

SUPREME COURT COPY

S215990

IN THE
SUPREME COURT OF CALIFORNIA

MILTON HOWARD GAINES,

Plaintiff/Appellant,

vs.

FIDELITY NATIONAL TITLE INSURANCE COMPANY, et. al.

Defendants/Respondents.

SUPREME COURT
FILED

SEP 18 2015

Frank A. McGuire Clerk

Deputy

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

**REPLY TO SUPPLEMENTAL LETTER BRIEFS BY PLAINTIFF AND
APPELLANT MILTON HOWARD GAINES**

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I.

INTRODUCTION

Plaintiff and appellant **MILTON HOWARD GAINES** (“Appellant”) submits this reply to the supplemental letter briefs of Respondents Fidelity National Title Insurance Co., Bobby Jo Rybicki (collectively “Fidelity”), Lehman Brothers Holdings, Inc. (“Lehman”), and Aurora Loan Services, LLC (“Aurora”).

This Court’s order filed July 29, 2015, requested that the parties submit supplemental letter briefs on 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)?

Appellant’s supplemental brief contended that the trial court’s April 3, 2008 order “striking the current trial date of September 22, 2008,” did constitute a “stay” of the “trial of the action” requiring mandatory tolling under CCP § 583.340(b). Appellant argued that interpreting the court’s order as a stay is consistent with and supported by the record regarding the express intent of the parties to obtain a “stay” of the proceedings to “preserve the

status quo” (CT 250-276).

Interpreting the order as a stay is also consistent with the functional effect of order since the scheduled trial date of September 22, 2008 was struck and no new trial date was scheduled. The trial court issued an order to “stay” the proceedings for 120 days, not to “continue” the trial date. The trial court issued an order to strike the existing trial date, and it did not schedule a new trial date. (CT 278-279).

Appellant also contended there was no appellate authority addressing the factual scenario presented in the instant case regarding the questions posed by this Court. Therefore, this Court should apply the analyses articulated in *Holland v. Dave Altman’s R.V. Center* (1990) 222 Cal.App.3d 477 and *People v. Santana* (1986) 182 Cal.App.3rd 185 and determine that the factors which distinguish between a “stay” of trial and a “continuance” of trial in the instant case are whether the September 22, 2008 trial date was, in fact, continued to a specific later date and whether the functional effects of the trial court’s ruling was to suspending all litigation activities pending the defined contingency of mediation efforts by the parties.

Respondents Fidelity, Lehman and Aurora contend the April 3, 2008 order did not constitute a stay of the trial of the action based upon the argument that such a finding would be inconsistent with CCP § 583.340(b) and *Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717. (Fidelity Brief pgs. 2-5;

Lehman/Aurora Brief pgs.4-7.) Fidelity's brief was silent on the second question presented by this Court while Lehman and Aurora submitted that the factors distinguishing between a "stay" and a "continuance" are similar to the bright line test discussed by this Court in *Bruns*. (Lehman/Aurora Brief pgs.9-10)

In reply, Appellant contends a finding that the trial court's April 3, 2008 order was a stay of the "trial of the action" would not be inconsistent with this Court's ruling in *Bruns* and does fit within the narrow exception of CCP § 583.340(b). Appellant contends the reasoning applied in *Holland* and *Santana*, which were not overruled by *Bruns*, should control this Court's decision regarding these issues.

II.

HOLDING THAT THE TRIAL COURT'S APRIL 3, 2008 ORDER WAS A STAY OF THE "TRIAL OF THE ACTION" WOULD NOT BE INCONSISTENT WITH THIS COURT'S RULING IN *BRUNS* AND FITS WITHIN THE NARROW EXCEPTION OF CCP § 583.340(B)

The questions presented by this Court pertain exclusively to the issue of whether the trial court's April 3, 2008 order striking the trial date constituted a stay of the trial. Respondents' arguments rely on this Court's ruling in *Bruns*. However, Respondent Fidelity concedes that "Admittedly, in *Bruns*, this Court dealt with the stay of the proceedings in its analysis and *not stays of the trial*", and "Admittedly, this Court was addressing stays of the prosecution of the action under subdivision (b) and *not stays of trial*."

(Fidelity Brief, pg. 3, ¶¶ 2 and 4) (*Emphasis added*). Respondent Fidelity must make these admissions because the instant case raises issues regarding a *stay of trial*, and the decision in *Bruns* did not.

