at p. 383.) " 'Generally speaking, a legislative action is the formulation of a rule to be applied to all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts.' " (*Ibid.*)

Lewin explained at length the reasoning behind the deferential review for a hospital board's quasi-legislative action: "[T]he limited judicial review applicable to the quasi-legislative actions of a governmental administrative agency is also appropriately

applied to judicial review of rule-making or policy-making actions of a nonprofit hospital corporation. In the first place, the propriety of judicial review of the rule-making or policy-making actions of such an entity is based in large part on the notion that its actions substantially affect the public interest and that it is not therefore entirely 'private.' [Citations.] Secondly, to the extent the scope of judicial review is limited as a matter of deference by the courts to the presumed expertise of administrative agencies in respect to matters within their jurisdiction [citations], the reason for the rule is fully applicable to a nonprofit hospital corporation. The operation and administration of a hospital involves a great deal of technical and specialized knowledge and experience, and the governing board of a hospital must be presumed to have at least as great an expertise in matters relating to operation and administration of the hospital as any governmental administrative agency with respect to matters committed to its authority. Third, to the extent the limited scope of judicial review may be attributable to the concept of separation of powers and judicial deference to a coordinate branch of government [citation], a similar deference is not inappropriate in respect to rule-making or policy-making actions of a 'private,' nonprofit hospital corporation." (*Lewin, supra,* 82 Cal.App.3d at pp. 384-385.) "Judges are untrained and courts ill-equipped for hospital administration, and it is neither possible nor desirable for the courts to act as supervening boards or directors for every nonprofit hospital corporation in the state." (*Id.* at p. 385.)[3]

Although the parties disputed below whether the board's approval of the services agreement was quasi-legislative in nature (and thus to what level of review the decision was subject), Colonial does not directly challenge the trial court's finding that Mercy's approval of the services agreement was quasi-legislative. Instead, it focuses on the form of action it was required to pursue, arguing that there is no legal requirement that challenges to such hospital policies be brought as petitions for a writ of mandate. We find *Lewin, supra,* 82 Cal.App.3d 368, upon which the trial court relied in ruling that

[3] Colonial invites us to part company with *Lewin* "to the extent that it holds that hospital contracting decisions are quasi-legislative acts," but we decline to do so, because Colonial offers no compelling reason to abandon this well-settled rule.

Colonial was required to proceed as a writ of mandate, instructive. In *Lewin*, a doctor challenged a private hospital's decision to operate one of its units on a closed-staff basis. (*Id.* at pp. 375-377.) The *Lewin* court rejected the doctor's claim that he was entitled to proceed by way of administrative mandamus (§ 1094.5) and held that the trial court was limited to resolving the claim under traditional mandamus (§ 1085) to determine whether the hospital's quasi-legislative determination to amend its policy was arbitrary, capricious, or entirely lacking in evidentiary support or whether the hospital failed to follow proper procedure or give the notice required by law. (*Lewin* at p. 382; see also *Santa Ana Tustin Community Hospital v. Board of Supervisors* (1982) 127 Cal.App.3d 644, 652-653 [decision by board of supervisors to designate certain hospitals as trauma centers reviewable only by petition under § 1085].)

