

SUPREME COURT COPY

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IN THE
SUPREME COURT OF CALIFORNIA

MILTON HOWARD GAINES,

Plaintiff/Appellant,

vs.

FIDELITY NATIONAL TITLE INSURANCE COMPANY, et. al.

Defendants/Respondents.

SUPREME COURT
FILED

AUG 31 2015

Frank A. McGuire Clerk

Deputy

CRC
8.25(b)

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
CASE NO. B244961
Superior Court, Los Angeles County
Case No. BC361 768
The Honorable Rolf M. Treu, Judge

**SUPPLEMENTAL LETTER BRIEF OF PLAINTIFF AND APPELLANT
MILTON HOWARD GAINES**

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Pursuant to the Court's order filed July 29, 2015, plaintiff and appellant **MILTON HOWARD GAINES** submits this supplemental letter brief to address the following questions:

1. Did the trial court's April 3, 2008 order "striking the current trial date of September 22, 2008" (CT 279) constitute a stay of the "trial of the action" under Code of Civil Procedure, section 583.340, subdivision (b)?

2. What factors distinguish between a stay of trial and a continuance of trial for purposes of Code of Civil Procedure, section 583.340, subdivision (b)?

I.

THE TRIAL COURT'S ORDER OF APRIL 3, 2008 DID CONSTITUTE A STAY OF THE "TRIAL OF THE ACTION" UNDER CODE OF CIVIL PROCEDURE §583.340(b)

The trial court's order of April 3, 2008 did constitute a "stay" of the "trial of the action" under Code of Civil Procedure §583.340(b) for several reasons which include:

1. The intent of the parties as expressly stated in communications between the parties prior to and at the time of the April 3, 2008 ex parte application was to obtain a "stay" of the proceedings to "preserve the status quo". (CT 250-276);

2. The intent of the trial court as expressly stated in the April 3, 2008 order was to "stay" the case for 120 days to allow the parties to mediate

the issues while “striking” the existing trial date and scheduling a future post mediation and trial setting conference date. (CT 278-281; 283-284).

3. Case authority supports the interpretation of the actions of the parties and the court as constituting a “stay” of the “trial of the action” as opposed to a “continuance” of the trial. Holland v. Dave Altman’s R.V. Center (1990) 222 Cal.App.3d 477, 481-483.

In Holland, supra, the trial court granted a motion to dismiss for failure to bring a case to trial within five years from the date that it was filed. The appellate court reversed the trial court’s dismissal after finding that the trial court failed to exclude time from the five-year computation as required by Code of Civil Procedure §583.340. The case in the trial court had been suspended for 16½ months while plaintiff appealed the dismissal of one of the defendants, a Swiss citizen who had made a successful motion to quash an attempted substituted service. The trial court granted an ex parte application from plaintiff to “continue” the trial during the pendency of the appeal. The trial court “vacated” the trial date and placed the case “off calendar pending the ruling on appeal”. The five year period from the date of filing the complaint expired during the appeal. After remand to the trial court, the remaining defendants’ motion to dismiss under Code of Civil Procedure §583.310 was granted. Holland, supra, 222

Cal.App.3d, at pp. 480-481.

The appellate court reversed the dismissal based on its determination that the time during which the case was suspended should have been excluded from the calculation of the five year period pursuant to Code of Civil Procedure §583.340(b) and (c). The appellate court ruling specifically addressed the meaning of the term “stay” as used in §583.340. It determined that a “stay” meant “...an indefinite postponement of an act or the operation of some consequence, pending the occurrence of a designated event.” The court cited a criminal case, People v. Santana (1986) 182 Cal.App.3rd 185, which defined a “stay” as the “...temporary suspension of a procedure in a case until the happening of a defined contingency.” In addition, the court cited Black’s Law Dictionary which defined a stay as “a suspension of the case or some designated proceedings within it.” The court contrasted the use of the term “stay” with the definition of “continuance” which the court defined as “...a postponement of the trial of the pending action to a later date, at which time it automatically resumes.” (7 Witkin, Cal. Procedure (3d ed. 1985) Trial, §6, p. 23.) Holland, supra, at pp. 480-483.

The appellate court in Holland reasoned that the trial court’s use of the word “continue” in the trial court’s order was not determinative. The trial court’s order, which put the trial over indefinitely until the happening of a

designated event instead of postponing the trial to a known date, was determined to be a stay of the trial rather than a continuance of the trial.

The facts and issues presented in the instant case are substantially analogous to the facts and issues presented in Holland. Plaintiff GAINES had an agreement with all defendants and other holders of interests in the subject property which was the basis and substance of the April 3, 2008 ex parte application. The agreement was that the action should be “stayed” for 120 days to allow the parties to maintain the “status quo” while efforts were made to mediate the case. (CT 259-269). The scheduled trial date of September 22, 2008 was not continued to a later date. Instead, the trial court struck the trial date and scheduled a post mediation and trial setting conference for July 16, 2008. (CT 279).

The trial setting conference which was scheduled for July 16, 2008 did not occur as scheduled due to the absence of the former trial judge and the reassignment of the case to a new judge. After the case was assigned to a new judge, a status conference was conducted on November 6, 2008. (CT 238). The stay was terminated at the November 6, 2008 status conference, and the case was scheduled for another trial setting conference on December 11, 2008. (CT 238; 304). The next scheduled trial date was August 29, 2009. (CT 238).