Indeed, this Court’s ruling in *Bruns* focused specifically on the meaning of the word “prosecution” because unlike *Holland* and the instant case, the trial in *Bruns* was never stayed:

“*Holland* did not address whether the “prosecution” of the action was stayed within the meaning of section 583.340 when only a designated proceeding in a case, **other than a trial**, was stayed or suspended “until the happening of a defined contingency.” (Citing *People v. Santana, supra*, 182 Cal.App.3d at p. 190, 227 Cal.Rptr. 51.)¹⁰ Because the word “stay” is ambiguous in this context, we turn to what must be stayed. Only when the “prosecution” or “the trial” of the “action” is stayed does running of the five-year period halt under 583.340(b). **The trial was never stayed in this case**; we therefore focus on the meaning of the word “prosecution.” *Bruns, supra* at 725. [**Emphasis added.**]

Nothing set forth in the *Bruns* opinion or respondents’ supplemental briefs indicate that the holding in *Holland*, or the reasoning supporting that holding, were overruled or inapplicable when a *stay of the trial* is considered. In the *Bruns* opinion, this Court simply recognized that the holding in *Holland*, while informative when a stay of the trial is at issue, did not fit the *Bruns* circumstances.

Similarly, the instant case does not fit the *Bruns* circumstances and creates no conflict with the decision in *Bruns*. Despite relying heavily on *Bruns*, Respondents’ briefs are silent as to factors which distinguish this case

from *Holland*. Fidelity's brief makes no mention of *Holland*. Lehman and Aurora's brief simply copy and paste portions of the *Bruns* decision referring to *Holland*, while omitting the portions of the opinion which distinguish *Bruns* from *Holland* and explicitly address this Court's questions. (Lehman Brief pg. 7-10). Respondents' failures to distinguish *Holland* are admissions that the facts and issues presented in the instant case are more analogous to the facts and issues presented in *Holland* than the facts and issues presented in *Bruns*. A ruling in Appellant's favor would not be in conflict with the decision in *Bruns*.

III.

HOLDING THAT THE TRIAL COURT'S APRIL 3, 2008 ORDER WAS A STAY OF THE "TRIAL OF THE ACTION" FITS WITHIN THE NARROW EXCEPTION OF CCP § 583.340(B)

Respondents arguments that a finding in Appellant's favor would be inconsistent with CCP § 583.340(b) are primarily based on *Bruns*. (Lehman/Aurora pg. 3-4). However, an analysis of the plain language of the statute, coupled with analyses of the distinguishing facts in *Bruns* as compared to the similar facts in *Holland* indicate that there is no conflict.

CCP § 583.340(b) states:

"In computing the time within an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:
(b) Prosecution or **trial of the action was stayed** or enjoined."

The record is clear that the September 22, 2008 trial was struck from the calendar and was not continued to a later date. (CT 279). Further, the trial court's order striking the trial date did operate as a stay of the trial *and* the proceedings considering all litigation (pleading, discovery, etc.) was frozen until after the happening of a defined contingency, the mediation. (CT 247-248; 259-262; 267-269). *People v. Santana* (1986) 182 Cal.App.3d 185, 190.

The trial court's language that only already outstanding discovery be responded to should not be determinative. Those discovery responses, if any, were allowed only to facilitate the mediation. Further, even assuming hypothetically that any outstanding discovery responses were served, the parties would have been precluded from moving to compel further responses under the trial court's order, which arguably would have stayed the time to do so as well.

The trial court's use of the word "strike," is not determinative in and of itself, and this Court is respectfully requested to consider the functional intent of the trial court's ruling. In *Holland*, the appellate court stated:

"While the January 26, 1987 order used a form of the word "continue," it is plain that the court did not intend to postpone trial to any known date. Instead, it put the trial over indefinitely, until the happening of a designated event: determination of the Inderbitzen appeal. The legal effect of this order was to stay, rather than to continue the trial." *Holland, supra* at 482.

As a preliminary matter, the Court of Appeal expressly held that the dismissal statute is inapplicable to Lehman in this matter because Lehman

was not named and did not appear in the action as a defendant until 2011 and the five-year period had not expired on its face. In its supplemental brief Lehman again recites alleged facts that are not supported by the record since none of the respondents ever presented any facts other than the brief declaration of counsel for Fidelity which did not address any facts of the case. (CT 1010). Appellant's contentions regarding the facts of this case are undisputed. (CT 236-279).