Colonial counters that there is no rule that challenges to hospital rule-making must be brought exclusively as writs of mandate. In *Lewin*, there was no dispute that such challenges be brought by writ of mandate, the only question was the form of mandate, which affected the deference to be given the decision under review. (*Lewin*, *supra*, 82 Cal.App.3d at p. 382.) In support of its argument that non-writ causes of action may challenge hospital-board actions, Colonial cites to cases, including some that rely on *Lewin*, that involved other types of causes of action. (*Major v. Memorial Hospitals Assn.*, *supra*, 71 Cal.App.4th at p. 1385 [plaintiff doctor filed complaint against hospital and waived trial by jury]; *Mateo-Woodburn v. Fresno Community Hospital & Medical Center* (1990) 221 Cal.App.3d 1169, 1174 [appeal from judgment denying permanent injunction; unclear whether case brought as writ of mandate]; *Redding v. St. Francis Medical Center* (1989) 208 Cal.App.3d 98, 100-101 [plaintiffs filed complaint against hospital; appeal was from denial of preliminary injunction]; *Centeno v. Roseville Community Hospital*, *supra*, 107 Cal.App.3d at pp. 65-66 [doctor filed complaint against hospital for declaratory judgment, injunctive relief, and damages]; *Blank v. Palo Alto-Stanford Hospital Center* (1965) 234 Cal.App.2d 377, 379 [plaintiff filed complaint for injunctive relief and damages].)

But even though some of these cases may have assumed the viability of non-writ causes of action, they all stressed that hospital boards' quasi-legislative actions are subject to deferential review—i.e., whether the actions were arbitrary, capricious, or entirely lacking in evidentiary support. (*Major v. Memorial Hospitals Assn., supra*, 71 Cal.App.4th at pp. 1398, 1410-1411; *Mateo-Woodburn v. Fresno Community Hospital & Medical Center, supra*, 221 Cal.App.3d at pp. 1183-1184; *Redding v. St. Francis Medical Center, supra*, 208 Cal.App.3d at p. 104; *Centeno v. Roseville Community Hospital, supra*, 107 Cal.App.3d at pp. 72-73; *Blank v. Palo Alto-Stanford Hospital Center, supra*, 234 Cal.App.2d at p. 394.) This is precisely the inquiry undertaken in traditional mandate under section 1085. (E.g., *Fullerton Joint Union High School Dist. v. State Bd. of Education* (1982) 32 Cal.3d 779, 786; *Klajic v. Castaic Lake Water Agency* (2004) 121 Cal.App.4th 5, 11; *Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 1264-1265.) None of the cases cited stand for the proposition, as Colonial posits, that a trial court necessarily commits reversible error in insisting that a challenge to a quasi-legislative action by a hospital board be brought through a writ of mandate.

Colonial contends that *Lewin* does not apply here because Colonial had adequate remedies at law, which included the causes of actions for "business torts" as alleged in the complaint, and the trial court wrongly denied the company the opportunity to pursue those legal remedies by sustaining Mercy's demurrer. (§ 1086 [petitions for writ of mandate under § 1085 generally lie only "where there is not a plain, speedy, and adequate remedy, in the ordinary course of law"].) But given the well-settled authority that quasi-legislative actions by hospital boards are subject to the type of review available by traditional mandate under section 1085, we cannot say that the trial court committed reversible error in requiring the action to proceed in that manner.

Colonial argues that the trial court's rulings in its favor (that the court would determine the legality of the services agreement as a matter of law and would consider evidence outside of the agreement itself to make its determination) demonstrate that the court erred in requiring this action to proceed by writ. According to Colonial, these

rulings demonstrate that this case was more akin to an action at law, and it was thus "intuitive" for the court to treat it accordingly and deny the demurrer.

We must, however, consider Colonial's argument in the unusual procedural context of this case. The argument asks us to reverse the trial court's decision sustaining the demurrer even though 1) Colonial did not challenge that ruling at the time by way of an appellate writ, which it was entitled to do (*Shaw v. Superior Court* (2017) 2 Cal.5th 983, 992); 2) the petition below went forward, a hearing was held, and a determination on the merits was entered; and 3) Colonial does not challenge that determination on the merits in its appeal. "After a trial to the court it may be difficult for [an appellant] to establish that he was prejudiced by the denial of a jury trial." (*Byram v. Superior Court* (1977) 74 Cal.App.3d 648, 654.)

