SUPREME COURT
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IN THE SUPREME COURT

STATE OF CALIFORNIA

FANNIE MARIE GAINES,	)	**CASE NO. S215990**
Plaintiff/Appellant and Petitioner,	)	2ND District Court of Appeal Case No. B244961
v.	)	
JOSHUA TORNBERG, et. al.,	)	Los Angeles County Superior Court Case No. BC361768
Defendants/Respondents.	)	

After a Decision by the Court of Appeal
Second Appellate District
Case No. B244961

Superior Court, Los Angeles County
Case No. BC361768
Honorable Rolf M. Treu, Judge Presiding

APPELLANT'S OPENING BRIEF ON THE MERITS

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TABLE OF AUTHORITIES

CASES

A & B Metal Products v. MacArthur Properties, Inc.
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Baccus v. Superior Court
(1989) 207 Cal.App.3d 1526, 1532

Baltayan v. Estate of Getemyan
(2001) 90 Cal.App.4th 1427, 1434

Barak v. Quisenberry Law Firm
(2006) 135 Cal.App.4th 654, 660–661

Bayle-Lacost & Co., Inc v. Superior Court of Alameda County et. al.
(1941) 46 Cal.App.2d 636

Bennet v. Bennet Cement Contractor's Inc.
125 Cal.App.3d 673, 676

Blank v. Kirwan
(1985) 39 Cal.3d 311, 331

Brown & Bryant, Inc. vs. Hartford Accident & Indemnity Co.
(1994) 24 Cal.App.4th 247,251

Bruns v. E-Commerce Exchang
(2011) 51 Cal.App.4th 717

Butler v. Hathcoat
146 Cal.App.3d 834, 838,839

City of Los Angeles v. Gleneagle Development Co.
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Denham v. Superior Court
(1970) 2 Cal.3d 557, 556

Dickson, Carlson & Campillo v. Pole
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Ferk v. County of Lake
(1988) 205 Cal.App.3d 268, 278

Gaines v. Fidelity National Title Insurance Company
(2013) 222 Cal.App.4th

Hocharian v. Superior Court
(1981) 28 Cal.3d 714, 724

Messler v. Bragg Managemen
(1990) 219 Cal.App.3d 983

Mitchell v. Frank R. Howard Memorial Hospital
(1992) 6 Cal.App.4th 1396, 1404-1406

Ordway v.Arata
(1957) 150 Cal.App.2d 71, 78

People v. Jacobs
(2007) 156 Cal.App.4th 728, 740

Southern Pacific Company v. Seaboard Mills
(1962) 207 Cal.App.2d 97.

Stebley v. Litton Loan Servicing, LLP
(2011) 202 Cal.App.4th 522, 527

Synanon Foundation, Inc. v. County of Marin
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Tresway Aero, Inc. v. Superior Court
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OTHER AUTHORITIES

9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 364, p. 420

I.

ISSUES PRESENTED

The issues presented in this appeal are:

A. Did the trial court abuse its discretion in dismissing the action for failure to bring the case to trial within five years, or should the trial court have excluded the time that the action was stayed for purposes of mediation from the calculation of the five year limitations period pursuant to CCP §583.340, subsections (b) or (c)?

B. Does application of the "abuse of discretion" standard of appellate review require the appellate courts to accept the trial court's decision which, pursuant to CCP §583.130, failed to conform with the spirit of the law and which defeated the ends of substantial justice?

II.

INTRODUCTION

This case involves claims of home equity fraud committed against desperate elderly homeowners facing foreclosure. It was one of many lawsuits that grew out of the mortgage industry meltdown.

Milton and Fannie Marie Gaines were an elderly couple in poor health, who were scammed out of the title to their property while it was in

foreclosure. Both of the Gaineses died during the protracted course of events which are the subjects of this litigation to regain the title to their home.

The trial court granted a motion to dismiss the entire action for failure to bring the case to trial within five years from the date on which the complaint was filed. Appellant contends the trial court abused its discretion in failing to exclude from the limitations period the time during which all of the parties had agreed that the prosecution of the action would be stayed in order to attempt alternative dispute resolution.

Appellant's complaint alleged several causes of action including but not limited to causes of action based on the Home Equity Sales Contract Act (HESCA) and the Elder Abuse and Dependent Adult Civil Protection Act. Both acts were intended to prevent or provide remedies for the types of abuses alleged by appellant in this action.

The issues in this appeal are based on limitations statutes intended to discourage stale claims, compel reasonable diligence, and promote the strong public policy of preferring litigation on the merits over dismissal. The trial court ignored these principles in dismissing this action instead of allowing the case to proceed to trial on the merits.

The trial court defendants did not offer any evidence that they had been prejudiced by the failure to bring the matter to trial within the five year limitations period. The trial court defendants did not present evidence that plaintiff had not been diligent in prosecuting this action. On the other hand, plaintiff presented significant, uncontradicted evidence of her diligence in prosecuting the case while contending with a variety of assignees and transferees claiming interests in the subject property.

The trial court should have exercised its discretion to serve the ends of substantial justice by allowing this action to proceed to trial on the merits. Instead, the trial court exercised its discretion by dismissing the entire action against all of the defendants, including several defendants that did not request dismissal by filing their own motions or by joining in the motion to dismiss filed by the moving defendants.[1]

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[1] Six defendants were named in the original complaint filed on November 13, 2006. The complaint was amended four times subsequently and new defendants were added as additional defendants claiming interests in the subject property were identified. The operative Fifth Amended Complaint, filed February 1, 2010, included eleven named defendants. The twelfth defendant, Lehman Brothers Holdings, Inc., was added by an Amendment To Complaint filed November 15, 2011. Several named defendants either settled or were dismissed as the litigation proceeded from its inception. At the time of the filing of the motion to dismiss by defendants Fidelity National Title Insurance Company and Bobbie Jo Rybicki, there were seven named defendants involved in the case. None of the other five defendants filed motions to dismiss, and none of the other defendants joined in Fidelity/Rybicki's motion. The trial court exercised its discretion to dismiss the entire action as to all defendants.

Appellant contends that the trial court's discretion should have been exercised to effectuate the following policies:

1. Policy favoring trial on the merits over dismissal pursuant to Code of Civil Procedure § 583.130;
2. Policy protecting homeowners in foreclosure from home equity fraud pursuant to Civil Code § 1695 et seq;
3. Policy protecting the elderly from being taken advantage of financially pursuant to Welfare & Institution Code § 15610.30; and,
4. Policy favoring the rights of the parties to cooperate and make agreements pursuant to Code of Civil Procedure § 583.130.

III.

STATEMENT OF THE FACTS

A. Gaineses' Financial Problems, Foreclosure, and the Tornberg Defendants

The Gaineses purchased the subject property in 1999. In 2006, the property was encumbered by a first deed of trust in the amount of $554,000 held by Countrywide Home Loans, Inc. ("Countrywide"). In February 2006, the Gaineses were two months behind in their monthly payments on

the Countrywide loan. [I, AA1-149]. At that time, they received a "Notice of Default and Acceleration" from Countrywide warning of foreclosure proceedings if they did not make their delinquent payments which totaled less than $8,000. [I,AA104-105].

At all times relevant, plaintiff and her husband were both more than 65 years of age, not financially sophisticated, and in poor health. Mrs. Gaines suffered from hypertension and heart problems. Mr. Gaines was seriously ill with heart problems and advanced prostate cancer. The subject property was located at 1259/1261 S. Longwood Avenue, Los Angeles, California. [I, AA059]. Based on an appraisal that valued the home at $1.25 million, the Gaineses had almost $700,000 of equity in their property as of June 2006. [I,AA067-071].

In or about March 2006, Plaintiff was contacted by A.J. Roop ("Roop") on behalf of Countrywide who identified herself as an employee and/or Executive Loan Officer with Countrywide. Roop told plaintiffs that they had been pre-approved for a refinance loan. Roop and Countrywide sent Plaintiff a loan package and requested that Plaintiff submit supporting documentation for their refinance application. Plaintiff engaged in several phone conversations with Roop regarding the status of the application. [I,AA066-067; 0107].

In or about June or July 2006, Roop advised Plaintiff that their loan application to Countrywide had been rejected or had not been approved. Plaintiff never received any formal documentation or notification from Countrywide that her application for a refinance loan was rejected or why it was rejected. Plaintiff and her husband began to seek other refinancing options. [I,AA068].