There is nothing in the record to indicate that the September 22, 2008 trial date was ever “continued”. There are no bases for determining that the September 22, 2008 trial date was continued. The trial court made an order on April 3, 2008 “striking” the September 22, 2008 trial date and no new trial date was scheduled. Therefore, the “trial of the action” scheduled for September 22, 2008 was stayed for purposes of Code of Civil Procedure §583.340(b). The “trial of the action” was not continued.

II.

THE FACTORS WHICH DISTINGUISH BETWEEN A STAY OF TRIAL AND A CONTINUANCE OF TRIAL FOR PURPOSES OF CODE OF CIVIL PROCEDURE §583.340(b) ARE BASED ON WHETHER THE TRIAL DATE IS SUSPENDED UNTIL THE HAPPENING OF A DEFINED CONTINGENCY IN CONTRAST TO POSTPONING THE TRIAL DATE UNTIL A LATER DATE AT WHICH TIME THE TRIAL AUTOMATICALLY RESUMES

The only reported appellate opinion found by appellant which seems to address the second question of this Court is Holland v. Dave Altman’s R.V. Center (1990) 222 Cal.App.3d 477. The Holland decision specifically addressed the distinction between a stay of trial and a continuance of trial within the context of reviewing the dismissal of an action pursuant to Code of Civil Procedure §583.310. The Court in Holland reversed the dismissal based on its determination that the action had been stayed pursuant to Code of Civil Procedure §583.340(b) and the five year period had not expired after the Court calculated and applied the

appropriate exclusions of time.

In People v. Santana (1986) 182 Cal.App.3d 185, a case cited in the Holland opinion, the appellate court discussed the distinctions between the terms “stay” and “strike”. A “stay” was defined as a “...temporary suspension of a procedure in a case until the happening of a defined contingency.” In contrast, the term “strike” was defined as “...an unconditional deletion of the legal efficacy of the stricken allegation or fact for purposes of a specific proceeding.” The court in Santana also reasoned that the “...focus should not be on the words used but on the functional effects of the trial court’s order.” People v. Santana, supra, at pp. 190-191.

Applying the reasoning expressed in the Holland and Santana decisions, it is clear that the trial court in the instant case stayed the trial scheduled for September 22, 2008. The trial court’s order temporarily suspended all litigation activities, including the trial date, for 120 days to allow the parties to attempt resolution of the case by mediation proceedings. The trial date was not continued to a later date at which time it automatically resumed. No new trial date was scheduled.

As a result of the stay, defendant AURORA was not required to file a responsive pleading as it would have been under the then applicable “fast track” rules. AURORA discontinued its foreclosure proceedings

regarding the subject property. Plaintiff GAINES ceased efforts to obtain a preliminary injunction to stop the foreclosure proceedings. Defendant COUNTRYWIDE refrained from making a motion for summary judgment. Other entity defendants, UNITED MORTGAGE and UM ACQUISITIONS, that claimed interests in the subject property agreed to participate in the mediation. All parties refrained from conducting any new discovery. (CT 247-248; 259-262; 267-269). If the trial date had merely been continued, all of the parties would be allowed to continue litigating the matter. It would have been in bad faith for any of the parties to continue to prosecute the action in defiance of the trial court's order and the agreement between the parties. (See Brown & Bryant, Inc. v. Hartford Accident & Indemnity Co. (1994) 24 Cal.App.4th 247, 256.)

III.

CONCLUSION

Based on the foregoing authorities and arguments, this Court should determine that:

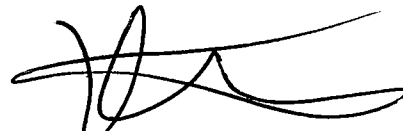
1. The trial court's order of April 3, 2008 "striking the current trial date of September 22, 2008 constituted a stay of the "trial of the action" under Code of Civil Procedure §583.340(b) because it resulted in a temporary suspension of

all trial court proceedings in the case until the happening of a defined contingency, the mediation conducted by the parties;

2. The factors which distinguish between a stay of trial and a continuance of trial for purposes of Code of Civil Procedure §583.340(b) support a finding that the trial court's order stayed the trial of the action instead of continuing the trial of the action because the intent of the parties, the intent of the court, and the functional effect of the court's order were to stay the trial of the action, not to continue the trial of the action.

Respectfully submitted,

IVIE, McNEILL & WYATT

A handwritten signature in black ink, appearing to be 'W. Keith Wyatt', written over a horizontal line.

W. KEITH WYATT

Attorneys for Plaintiff and Appellant

MILTON HOWARD GAINES

PROOF OF SERVICE

I am employed in the County of Los Angeles at 444 South Flower Street, Suite 1800, Los Angeles, California 90071. On the date of mailing, I am over the age of eighteen, and not a party to the above described action.

On May 16, 2014, I served the within:

Supplemental Letter Brief of Plaintiff and Appellant MILTON HOWARD GAINES

By depositing a true copy thereof enclosed in a sealed envelope addressed as follows:

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Floor Two, North Tower
Los Angeles, CA 90013-1213

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BY FEDEX DELIVERY SERVICES for overnight express mail delivery.

Executed on August 28, 2015 at Los Angeles, California. I declare under penalty of perjury that the foregoing is true and correct.



M. CHRISTINA MUNOZ