Colonial maintains that we may not consider any lack of prejudice or any litigation inefficiencies that would result from a reversal because it was denied its right under the California Constitution to a trial by jury (Cal. Const., art. I, § 16), and such a denial is reversible error per se. (*Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 698 [reversing judgment in civil action for equitable indemnity where party wrongfully denied its right to jury trial].) But we cannot agree. First, there is no constitutional right to a jury trial in an equitable action. (*C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 8-9.) Second, even in "mixed" cases involving both equitable and non-equitable claims, trial courts may "proceed[] first with the equitable claims—without a jury or with an advisory jury—and ' "if the court's determination of those issues is also dispositive of the legal issues, nothing further remains to be tried by a jury." ' " (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1240.)

Colonial's basic grievances are that Mercy and GEMCare unlawfully interfered with Colonial's right to pursue its business with the CDCR; conspired to so interfere; violated the anti-kickback statutes; and sent out misleading and unjustified flyers, letters, and other communications. The inescapable fact, however, is that the trial court has already rejected these grievances on the merits. The trial court specifically stated it needed to decide the issue of "whether th[e] language [in the agreement between Mercy

and GEMCare] is a true reflection of the agreement between [Mercy] and GEMCare or simply a 'cover' for an unwritten illegal 'kickback' scheme as alleged by Colonial." After weighing all the evidence, the court concluded that there was "*no evidence* of an agreed tie-in or connection between the rights accorded to GEMCare under the covered services contract and GEMCare and its physicians' plans to use the MGU [medically guarded outpatient facility]." (Italics added.) Colonial responds that it would amend its allegations "to conform to what it learned in discovery." But what it learned in discovery was presumably presented to the court, which found it to be insufficient to show any wrongdoing by Mercy. In short, however Colonial claims it should be allowed to *plead* its case, it has already tried, and failed, to *prove* the underlying allegations.

Accordingly, Colonial would be unable to establish liability against Mercy even if it were allowed to pursue the two additional causes of action in its original complaint (intentional interference with economic advantage and violation of the unfair competition law). As for its cause for intentional interference with contractual relations, Colonial is correct insofar as it contends that to state a cause of action a plaintiff must plead "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.) But in denying Colonial's writ petition, the trial court noted that there was "no evidence that any current or former staff at the MGU believed that there was any impropriety about GEMCare's use of the MGU. There is no evidence that any current, former or prospective GEMCare physicians or any of their staff felt pressured or threatened to use, or were told to use, the MGU. There is no comparative numerical or statistical evidence of the use of the MGU by Colonial and GEMCare physicians." Given these unchallenged findings, there is no way Colonial could establish the necessary elements to prove that Mercy intentionally induced or actually caused a disruption of Colonial's contractual relations with the CDCR.

Finally, as for a cause of action for a violation of the unfair competition law, a plaintiff must show there way an "unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code, § 17200; see also *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 209-210.) Again, the trial court concluded that Colonial's evidence showed on the merits that there was *no indicia* of a wrongful agreement and that, even if there was, the agreement "ha[d] the legitimate purpose of enhancing the safety of inmates and the public." Given this unchallenged factual conclusion, we cannot conceive how Colonial could successfully pursue such a cause of action.

In sum, although Colonial frames its argument in terms of having the legal right to pursue a complaint seeking damages, what it in effect seeks to do is re-try claims it has already lost in mandate proceedings. We do not believe it must be permitted to do so under the procedural circumstances of this case.

B. The Trial Court Did Not Abuse Its Discretion in Declining to Order a Jury Trial with Live Testimony.

Colonial contends that even if the company's only recourse was by writ of mandate, the trial court erred in denying its request for a jury trial and in allowing presentation of evidence only by way of written evidence. Colonial is mistaken.