Plaintiff was again contacted by Roop in or about June or July, 2006. Roop told plaintiff that she (Roop) felt badly because Countrywide had delayed a decision on their loan application for so long. Roop advised plaintiff that her fiancé, defendant Joshua Tornberg, could assist plaintiff in obtaining a refinance loan. Roop told plaintiff that Tornberg worked with his business associate, defendant Craig Johnson, doing real estate loans under the business name Ray Management Group to assist people who had difficulty in obtaining loans. Roop told plaintiff that she had given plaintiff's loan application and telephone number to Tornberg and Johnson and plaintiff should expect a call from them. [I,AA068-069].

In the subject lawsuit, plaintiff Gaines referred to defendants Roop, Tornberg, Johnson, and Ray Management Group collectively as "the Tornberg Defendants." All of the Tornberg defendants were Arizona residents. [I,AA059-060]

Plaintiff was contacted by Tornberg and Johnson in or about June 2006. They told plaintiff they could help her, and they advised her not to seek financing from any other lenders.

Foreclosure proceedings were initiated by Countywide on July 6, 2006. The Notice of Default indicated the Gaineses needed to pay $16,625.34 to cure the default. [I,AA071; 113-114].

On or about July 12, 2006, the Tornberg defendants advised plaintiff that they were unable to obtain a refinance loan for them. They offered a temporary solution in which Tornberg would purchase the Gaineses home, allow them to remain in the property pursuant to a lease agreement, and allow them to repurchase the home when they secured financing in the future. The Gaineses were presented with a contract to purchase the property for $950,000 which provided that $100,000 of the purchase price would be used for repairs to the property. The Tornberg defendants were to oversee the repairs. [I, AA 071-072; 116-129].

On or about August 1, 2006, the Tornberg defendants had the Gaineses execute a Warranty Deed to transfer title to the subject property to Tornberg. However, the original deed was defective in many respects including but not limited to the absence of an address or legal description of the subject property. The Gaineses executed the defective deed before a notary public. [I,AA 072-073; 091-098; 0131-0135]

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B. ***The Tornberg Defendants Obtain The Assistance of Fidelity/Rybicki to Alter Deeds and Obtain $90,000 From Escrow Without Authorization***

An escrow was opened with defendant Fidelity National Title Insurance Company in Phoenix, Arizona to complete the sale transaction. The escrow officer was defendant Bobbi Jo Rybicki, an Arizona resident, who was employed by defendant Fidelity. Rybicki failed to disclose to the Gaineses that she had a pre-existing personal relationship with Tornberg. [I,AA060; 091-098; 0137-0139].

The Tornberg defendants, Rybicki, and Fidelity subsequently altered the original defective deed to correct some of the defects without the Gaineses' knowledge or consent. The altered deed was recorded to complete the transfer of title from the Gaineses to Tornberg. [I,AA 072-073; 091-098; 0131-0135].

The escrow closed on August 7, 2006. Without the Gaineses' knowledge or consent, Rybicki/Fidelity paid $90,000 of Tornberg's purchase money out of the escrow to the Tornberg defendants for repairs to the subject property. No repairs were ever made. [I,AA 091-098; 068-069].

C. ***The Tornberg Defendants Change the Deal and Milton Gaines Dies Shortly Thereafter***

Immediately after the close of escrow, the Tornberg defendants began to make conflicting representations regarding the lease terms under

which the Gaineses could continue to live in their home. Instead of presenting the Gaineses with a lease agreement with an option to repurchase as had been agreed, the Tornberg defendants presented the Gaineses with a month to month rental agreement with a commencement date of August 3, 2006. [I,AA 075-076; 0141-0146].

The rental agreement did not include an option for the Gaineses to repurchase the subject property. In fact, the proposed rental agreement required the Gaineses to immediately pay Tornberg, their new landlord, $10,000 in "move in" costs which included $6000 for three months rent and a $4000 security deposit. [I,AA 075-076; 0141-0146].

After receiving the $90,000 from escrow in August 2006, Tornberg immediately obtained an additional loan on the property for $150,000 which was never repaid. The Tornberg defendants had quickly taken $240,000 of the Gaineses equity for themselves, defendants had title to the subject property which still had an additional $250,000 of equity remaining, and defendants were ready to evict the Gaineses by unlawful detainer proceedings, not by foreclosure, at the first opportunity. [II,AA 058-0157].

Both of the Gaineses, who were already experiencing health problems prior to their interactions with the Tornberg defendants, experienced increased anxiety and health issues as the Tornberg defendants refused to discuss the previously proposed lease agreement, insisted that the Gaineses pay the various rent deposits/payments, and threatened to evict

the Gaineses unless said payments were made. As these unexpected, stressful developments were occurring, Milton Gaines died on August 25, 2006 at the age of 74 leaving his 68 year old widow, Fannie Gaines, alone in the effort to remain in their home. [I,AA 075-076].

D. *The Financial Institutions' Involvement in Transactions Regarding the Subject Property*

Defendants Aurora Loan Services, LLC.; Greenpoint Mortgage Funding, Inc.; United Mortgage & Loan Investment, LLC.; UM Acquisitions, LLC.; and Lehman Brothers Holdings, Inc. all approved, funded, and/or bought purchase money and equity loans for Tornberg on the subject property. The transactions occurred at various times during and after July 2006. However, at all times the Gaineses remained as residents in their home in open and notorious possession of the subject property. [II,AA 058-0157].

IV.

PROCEDURAL FACTS AND HISTORY

A. *Plaintiff Fannie Gaines Retains Counsel and Files the Subject Action*

Plaintiff Fannie Gaines retained legal counsel in October 2006. After attempts to negotiate with the Tornberg defendants proved unproductive, the subject action was filed on November 13, 2006. [II,AA

0236-0243]. The original complaint alleged several causes of action against seven named defendants seeking, among other remedies, a declaratory ruling that plaintiff was the owner of the subject property and that other various deeds of trust which had been recorded against the subject property by Tornberg were void. The complaint also alleged that the Tornberg defendants had committed several violations of the Home Equity Sales Contract Act (HESCA) pursuant to Civil Code §§ 1695, et.seq. [II,AA1-57].

Based on various challenges to the original complaint and to subsequent amended complaints, plaintiff Gaines filed a Second Amended Complaint on April 2, 2007 and a Third Amended Complaint on June 21, 2007. The Los Angeles Superior Court Case Summary for the subject action establishes the substantial litigation activity which occurred in this action.[2]

B. *Plaintiff Pays over $30,000 to Stop the Foreclosure Sale of the Subject Property*

Defendant Tornberg did not make the payments necessary to keep the mortgage current although he continued to claim title to the subject property. On or about June 14, 2007, Gaines paid $30,730.03 to stop a

[2] Plaintiff/Appellant has concurrently filed a Request for Judicial Notice requesting that the LASC Case Summary be reviewed as part of the record in this appeal.

foreclosure sale of the subject property by defendant GMAC. [II,AA 0236-0243; 0247-0248; 0372-0379].

C. *Aurora Added as a Defendant in the Action*

The Fourth Amended Complaint was filed on January 28, 2008 to add Aurora as a named defendant. The causes of action alleged against Aurora included cancellation of warranty deed and quiet title. [II,AA 0236-0243].

D. *All Parties Agree to Obtain a Court Order Staying the Action for 120 Days*

On or about March 18, 2008, counsel for Aurora, Attorney Scott Drosdick, initiated discussions with plaintiff and co-defendants regarding obtaining a stay of the proceedings in order to:

1. Avoid the "fast-track" requirements that Aurora file a responsive pleading in the action immediately; and,
2. Avoid plaintiff's efforts to obtain a preliminary injunction to prevent Aurora, or its agents, from foreclosing on an $865,000 loan against the subject property which Aurora, at that time, represented that it was the holder of. [II, AA 264,265].

As indicated in a March 18, 2008 letter from Attorney Drosdick, Aurora requested time to retain California counsel and wanted "*...to preserve the status quo...*" while allowing time to "...explore resolution of this case before substantial additional expenses and attorney's fees are

incurred by them in connection with this case." Attorney Drosdick represented in his letter that Aurora was the current holder of the $865,000 loan made by GreenPoint Mortgage to Tornberg on or about September 29, 2006. [II,AA 0270-0271].

An agreement was reached between all parties who had appeared in the action and Aurora to vacate the trial date which was then scheduled for September 22, 2008, and stay the litigation by way of an ex parte application until a future trial setting conference was held. The parties agreed to respond to any outstanding discovery, not serve any additional discovery prior to the future trial setting conference, strike some allegations from the complaint, and participate in a global mediation of all claims. [II,AA236-292].