Notwithstanding, Respondent Lehman's policy argument that the trial court's order does not or should not function as a stay under CCP § 583.340(b) simply by virtue of the fact that it was initially procured through *Respondent Aurora's* desire to enter into an agreement staying the trial and entire action "to preserve the *status quo*" ultimately fails to answer the two questions presented by the court. No authority is cited by Respondents to support their contention that a trial court order which uses the term "strike" but effectually stays a trial date under CCP § 583.340(b) nonetheless does not operate as a stay simply because the parties were in agreement or sought to facilitate that order. No authority is cited by Respondents to support their contention that the agreement of the parties to request an order to "strike" the trial date and "stay" the case does not or should not legally stay the trial under CCP § 583.340(b) simply because it is unfavorable to the dismissed parties' position. Thus, Respondent Lehman's arguments on the bases of policy do not

answer this Court's questions.

IV.

THE FACTORS OF WHETHER ANOTHER TRIAL WAS SCHEDULED AFTER STRIKING THE SEPTEMBER 22, 2008 TRIAL DATE, WHETHER THE TRIAL COULD NOT BE SCHEDULED UNTIL THE HAPPENING OF A CONTINGENCY, WHETHER LITIGATION COULD FUNCTIONALLY CONTINUE, AND THE INTENT OF THE COURT AND THE PARTIES SHOULD BE THE FACTORS CONSIDERED IN DISTINGUISHING BETWEEN A STAY OF TRIAL AND A CONTINUANCE OF TRIAL IN THIS CASE

Fidelity's brief is silent regarding this question. Lehman's brief appears to favor a *Bruns* analysis despite Fidelity's admissions that *Bruns* deals with a different set of circumstances than the instant case. In *Holland*, the fact that the trial court's order put the trial over indefinitely until the happening of a designated event instead of postponing the trial to another known date appeared to be a significant factor in the evaluation of the nature of the order as a stay of the trial rather than a continuance of the trial. *Id.* at 482.

In *Santana*, the court also stated 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. Appellant submits that these factors should be considered in distinguishing between a stay or continuance of trial.

The parties agreed upon a "stay" of the proceedings, including the scheduled trial date of September 22, 2008. (CT 259-269). The parties requested that the trial court "stay" and "strike" the September 22, 2008 trial date in the ex parte application of April 3, 2008 (CT 252). The trial court

issued an order striking the trial date and staying all proceedings including the trial date (CT 279). Respondents' attempts to have this Court ignore what was expressly agreed to by the parties, ignore what the trial court expressly ordered, and ignore the functional effect of what occurred in this case should be rejected by this Court.

V.

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 express intent of the parties, the express 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 read 'W. Keith Wyatt', written over the printed name below.

**W. KEITH WYATT
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Attorneys for Plaintiff and Appellant
MILTON HOWARD GAINES

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES) ss.:

Case Name: Milton Howard Gaines vs. Fidelity National Title Ins. Co, et. al.

Case No.: S215990

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, State of California, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 444 S. Flower Street, Suite 1800, Los Angeles, CA 90071; that on September 17, 2015, I served on interested parties in said action the within **REPLY TO SUPPLEMENTAL LETTER BRIEFS BY PLAINTIFF AND APPELLANT MILTON HOWARD GAINES** in said action or proceeding by depositing a true copy thereof, enclosed in sealed envelopes with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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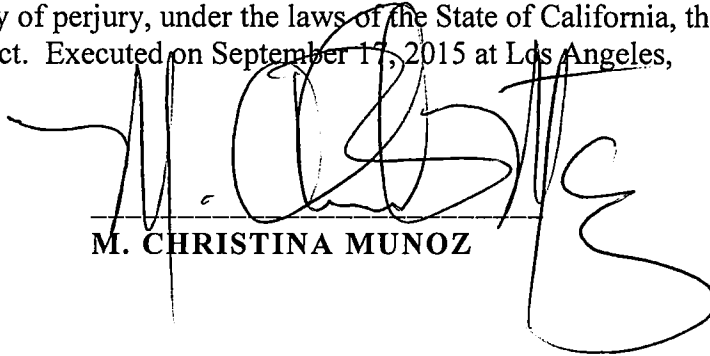
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I declare, under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed on September 17, 2015 at Los Angeles, California.



M. CHRISTINA MUNOZ