Petitions for writ of mandate are handled by way of a law-and-motion hearing in the trial court, with evidence received by declaration without testimony or cross-examination unless good cause exists for live testimony. (§ 1090; Cal. Rules of Court, rules 3.1103(a)(2), 3.1306(a).) Where a petition for writ of mandate raises a question of fact essential to the determination of the petition that affects the parties' substantial rights, the court may in its discretion order that the question be tried by a jury. (§ 1090.) It is settled that in writ proceedings, the trial court has broad discretion both in permitting live testimony and in ordering a jury trial. (*American Federation of State, County & Municipal Employees v. Metropolitan Water Dist.* (2005) 126 Cal.App.4th 247, 263 [" 'In a law and motion, writ of mandate hearing, the trial court has broad discretion to decide a case on the basis of declarations and other documents rather than live, oral

testimony.' "]; *Hutchison v. Reclamation Dist. No. 1619, supra,* 81 Cal.App. at p. 434 [trial court has discretion to order jury to determine question of fact in mandamus proceeding].)

In arguing that the trial court erred in not ordering a jury trial with live testimony, Colonial places undue reliance on section 1090, which provides in full: "If a return be made, which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the court may, in its discretion, order *the question* to be tried before a jury, and postpone the argument until such trial can be had, and the verdict certified to the court. The question to be tried must be distinctly stated in the order for trial, and the county must be designated in which the same shall be had. The order may also direct the jury to assess any damages which the applicant may have sustained, in case they find for him." (Italics added.) The jury's verdict on such a factual question is "merely advisory and does not bind the court." (*Cutter Laboratories v. R. W. Ogle & Co.* (1957) 151 Cal.App.2d 410, 418; see also 3 Cal. Civ. Proc. Before Trial (Cont.Ed.Bar 2016) Jury Trial Demands, § 41.7, p. 41-5.) Even where a trial court empanels a jury to determine a factual issue, it retains the discretion to later dismiss the jury. (*Constantine v. City of Sunnyvale* (1949) 91 Cal.App.2d 278, 280; 3 Cal. Civ. Proc. Before Trial, *supra,* at p. 41-5.) Thus, while Colonial speaks generally of the existence of factual disputes and the importance of evaluating witness credibility, it overstates the role that a jury would have played even if the trial court had empaneled one.

Colonial mistakenly implies that the trial court was *compelled* to order a jury trial.[4] The company relies on a passage in *English v. City of Long Beach* (1952) 114 Cal.App.2d 311, 316, which held that the trial court erred in dismissing a writ as a matter of law because "[t]he pleadings have tendered a factual issue which, if determined favorably to appellant, required the entry of judgment in her favor, she was entitled as of right *to a*

[4] Colonial also repeats its argument, which we have rejected, that it had a constitutional right to a jury trial.

trial thereon either by the court or, *in the latter's discretion* and as requested by counsel for appellant, by a jury. (Code Civ. Proc., § 1090.)" (Italics added.) In other words, the trial court retains discretion to order a jury determination of a factual issue. But Colonial apparently contends that *English*'s reference to a "trial" means that the company was entitled to live testimony, which is not required under the current Rules of Court. (Cal. Rules of Court, rules 3.1103(a)(2), 3.1306(a).) Colonial also cites *Serna v. Superior Court* (1985) 40 Cal.3d 239, an original writ proceeding brought by a defendant to compel a municipal court to dismiss misdemeanor proceedings against him based on speedy-trial grounds. The court mentioned in passing that the writ proceeding was distinguishable from ones, such as this one, where "evidence may be taken and disputed factual allegations resolved by a judge or jury in appropriate circumstances (Code Civ. Proc., § 1090)." (*Id.* at p. 245.) *Serna* does not stand for the broad proposition, as Colonial claims, that parties have the right to a jury trial with live evidence in writ petitions under section 1085. Colonial has not demonstrated that the trial court abused its discretion in conducting the proceedings below as a law-and-motion matter, without a jury or live witnesses.

III.
DISPOSITION

The judgment is affirmed. Respondent Mercy shall recover its costs on appeal.

_____

Humes, P.J.

We concur:

_____

Margulies, J.

_____

Banke, J.