On or about March 31, 2008, Attorney Randall Kennon sent a letter to all counsel involved in reaching the agreement which memorialized the terms of the agreement. [II,AA267-269] It was agreed by all parties, potential parties, and their counsel that plaintiff would obtain an order from the Court by way of an ex parte application which would formalize the agreement which had been reached by all counsel. [II,AA259-291].

Counsel for plaintiff appeared for a hearing on the ex parte application on April 3, 2008 before the Hon. Charles Lee in Department 33 of the Los Angeles Superior Court. [II,AA249-276]. The ex parte application was unopposed. [II,AA283,284].

The Court granted the ex parte application and issued an Order which struck the existing trial date of September 22, 2008, the final status conference date of September12, 2008, and the post medication conference date of August19, 2008, and:

(a) stayed the action for 120 days with the only exception being that already outstanding discovery responses should be served;

(c) set a future trial setting conference date; and,

(d) ordered all parties to participate in good faith in a mediation of all claims within the next 90 days. [II,AA277-291]

E. *Mediation is Conducted, and the Stay Extends to November 6, 2008*

After obtaining the Order which imposed a stay of the action for 120 days in order to attempt to resolve the action through private mediation, a mediation hearing was scheduled for May 30, 2008 with Retired Judge Bruce J. Sottile from Alternative Resolution Centers, LLC. [III,AA0717,0718]. The mediation was conducted on May 30, 2008 with all parties participating.

The case was not resolved through mediation. However, the settlement discussions which were initiated facilitated further settlement negotiations between all of the parties. [II,AA0414-0427;III, AA0454-0460;0718].

Settlement discussions were diligently conducted between plaintiff and the defendants, including non-appearing defendants and/or potential defendants, during the 104 days that the action was stayed from April 3, 2008 to July 16, 2008. Plaintiff did reach agreements to settle with defendants United Mortgage and UM Acquisitions in which said defendants agreed to re-convey their $150,000 interest in the subject property in exchange for a dismissal from plaintiff. The re-conveyance and the dismissal were exchanged on or about June 9, 2008. [III,AA0458; 0719-0724].

Meanwhile, the trial judge, the Honorable Charles Lee, left the bench to assist the United States delegation for the 2008 Olympics in Bejing, China. The trial setting conference which had been scheduled for July 16, 2008 was continued by the Court until a new judge was assigned to replace Judge Lee.[II,AA236-243].

Eventually, on November 6, 2008, after a peremptory challenge to one proposed replacement judge, the newly assigned judge, the Honorable Rex Heeseman, conducted a status conference, lifted the stay, and scheduled the matter for trial on August 29, 2009. [II,AA302-306] As of November 6, 2008, the case had been stayed, pursuant to the both April 3, 2008 Order based on the agreement of the parties, for a period of 217 days.[II,AA238].

No litigation or discovery occurred during the 217 day period. Defendant Aurora did not formally appear in the action until it filed a demurrer on November 12, 2008, six days after the stay was lifted. The demurrer was overruled and Aurora filed a verified answer to the plaintiff's Fourth Amended Complaint on January 21, 2009. [III,AA557-566].

F. Plaintiff Successfully Opposes Countrywide's Summary Judgment Motion, The Parties Announce Ready For Trial, And Plaintiff Settles With Countrywide.

Prior to the August 29, 2009 trial date, plaintiff successfully opposed defendant Countrywide's motion for summary judgment on July 17, 2009. The parties prepared for trial, submitted Final Status Conference documents, and appeared for final status conferences on August 20, 2009 and August 24, 2009 at which time they announced ready for the trial scheduled for August 29, 2009.[II,AA236-243].

However, on or about August 20, 2009, plaintiff reached agreement to settle her claims against defendant Countrywide for $350,000, and the August 29, 2009 trial date was taken off calendar to, allow Countrywide time to make a motion for good faith settlement. The case was scheduled for a status conference on November 4, 2009. [II,AA236-243].

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G. *Aurora And Lehman Claim Mistakes Re True Ownership*

On or about November 6, 2009, defendant Aurora filed a motion for leave to file an amended answer in which it asserted, for the first time and contrary to its admission in its answer to the Fourth Amended Complaint, that it did not hold an interest in the subject property. [AAA, 869-886]. Aurora had previously filed a verified answer to plaintiff's Fourth Amended Complaint on January 21, 2009 in which it admitted that it held a $865,000 interest in the property.[II,AA236-243;292-301;343-353].

In the motion to amend its answer, Aurora contended that Lehman was the owner of the loan encumbering the subject property. It further asserted in its motion that Lehman had filed for Chapter 11 bankruptcy in New York on September 15, 2008. [AAA, 869-886].

H. *Plaintiff Requests Actual Proof Of Ownership*

The unexpected reversal of Aurora's contentions caused confusion and uncertainty for plaintiff as to whether all of the parties necessary to resolve the quiet title cause of action were participants in the litigation. Plaintiff's counsel requested that Aurora provide some proof of its contention that Lehman held the interest which Aurora had admitted holding less than one year prior to filing its motion to amend its verified answer. [II,AA236-243;292-301;343-355].

I. *Plaintiff Dies And A Successor In Interest Is Approved To Continue The Action*

Unfortunately, plaintiff Fannie Marie Gaines passed away on November 29, 2009 due to cancer. Plaintiff made a successful ex parte application to have Milton Gaines substituted in as the successor in interest for Ms. Gaines. [II,AA325-342]. The order granting the ex parte application was filed on January 28, 2010. In ruling on the motion to dismiss for failure to bring this matter to trial within five years of the date of filing of the complaint, the trial court correctly excluded the 60 day period from November 29, 2009 to January 28, 2010 in calculating whether the five-year period had expired.[II,AA411-413;III, AA725-730].

J. *Fifth Amended Complaint Is Filed On February 2, 2010*

Plaintiff filed a verified Fifth Amended Complaint on February 2, 2010. The Fifth Amended Complaint added causes of action for assisting elder abuse and breach of fiduciary duty against defendants Fidelity and Rybicki. [I,AA58-149].

K. *Aurora And Lehman Establish Proof of Title In December 2010*

Based upon the inconsistent representations of Aurora in its pleadings, plaintiff reasonably refused to accept Aurora's unverified representations that defendant Lehman held title to the subject property until plaintiff was provided with some documented proof of the alleged

interest held by defendant Lehman. Defendant Lehman eventually provided plaintiff with a document entitled "Assignment Of Deed Of Trust And Request For Special Notice" dated December 10, 2010 which indicated that Lehman had been assigned the interest in the deed of trust executed by defendant Tornberg to Marin Conveyancing Corporation. [II,AA354-355].

L. *Lehman's Bankruptcy And Plaintiff's Efforts To Obtain Relief From Automatic Stay*

After Aurora's inconsistent and misleading representations regarding its interest in the subject property had been addressed and after defendant Lehman finally provided adequate proof that defendant Lehman held an interest in the subject property, it was clear that Lehman was an indispensable party in the action with respect to the cause of action for quiet title. It was also clear that no action could be taken to litigate Lehman's alleged interest in the subject property unless and until relief was obtained from the automatic stay from Lehman's bankruptcy proceedings in New York which shielded Lehman from being sued.[II,AA236-243;414-427].

Due to financial considerations, plaintiff was unable to immediately retain bankruptcy counsel in New York to obtain relief from the automatic stay and include Lehman as a defendant in the subject action. However, plaintiff eventually retained bankruptcy counsel in New York in June 2011. [II,AA236-243].

Plaintiff ultimately paid bankruptcy counsel $19,221.19 to obtain relief from the bankruptcy stay which prevented defendant Lehman from being joined as a defendant in the action. [II,AA356-371]. The bankruptcy counsel in New York commenced efforts to obtain relief from the automatic stay beginning on or about June 22, 2011, and an Order granting relief from the stay was obtained on October 25, 2011. [II,AA359-364].

Defendant Lehman was an indispensable party to the quiet title cause of action. In ruling on the motion to dismiss for failure to bring this matter to trial within five years of the date of filing of the complaint, the trial court correctly excluded the 125 day period from June 22, 2011 through October 25, 2011 in calculating whether the five-year limitations period had expired.[II,AA411-413;IV,AA725-730].

M. *Relief From Bankruptcy Stay And Scheduling Of August 6, 2012 Trial Date*

On November 15, 2011, plaintiff filed an Amendment To Complaint to substitute Defendant Lehman as the true name of the defendant previously designated as DOE 31 and served Lehman with the Fifth Amended Complaint. [I,AA155-157]. Defendant Lehman filed an answer to the Fifth Amended Complaint on January 3, 2012. [AAA, 887-894].

On January 30, 2012, the Court scheduled the trial date in this action for August 6, 2012 in order to allow defendant Lehman an opportunity to conduct discovery and file a motion for leave to file a cross complaint

against Plaintiff and Tornberg. Defendant Lehman filed its motion for leave to file a cross-complaint on May 16, 2012. [AAA, 896-994].

On May 2, 2012, this case was reassigned to its fourth trial judge, and the August 6, 2012 trial date was vacated. [AAA, 895]. The August 6, 2012 trial date was subsequently reinstated. [AAA, 1015-1018].

V.

ARGUMENT

A. THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING THE ACTION FOR FAILURE TO BRING THE CASE TO TRIAL WITHIN FIVE YEARS, BECAUSE THE TRIAL COURT SHOULD HAVE EXCLUDED THE TIME THAT THE ACTION WAS STAYED FOR PURPOSES OF MEDIATION FROM THE CALCULATION OF THE FIVE YEAR LIMITATIONS PERIOD PURSUANT TO CCP §583.340, SUBSECTIONS (B) OR (C).

1. It Was Impracticable, if not Impossible, to Bring This Matter To Trial During the Stay

Based on the agreed upon and court ordered stay of all litigation, it was impracticable and impossible to bring this matter to trial from July 16, 2008 until November 6, 2008 because such actions would have violated the court order of the previously assigned Judge who was no longer available. It would have also violated the agreement reached by all the parties to stay

the case until a future trial setting conference was conducted. [II,AA226-431].

No new judge was assigned, and no trial setting conference was conducted to lift the stay until November 6, 2008. It was impossible and impracticable to bring this matter to trial during the time that no judge was assigned. [II,AA226-431].

Based upon the November 6, 2008 date on which the stay in these proceedings was terminated, the actual period of the stay and the period of time during which it was impracticable and impossible to bring this matter to trial was a period of 217 total days from April 3, 2008 to November 6, 2008. Those 217 days should have been excluded from the five year limitations period to bring this matter to trial.

2. ***Plaintiff Was Reasonably Diligent In Prosecuting This Action***

The complicated factual circumstances of this action required significant diligence by plaintiff to bring all relevant parties into the litigation. The specific circumstances are set forth below:

• First, the complaint had to be amended four (4) times during the first 14 months of the litigation as is common in many of the post "financial meltdown" cases as various additional interest holders were discovered.

• Second, the diligence of plaintiff before, during, and after the 217 day stay was reasonable as indicated by the facts that other defendants

named in the action including Greenpoint Mortgage Funding, Inc., United Mortgage Loan & Investment, LLC, UM Acquisitions, LLC, and Countrywide eventually reached settlements with plaintiff. [II,AA414-427;III, AA454-460;718].

• Third, plaintiff Gaines died on November 29, 2009. Her husband, Milton Gaines, had died in August 2006. On January 28, 2010, the Gaineses' son, also named Milton Gaines, was substituted in as the plaintiff, an amended complaint was filed, and defendants were given 30 days to file answers. It was impracticable to conduct litigation immediately after the death of the original plaintiff until a successor was approved to proceed in the litigation, which took 60 days. [II,AA325-342]. Id.

•Fourth, defendant Aurora made incorrect verified representations as to their ownership interest in the properties, which caused significant delays in bringing the matter to trial. On or about November 6, 2009, defendant Aurora filed a motion for leave to file an amended answer in which it asserted, for the first time and contrary to its admission in its answer to the fourth amended complaint, that it did not hold an interest in the subject property.

In fact Lehman Brothers was the owner of the loan encumbering the property. [AAA, 869-886]. Aurora had previously filed a verified answer to plaintiff's fourth amended complaint on January 21, 2009 in which it claimed that it held a $865,000 interest in the property. [II, AA236-

243;292-301;343-355]. Lehman Brothers had filed for bankruptcy in 2008. It was not until after December 2010 that Aurora provided any proof to plaintiff or the court that Lehman Brothers had an actual interest in the property. It was impracticable to proceed with this litigation without the inclusion of the party that held the primary financial interest in the property.

• Fifth, prior to the August 29, 2009 trial date, plaintiff successfully opposed defendant Countrywide's motion for summary judgment on July 17, 2009. The plaintiff was prepared for trial, submitted final status conference documents, and appeared for final status conferences on August 20, 2009 and August 24, 2009, at which time plaintiffs announced ready for the August 29, 2009 trial. [II,AA236-243]. However, on or about August 20, 2009, plaintiff reached agreement to settle her claims against defendant Countrywide, and the August 29, 2009 trial date was taken off calendar to allow Countrywide time to make a motion for good faith settlement. [II,AA236-243].

•Sixth, further delays in proceeding against Lehman Brothers were caused by financial difficulties plaintiff encountered in retaining counsel in New York where the bankruptcy proceedings were pending. In June 2011, New York counsel commenced work on the motion to vacate the bankruptcy stay. The stay was lifted in October 2011. [II, AA359-364]. Id. Plaintiff ultimately paid bankruptcy counsel $19, 221.19 to obtain relief

from the bankruptcy stay, which prevented defendant Lehman, an indispensible party, from being joined as a defendant in the action. [II,AA356-371]. Because of the pending bankruptcy and the need to obtain relief from the litigation stay against Lehman Brothers, the latter was not named in an amended complaint until November 2011. [II, AA 236-243; 354-355; 414-427]. Plaintiff's limited financial means made it impracticable to proceed sooner, and plaintiff's requirement that proof be provided of Lehman's alleged interest in the property was reasonable.

3. *The Trial Court Unreasonably Ignored Evidence Which Established Plaintiff's Diligence in Prosecuting the Action During the Stay*

Notwithstanding the aforementioned facts establishing plaintiff's diligence, two of five of the trial court's reasons for failing to exclude the time period for which the stay was in effect were:

- Plaintiff failed to present any evidence of diligence in prosecuting the action during the partial stay;
- Plaintiff failed to present any evidence of why the stay made it impossible, impractical, or futile to bring this action to trial beyond plaintiff's control.

In response to the trial court's tentative ruling, counsel for plaintiff made specific representations regarding the efforts of plaintiff to schedule a mediation which included all parties, to participate in a mediation which included all parties, and to reach settlement with at least one defendant

during the time that the action was stayed. The trial court apparently ignored those undisputed facts. [II,AA414-427]. Further, defendants failed to make any factual presentation which supported any of the court's findings. [II,AA414-427].

Code of Civil Procedure §583.340 subsections (b) and (c) state, in pertinent part:

> "In computing the time within which 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.
>
> (c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile."

From April 3, 2008 to November 6, 2008, this action was stayed by Order of the court and the agreement of all counsel for a period of 217 days which should have been excluded from calculating the five-year period pursuant to CCP § 583.340(b) and/or (c) because the action was stayed. It would have been bad faith, impracticable and impossible to continue litigating the matter contrary to the agreement between all counsel, contrary the court's order, and during the time when there was no judge assigned to lift the stay or handle litigation matters.

Given the aforementioned extraordinary circumstances of this case, state policy favoring trial on the merits and the facts establishing reasonable diligence by plaintiff, the trial court abused its jurisdiction granting the

respondents' motion to dismiss. Further, the trial court did not exercise its discretion to exclude *any portion* of the universally agreed upon 120 day stay ordered by the Hon. Charles Lee or the 97 additional days until the stay was lifted under Code of Civil Procedure § 583.340, subdivision (b) or (c) when Respondents moved to dismiss under the five-year statute of CCP 583.310 and 583.360 which would have placed plaintiffs within the five-year statute by a minimum of 38 days or maximum of 134 days.

In his dissenting appellate court opinion in *Gaines v. Fidelity National Title Insurance Company (2013) 222 Cal.App.4th 25* Justice Rubin summed up that if the trial court had exercised its discretion "in conformity with the spirit of the law" and not to "defeat the ends of substantial justice" and excluded the 120 days of the parties' stipulated stay or the 217 days of actual stay or any significant part of the Aurora/Lehman Brothers time, the five years would not have elapsed. *Gaines, supra,* at *57*; *People v. Jacobs (2007) 156 Cal.App.4th 728, 740.* The lack of an exercise of discretion based upon relevant factors in the individual case constitutes an "abuse of discretion." *Dickson, Carlson & Campillo v. Pole (2000) 83 Cal.App.4th 436, 449*; *see also Ziesmer v. Superior Court (2003) 107 Cal.App.4th 360, 363.*

As indicated in a March 18, 2008 letter from Attorney Drosdick, Aurora requested time to retain California counsel and wanted "...to

preserve the status quo..." while allowing time to "...explore resolution of this case before substantial additional expenses and attorney's fees are incurred by them in connection with this case." [II,AA264,265]. It was impracticable for Gaines to attempt to outspend the financial institution defendants to resolve the legal issues regarding her rights to remain in her home. It was reasonable for Gaines to attempt to mediate the dispute, minimize her legal expenses, and cooperate with the other parties.

The stay, which was brokered by Aurora to "preserve the status quo", allowed the parties to proceed toward resolution of the issues consistent with the spirit of CCP §583.130. It was an abuse of discretion for the trial court to reject plaintiff's contentions that the stay should be excluded from calculation of the five-year deadline, because it was impracticable to litigate this matter during the time this case was stayed pursuant to an agreement reached by all of the parties and the Order of the court.

The policy of supporting/recognizing agreements reached between counsels regarding the management of litigation is intended to assist counsel in scheduling and managing the litigation processes. However, the trial court unreasonably abused its discretion in refusing to exclude *any portion* of the 217 day period during which this action was subject to a stay

which was discussed among all counsel, agreed upon by all counsel, and memorialized by the April 3, 2008 court order.

Notwithstanding the aforementioned facts of diligence, three of five of the trial court's reasons for failing to exclude the time period for which the stay was in effect were:

- The stay entered on April 3, 2008 was requested by plaintiff;
- The stay did not affect previously served outstanding written discovery; and
- The stay was only to last 120 days.

All five of the trial court's reasons were incorrect and/or unreasonable based on the information presented to the court in both plaintiff's opposition papers and at the hearing of the motion. [II, AA 226-399; 414-427]. Each of those reasons is addressed below.

4. *The Court Unreasonably Refused To Accept Uncontradicted Evidence That The Stay Was Requested By Defendant Aurora And Agreed Upon By All Parties*

Plaintiff's opposition papers clearly indicated and established that the discussions regarding the stay had been initiated by counsel for Aurora, attorney Scott Drosdick, in his letter dated March 18, 2008 which was attached as Exhibit A to plaintiff's opposition. [II,AA264-269]. Attorney

Drosdick stated that Aurora and plaintiff were entering a "... letter agreement to preserve the status quo...". [II,AA265]. Attorney Drosdick also sought agreement from plaintiff's counsel "... to petition the Los Angeles Superior Court and request that the court formally approve the stay;". [II,AA265]. Attorney Drosdick requested that plaintiffs' counsel agree "... to coordinate with all party defendants..." a non-binding mediation to discuss settlement. [II,AA265]. Plaintiff coordinated the ex parte application because Aurora had not yet appeared in the action.

Plaintiff's opposition papers included as Exhibit B the ex parte application made by plaintiff in compliance with the agreement proposed by attorney Drosdick to obtain court approval of the proposed stay. [II,AA249-276]. The ex parte application was specifically agreed upon and joined by all parties, according the declaration of plaintiff's counsel which was submitted with the ex parte application. [II,AA259-262].

The ex parte application, which was attached as an exhibit to plaintiff's opposition to the motion to dismiss, included a letter dated March 31, 2008 from counsel for plaintiff which confirmed the agreements reached with all counsel, including counsel for the individual "Tornberg Defendants", counsel for Fidelity/Rybicki, and counsel for Countrywide. [II,AA267-269]. Those agreements included an agreement that the court would strike the current September 22, 2008 trial date and "... all other

litigation efforts in this case be stayed until on or after the future Trial Setting Conference;". [II,AA267-269].

Plaintiff's opposition to the motion to dismiss included the April 3, 2008 Order of the court granting the ex parte application and staying the action in confirmation of the agreement reached between the parties. [II,AA277-281]. The Order imposed a stay for a period of 120 days with the exception of responding to previously served and outstanding discovery. [II,AA277-281].

At no time, did defendants present any facts, by way of declaration or otherwise, to dispute plaintiff's evidence that the stay was agreed to and requested by all parties. [AAA995-1012;II,AA226-431]. Therefore, the trial court's first rationale for failing to recognize the stay was completely wrong and should not have been considered as a basis for failing to recognize the stay or exercise judicial discretion to exclude the stay under CCP §583.340 (b) or (c).

5. *The Trial Court Unreasonably Failed To Consider Evidence That The Stay Made It Impossible, Impractical, Or Futile For Plaintiff To Bring The Action To Trial*

The Trial Court unreasonably determined that plaintiff failed to present any evidence as to why the stay made it impossible, impractical, or futile to bring this action to trial beyond plaintiff's control despite presentation of all of the facts presented herein above. Both the Order

staying the action for 120 days and the agreement reached between counsel to obtain the stay order, were specifically and explicitly intended to stop all litigation activity, including new discovery, during the period of the stay until a future trial setting conference was conducted. [II,AA226-399].

From April 3, 2008 to November 6, 2008, this action was stayed for a period of 217. All of that time period should have been excluded from calculating the five-year period pursuant to CCP § 583.340(b) and/or (c) because the action was in fact stayed.

It would have been bad faith, impracticable, and impossible to continue litigating the matter contrary to the agreement reached by all counsel. Said efforts would have been contrary the court's Order, during a time when there was no judge assigned to lift the stay or handle litigation matters.

In matters where bringing the action to trial is impossible, impracticable or futile, the extension of the five year period is to be construed liberally, which is consistent with policy favoring trial on the merits. What is deemed impossible, impracticable, or futile is determined by the Court in light of all the circumstances of a particular case, including the conduct of the parties and the nature of the proceedings. *Brown & Bryant, Inc. vs. Hartford Accident & Indemnity Co. (1994) 24 Cal.App.4th 247,251.* The critical factor is whether or not a plaintiff exercised reasonable diligence in prosecuting the case. *Brown & Bryant, Inc*, supra,

at p.251, citing *Baccus v. Superior Court (1989) 207 Cal.App.3d 1526, 1532.*

Defendants Fidelity and Rybicki did not address any factual or legal issues regarding the stay until they presented their reply to plaintiff's opposition. [AAA, 995-1012; II, AA 400-410]. At that time, for the first time, defendants Fidelity and Rybicki presented arguments that the stay was a "partial stay" and that it was requested by plaintiff only. Those arguments were false and misleading with respect to the contention that the stay was sought and requested by plaintiff only.

In addition defendants Fidelity and Rybicki specifically indicated in their motion to dismiss that they are "willing to admit" it was impracticable to bring the action to trial without defendant Lehman. [AAA, 1008 at lines 16-20]. The trial Court apparently ignored that concession of impracticability in granting the motion to dismiss.

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6. ***The Trial Court Unreasonably Failed To Exercise Its Discretion Under The Doctrine Of Equitable Estoppel In Light Of Evidence That The Defendants Clearly Used Plaintiffs' Reasonable Reliance On The Language And Spirit Of Their Universal Agreement And Court Order To Stay The Action To Plaintiffs' Detriment In Favor Of Dismissal***

The Courts have upheld that the doctrine of equitable estoppel applies when parties enter an agreement and one party uses the other party's reliance on the language of that agreement to their detriment with respect to motions brought under CCP § 583. Defendants Fidelity and Rybicki entered into the agreement, along with plaintiff and all other defendants, which stated that the action would be stayed for a period of 120 days, and the order granted the Ex Parte application was signed by the Hon. Charles Lee induced reasonable reliance on the agreement for at least that time frame by plaintiff. It was not until the reply to plaintiff's opposition that defendants Fidelity and Rybicki alleged that the period was not tolled at all for that period of time.

The court in *Woley v. Turkus (1958) 51 Cal.2d 402* encountered a similar issue where the trial court granted defendants' motion to dismiss under CCP § 583(b) despite defendants' agreement which was relied on by plaintiff. The Court stated "We perceive no logical reason why the doctrine

of estoppel should be so restricted. Stipulations in open court are not only the words or conduct which reasonably and commonly induce reliance by counsel. When the defendant induced the plaintiff to delay service of summons, or to overlook errors in service and plaintiff's reliance is reasonable, an estoppel is essential to prevent defendant from profiting from his own deception." Id. at 439, 440. *See also Tresway Aero, Inc. v. Superior Court (1971) 5 Cal.3d 431, 436* (Clearly enunciated the rule that equitable estoppel is available to a plaintiff who has failed to comply with the statutory requirements in reasonable reliance upon the words or conduct of the defendant).

Similarly, plaintiff was induced by defendants' acquiescence to the ex parte application to stay the matter for at least 120 days. Plaintiff reasonably relied on defendants' conduct in conformance with the stay order, which defendants Fidelity and Rybicki now claim should not excluded from the calculation of the five year limitations period. Despite receiving undisputed evidence of an 120 day stay which was agreed upon by all parties to this action (out of 217 total days before the stay was lifted) and was ***ordered*** by the Judge Charles Lee, the Trial Court did not add or consider any of the agreed upon 120 day stay to the overall number of days excluded from calculating the five-day limitations period.

As evidenced by the ruling in *Bennet v. Bennet Cement Contractor's Inc. 125 Cal.App.3d 673, 676*, "Each case must be decided on its own

particular facts, and no fixed rule can be prescribed to guide the court in its exercise of this discretionary power under all circumstances." All of the defendants but Lehman, who was not a party at that time, were active participants in seeking the stay in order to attempt alternative dispute resolution. Discretion dictated that the court favor the rights of the parties to reach agreements by recognizing the impracticability of prosecuting this matter while all parties and the court participated in an agreed upon stay of all proceedings. At a minimum, 120 days of the 217 day stay should have been excluded from the calculation of the five year limitations period by the trial court.

7. *The Trial Court Further Compounded Its Abuse Of Discretion By Dismissing Parties Who Did Not Join The Motion To Dismiss, Had Not Appeared In The Action Long Enough To Be Dismissed, and Who Waived The Right To Dismissal*

As discussed above, the Court granted defendant Fidelity and Rybicki's motion to dismiss under CCP § 583.310 as to all defendants, in the action which included the defendants who did not join the motion and/or were still within the five year period. Plaintiff was unable to submit any evidence supporting plaintiff's rebuttal to defendants' contentions regarding the process which led to the 120 day stay. Defendants did not

address the stay in their motion presented to the Trial Court until defendants submitted their reply to plaintiff's opposition.

The Court also did not address the bases for dismissal of the action under CCP § 583.310 as to defendants Aurora, Lehman, or as to the Tornberg defendants who did not join the motion to dismiss or present motions to dismiss of their own. Those defendants had waived their rights to move for dismissal. *Southern Pacific Company v. Seaboard Mills (1962) 207 Cal.App.2d 97.*

CCP § 1010 states, in relevant part, "Notices (of motions) must be in writing, and the notice of a motion, other than for a new trial, must state when, and the grounds upon which it will be made, and the papers, if any, upon which it is to be based. If any such paper has not previously been served upon the party to be notified and was not filed by him, a copy of such paper must accompany the notice. Notices and other papers may be served upon the party or attorney in the manner prescribed in this chapter, when not otherwise provided by this code."

The purpose for lengthy notice period with respect to motion to dismiss under CCP§ 583.310 for want of prosecution is to allow plaintiff to act to move the case to trial and/or gather evidence to prepare a defense against such motion. *Wilson v. Sunshine Meat & Liquor Co._(1983) 34 Cal.3d 554, 561, fn. 7* ("...due process demands notice to the plaintiff

adequate to defend against the charge of procrastination.");*City of Los Angeles v. Gleneagle Development Co. (1976)62 Cal.App.3d.543, 563.*

It is common practice for attorneys to join in another party's motion by filing a pleading captioned "Joinder in Motion of ... for ...," stating that the joining party adopts the requests and the points and authorities contained in the joined motion and sending notice to the parties in conformance with the rules of court. *Barak v. Quisenberry Law Firm (2006) 135 Cal.App.4th 654, 660–661.*

In *Bayle-Lacost & Co., Inc v. Superior Court of Alameda County et. al.(1941) 46 Cal.App.2d 636*, the court held that a defendant who voluntarily becomes a party to the litigation and participates in the litigation, despite the expiration of the five year statute under CCP § 583.310 impliedly waives the right to dismissal based on the record date of the filing of the complaint. Id. At. *641, 642. See also Butler v. Hathcoat (1983) 146 Cal.app.3d 834, 840* (The Court of Appeal held that defendant, by his failure to object in a timely manner, must be deemed to have waived his right to pursue a dismissal); *Synanon Foundation, Inc. v. County of Marin 133 Cal.App.3d 607, 614* ("However, by filing answers, setting forth affirmative defenses, and participating in discovery, the respondents indicated an intent to submit to the issues to the court for a determination on the merits. They did not avail themselves of the rights (to dismiss)

conferred by section 514 for almost two years until the case was clearly at issue and assigned for Trial Setting Conference."

Similarly, even if this Court is inclined to find that the five-year limit under CCP § 583.310 had expired as to defendants Fidelity and Rybicki, the defendants in this action who did not formally join defendants Fidelity and Rybicki in their motion to dismiss at any time during these proceedings and participated in the actual litigation of this case up until that point waived their rights to a dismissal under CCP § 583.310.

8. The Five year Time Period to Bring the Action to Trial under CCP §583.310 Had Not Expired as Applied to Defendant Lehman Brothers

In this case, defendant Lehman Brothers was not joined in this action as a defendant until plaintiff obtained relief from the automatic stay of the commencement of all actions against defendant Lehman under 11 U.S.C.§ 362 until on or around October 26, 2011. The trial court failed to consider that defendant Lehman had no right to dismissal under CCP §583.310. Plaintiff had no reason to anticipate that defendant Lehman, or any other defendant for that matter, except defendants Fidelity and Rybicki, was seeking dismissal under CCP §583.310. In fact, defendant Lehman filed a motion to file a cross-complaint, not a dismissal.

This litigation involved as many as 10 defendants at various times with different facts, circumstances, and timelines regarding their respective involvement in the subject matter of this action. The parties were all aware

that entirely different facts exist against dismissing this action as to defendants Lehman/Aurora. The trial court paid no regard to these issues.

B. APPLICATION OF THE "ABUSE OF DISCRETION" STANDARD OF APPELLATE REVIEW DOES NOT REQUIRE THE APPELLATE COURTS TO ACCEPT THE TRIAL COURT'S DECISION WHICH, PURSUANT TO CCP §583.130, FAILED TO CONFORM WITH THE SPIRIT OF THE LAW AND DEFEATED THE ENDS OF SUBSTANTIAL JUSTICE

1. *The Trial Court's Decision To Dismiss Was An Abuse Of Discretion As It Was Contrary To The Policy Favoring Trial On The Merits*

In opposition to the motion to dismiss, plaintiff argued the action was still within time-frame allotted under section 583.310 based on the time periods during the litigation for which it was objectively impracticable bring the action to trial. The action had been stayed for a total of 217 days in 2008 when the court granted the parties' unopposed ex parte application and ordered a 120-day stay of all litigation in April 2008, and the court did not lift the stay until November 2008. [II,AA414-427].

Plaintiff further argued that the two-month period of time between Fannie Marie Gaines's death and the substitution of a successor should be excluded from the five-year period. Plaintiff additionally contended the

five-year period was tolled for the period in which plaintiff sought relief from the bankruptcy stay between June and October 2011, because it was impossible, impracticable, or futile to bring the action to trial while the bankruptcy stay was in effect as to Lehman, an indispensible party for purposes of determining the cause of action to quiet title.

It had been Aurora's inaccurate admission in its January 2009 answer that it held an ownership interest in the Gaineses' property which caused an interruption of the litigation in order to bring Lehman into the case. The alleged error was not corrected by Aurora until November 2009, nearly eleven (11) months later. It was not until December 13, 2010, that Aurora provided documentary proof of its claim that Lehman was the actual interest holder. [I,AA0212-0216].

Plaintiff's counsel required six months to retain New York counsel, and plaintiff paid more than $19,000 to stop the foreclosure sale of the property. There was evidence presented which established diligence based on the extensive litigation of the matter. When plaintiff suggested the possibility of severing defendants from the action to move the matter forward, the trial court explicitly indicated that it would not bifurcate the action to allow trial to proceed against the Fidelity defendants first. [II,AA266-399].

In their reply, yet not mentioned in their moving papers, the Fidelity defendants argued that the 2008 court ordered mediation stay did not

qualify as a stay under section 583.340, subdivision (b) citing the decision in *Bruns v. E-Commerce Exchange (2011) 51 Cal.App.4th 717.*

The trial court determined that the stay of the action between April 2008 and November 2008 was a partial stay, and not a stay within the meaning of section 583.340, subdivision (b). Further, the trial court did not exclude any period of time for the partial stay finding that plaintiff had not demonstrated that plaintiff was reasonably diligent in prosecuting the action during the stay, or that the stay made it impossible, impractical, or futile to bring the action to trial. The trial court concluded that plaintiff should have commenced trial by May 16, 2012, to fall within the five-year period, and dismissed plaintiff's case. The scheduled trial date exceeded the adjusted 5-year-period by just 82 days.

For all of the reasons discussed herein, the trial court improperly applied the decision in *Bruns*. Plaintiff presented uncontradicted evidence that the agreed upon, court ordered stay made it impracticable, if not impossible, to bring this matter to trial during the period that the litigation was stayed.

On August 20, 2012, plaintiff filed a motion for reconsideration. There was a stay where all parties had agreed to attempt settlement and at least two other events that significantly interfered with plaintiffs' ability to get to trial. That stay was 120 days (the time the parties had agreed to stay) or 217 days (the time before the trial court actually lifted the stay). On

August 24, 2012, the trial court entered a judgment of dismissal. On September 6, 2012, Aurora and Lehman served a notice of entry of judgment. [IV, AA725-730] On October 22, 2012, the trial court denied the motion for reconsideration. [III, AA432-724]. Plaintiff filed a notice of appeal on November 5, 2012. [AAA, 1019-1021].

2. ***The Court Of Appeal Decision in (Gaines v. Fidelity National Title Insurance Company (2013) 222 Cal.App.4th 25.***

On December 11, 2013, the Court of Appeal affirmed in part and reversed in part the trial court's decision in a published opinion. The Court of Appeal applied the abuse of discretion standard to determine whether the trial court's ruling to dismiss a case that appellant contended was "impracticable" to be brought to trial should be reversed.

Despite the fact that the majority affirmed the trial court's dismissal, the dissenting opinion by Justice Rubin indicated that the facts established that the plaintiff objectively prosecuted this case with reasonable diligence and the matter was objectively too impracticable to be brought to trial. Justice Rubin opined that if the trial court had exercised its discretion "in conformity with the spirit of the law" and not to "defeat the ends of substantial justice," it should have excluded the 120 days of the parties' stipulated stay or the 217 days of actual stay or any significant part of the Aurora/Lehman Brothers time correcting their mistake regarding

ownership, such that the five year limitations period would not have elapsed. *Gaines, supra,* at *57; People v. Jacobs_(2007) 156 Cal.App.4th 728, 740.* The lack of an exercise of discretion based upon relevant factors in the individual case constitutes an "abuse of discretion." *Dickson, Carlson & Campillo v. Pole (2000) 83 Cal.App.4th 436, 449.*

3. It Was An Abuse Of Discretion For The Trial Court To Ignore Important State Policies And Dismiss This Action

Appellant contends that under the facts of this case, the trial court abused its discretion by failing to exercise its discretion in accordance with the spirit of the law and defeated, rather than subserved, the ends of substantial justice. The trial court dismissed plaintiff's case against three large corporate defendants on a technicality the defendants participated in creating rather than allowing the plaintiff's claims to proceed to trial on the merits.

In a legal sense, discretion is abused whenever in the exercise of its discretion the court exceeds the bounds of reason, all of the circumstances before it being considered. *Ordway v.Arata (1957) 150 Cal.App.2d 71, 78.* The court's discretion is controlled by legal principles and is to be exercised in accordance with the spirit of the law and with a view to the subserving, rather than defeating, the ends of substantial justice. Each case must be decided on its own peculiar features and facts. Id. The lack of an exercise of discretion based upon relevant factors in the individual case

constitutes an "abuse of discretion." *Dickson, Carlson & Campillo v. Pole (2000) 83 Cal.App.4th 436, 449.*

The standards and policies of the court, by legislative mandate, are embodied in Code of Civil Procedure §583.130 which state, in pertinent part, as follows:

> "It is the policy of the state that a plaintiff proceed with reasonable diligence in the prosecution of an action, but that all parties shall cooperate in bringing the action to trial or other disposition... the policy favoring the right of parties to make stipulations in their own interests and the policy favoring trial or other disposition of an action on the merits are generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action in construing the provisions of this chapter." [Emphasis added.]

"This legislative policy (of dismissal statutes), is tempered by judicial concern that subject to a plaintiff's exercise of *reasonable* diligence, an action should be tried on the merits wherever possible." *Butler v. Hathcoat 146 Cal.App.3d 834, 838,839 [citing Hocharian v. Superior Court (1981) 28 Cal.3d 714, 724.* Where these policies conflict, the judicial policy predominates. *Denham v. Superior Court (1970) 2 Cal.3d 557, 556.* Further, the court is afforded statutory discretion under CCP §§ 583.340 (b) and (c) to exclude periods of time, including periods when partial stays were in place. The measure is "the plaintiff's exercise of reasonable diligence" when the court concludes that bringing the action to trial was "impossible, impracticable, or futile" *Bruns, supra* at 726 and 731.

In his dissenting opinion *in Messler v. Bragg Management (1990) 219 Cal.App.3d 983* Justice Johnson discussed the legislative history of CCP §583.130 extensively. He indicated that the statement of the Legislature that California, as a matter of public policy, favors a trial on that merits over dismissal for failure to prosecute with reasonable diligence was not a mere platitude. Justice Johnson indicated the desire to reduce court congestion does not justify the sacrifice of substantial rights of litigants. Justice Johnson further pointed out that "perfect diligence" is not the standard. The statutory preference requires only reasonable diligence. *Messler, supra,* at pp. 996-1003.

Plaintiff Gaines has demonstrated reasonable diligence with uncontradicted evidence. The trial court abused its discretion in ignoring plaintiff's evidence and dismissing this action.

4. The Sales Contract The Tornberg Defendants Used To Purchase The Gaineses Home While It Was In Foreclosure Failed To Comply With HESCA Requirements On Its Face And Arguably Constituted Financial Abuse of An Elder

The Home Equity Sales Contract Act (HESCA) was adopted by the legislature in 1976 with the stated legislative purpose of addressing the problem of homeowners in foreclosure being taken advantage of by "home equity purchasers" which is the subject of this action. Welfare and Institutions Code §15610.30, which was adopted by the legislature in 1994,

defines financial abuse of an elder and provide remedies for the problem of elderly people being defrauded and taken advantage of in financial transactions. The statute would apply to transactions with the elderly that were arguably in violation of HESCA.

Further, Welfare & Institutions Code, § 15610.30 subdivision (a)(1) and (b) state, in pertinent part,

> "(a) Financial abuse' of an elder or dependent adult occurs when a person or entity does any of the following: (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both...or
> (b) A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult."

Stebley v. Litton Loan Servicing, LLP (2011) 202 Cal.App.4th 522, 527.

Defendants Tornberg, Johnson, Ray Management Group Inc., Roop and each of them, arguably violated the HESCA statutory requirements set forth in Civil Code §§1695.6 and 1695.13 in that the contract for sale of the subject property which said defendants presented to plaintiff and her husband did not comply with Civil Code §§1695.2, 1695.3, and 1695.5. The contract did not comply with the Civil Code requirements for reasons which include but are not limited to: (a) said contract did not include the terms of the rental agreement which said defendants proposed to plaintiff,

(b) a notice of cancellation,(c) a complete description of the services which said defendants represented they would perform for plaintiff and her husband before and after the sale, and (d) said defendants took unconscionable advantage of plaintiff and her husband. Further, said defendants refinanced and placed an encumbrance on the subject property without plaintiff's written consent in violation of Civil Code §§ 1695.6(b)(3) and 1695.6(e).

The Gaineses were elderly people who ultimately died while attempting to save their home from foreclosure despite having almost $700,000 in home equity. It had enough home equity such that they should have been able to obtain refinancing which would have allowed them to sell their home and benefit from the equity they had earned. They owed $560,000 on their only mortgage with Countrywide Home Loans. The property was appraised for as much as $1.25 million.

Instead the Gaineses got involved with some individuals who deceived and defrauded them. Those individuals were supported, either knowingly or negligently, by several financial institutions who made loans without regard to the clear violations of HESCA. The financial institutions sanctioned and assisted the HESCA violations by their failure to enforce the applicable HESCA protections.

The trial court's abuse of discretion and subsequent dismissal of the action completely eviscerates the spirit and purpose of the Home Equity Sales Contract Act and fails to provide protection for plaintiffs, who were especially vulnerable to such practices as elderly persons facing foreclosure. The undisputed facts arguably established that the defendants faced clear liability for flagrant financial abuse of an elder under Welfare & Institutions Code, § 15610.30 subdivision (a)(1) and (b) because they took real property from elderly adults for a wrongful use or with intent to defraud in violation of HESCA provisions.

Tornberg, Roop, and Johnson arguably stole the Gaineses equity, stole the Gaines title to the property, and stole an additional $90,000 from the Gaineses during the escrow closing. The financial institution defendants played a shell game with the title to the property. They arguably facilitated the elder financial abuse and the violations of the Home Equity Sales Contract Act committed by the Tornberg defendants. As set forth above, in abusing its discretion and dismissing the case, the trial court's ruling further served to directly "defeat the ends of substantial justice" by rewarding the defendants for the taking advantage of elderly people facing foreclosure.

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5. ***The "Abuse Of Discretion" Standard Does Not Require A Reviewing Court To Uphold Trial Court Decisions Which Do Not Comply With Important Policies Intended To Promote The Substantial Ends Of Justice***

The California judicial policy of the law favors, wherever possible, a hearing on the merits. *Weitz v. Yankosky (1966) 63 Cal. 2d 849, 854*; *Slusher v. Durrer 69 Cal. App. 3d 747, 754.* Appellate courts are more disposed to affirm an order where the result compels a trial on the merits. *Weitz*, *supra*, at 854. The policy of the law is to have every case tried on its merits and that policy views with disfavor a party who, regardless of the merits, attempts to take advantage of the mistake, inadvertence, or neglect of his adversary. *A & B Metal Products v. MacArthur Properties, Inc. (1970) 11 Cal.App.3d 642, 648.* In applying the abuse of discretion standard, appellate courts must be mindful that the trial court's discretion must be exercised "in conformity with the spirit of the law" and not "defeat the ends of substantial justice" as stated by Justice Richman in *People v. Jacobs (2007) 156 Cal.App.4th 728, 740.*

Trial courts must consider the fundamental judicial policy favoring a trial on the merits and, therefore, are not afforded the unbridled discretion to make decisions which may cause a "miscarriage of justice." *Baltayan v. Estate of Getemyan (2001) 90 Cal.App.4th 1427, 1434*; *see also Blank v.*

Kirwan (1985) 39 Cal.3d 311, 331. The "abuse of discretion" standard of appellate court review was originally formulated to be a rubric designed to afford trial courts a balanced level of deference and oversight, but due to its amorphous nature it has since been "itself much abused." *Ziesmer v. Superior Court (2003) 107 Cal.App.4th 360, 363.*

In the instant case, the facts are undisputed. Therefore, the general deferential policy that a trial court is better suited with factual knowledge to render a decision than an appellate court is inapplicable. The trial court was not in a significantly better position to decide this issue than the appellate court. With those facts, the appellate court is tasked with determining whether the trial court abused its discretion by dismissing the instant case on procedural grounds against appellant's arguments that the case was too "impracticable" to be brought to trial.

In *Bruns, supra,* 51 Cal.4th at page 731, this Court stated that impracticability, like futility, involves determining "excessive and unreasonable difficulty or expense in light of all circumstances of the particular case." Impracticable does not mean impossible. An argument can always be made that because it was not impossible to bring the matter to trial, it was possible and, therefore, the trial court could not have abused its discretion because a decision to dismiss was not and could not have been "whimsical."

No allowance for equity nor the interest of justice can exist within such standard as applied to the weighing of whether a case is truly too impracticable to be brought to trial no matter how complicated the facts or the amount of "reasonable diligence" of the party. The instant case was extensively litigated; the parties did not sit on their hands. Compare *Mitchell v. Frank R. Howard Memorial Hospital (1992) 6 Cal.App.4th 1396, 1404-1406* (Dismissal of action under five-year rule affirmed when plaintiff filed both federal and state actions and did nothing in the state lawsuit for four years; plaintiff "had long ago abandoned" the state court action; plaintiff's conduct was dilatory and the court would not reward "unreasonable procrastination."); *Ferk v. County of Lake (1988) 205 Cal.App.3d 268, 278* (Action "came to a standstill" when plaintiffs substituted themselves in pro per.)

Plaintiff exercised *reasonable* diligence as evidenced by amending the complaint at least four (4) times, actively engaging in mediation, hiring New York bankruptcy counsel, settling the matter with several parties, and announcing ready for trial at least twice throughout the proceedings. However, inaccurate representations by defendants and several events completely outside of plaintiff's control made bringing of the case to trial impracticable, if not impossible.

As a partial stay, under *Bruns, supra,* 51 Cal.4th at pages 724, 731, the stay arguably did not entitle plaintiffs to the automatic exclusion under

section 534.40, subdivision (b). But as *Bruns* itself clarifies, a partial stay is a factor to be *considered* under the subdivision (b) impracticability test. The trial court paid no consideration to the circumstances of the partial stay or plaintiff's reasonable efforts to settle the matter and excluded no time for the partial stay even though it had the discretion to do so. The lack of an exercise of discretion based upon relevant factors in the individual case constitutes an "abuse of discretion." *Dickson, Carlson & Campillo v. Pole (2000) 83 Cal.App.4th 436, 449.*

Further, defendant Aurora mistakenly admitted in its January 2009 answer that it had the right to assert an ownership interest in the Gaineses' property, which was not corrected by Aurora until nearly eleven (11) months later after plaintiffs had already declared ready for trial. It would be another nine (9) months after that until Aurora supplied documentary proof of its claim that Lehman Brothers owned the title to the property. Despite being completely beyond plaintiff's control and causing a twenty-one (21) month delay in the litigation of the matter, the trial court exercised no discretion and excluded none of the time caused by Aurora's unilateral mistake of claiming ownership although Lehman Brothers then became an indispensable/necessary party as a title holder. Finally, the trial court implicitly refused to bifurcate the matter to allow the matter to go to trial when plaintiff announced ready.

Under the trial court's calculation, the case was only 82 days beyond the five-year limitation and was dismissed on those grounds. Despite the clear equitable concerns and complicated factual circumstances the trial court dismissed the matter and denied plaintiff's motion for reconsideration. The trial court's holding disregarded the manifest interests of justice and policy for a trial on the merits for two elderly plaintiffs who were arguably scammed out of title to their home and robbed of over $240,000 of their home equity.

The appellate courts are not required to sanction this alleged injustice based on application of the abuse of discretion standard. That standard allows the appellate court to promote the substantial ends of justice and favor trial on the merits over procedural dismissal in instances in which a plaintiff, such as appellant Gaines, has demonstrated reasonable diligence in prosecuting her action.

VI.

CONCLUSION

Appellant is entitled to trial on the merits in this action. Impracticability to the Gaineses was far different than it was to Countrywide, Aurora, Fidelity, or Lehman Brothers. The Gaineses were not people with unlimited finances to spend in litigation in comparison to the large financial institution defendants which tossed the Gaineses' title

around like a football. The Gaineses did not sit on their hands during this litigation. The record indicates they did not. They were ready for trial in August 2009 when Aurora announced it did not hold an interest in the subject property after filing a verified answer, and the August 29, 2009 trial date was vacated.

However, the trial court abused its discretion in not following the policies of the State of California. The trial court should have preferred trial on the merits over dismissal, but preferred dismissal over trial on the merits. The policy of supporting/recognizing agreements reached between counsel regarding the management of litigation is intended to assist counsel in scheduling and managing the litigation processes. That policy is not intended to allow one party to take advantage of the other. The trial court further compounded its abuse of discretion by, on its own motion, dismissing the action against defendants who did not seek dismissal. Those defendants arguably waived their rights to seek dismissal.

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As set forth above, in abusing its discretion and dismissing this matter, the trial court's ruling served to directly defeat the ends of substantial justice and is in complete conflict with the policies intended to subserve the ends of substantial Justice.

Respectfully submitted,

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FANNIE MARIE GAINES

CERTIFICATE OF COMPLIANCE WITH RULE 8.204(c)(1)

I, the undersigned W. Keith Wyatt, declare that:

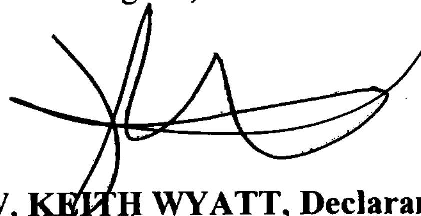
I am a member in the law firm of Ivie, McNeill & Wyatt, which represents plaintiff and appellant, Fannie Marie Gaines, in this case.

This Certificate of Compliance is submitted in accordance with Rule 8.204(c)(1) of the California *Rules of Court.*

This opening brief was produced with a computer. It is proportionately spaced in 13 point Times Roman typeface. The brief is 12,105 Words, including footnotes.

I declare, under penalty of perjury, under the law of the State of California that the foregoing is true and correct.

Executed on May 16, 2014, at Los Angeles, California.



W. KEITH WYATT, Declarant

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:

APPELLANT'S OPENING BRIEF ON THE MERITS

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

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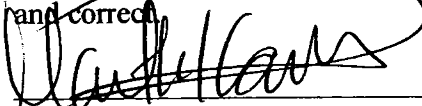

Martha I. Carrillo