S215990

IN THE
SUPREME COURT OF CALIFORNIA

FANNIE MARIE GAINES,

Plaintiff/Appellant and Petitioner,

vs.

JOSHUA TORNBERG, et. al.

Defendants/Respondents.

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

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

Plaintiff/Appellant, Fannie Marie Gaines ("Mrs. Gaines"), submits this Reply Brief ("Reply") in response to Defendants/Respondents, Fidelity National Title Company and Bobby Jo Rybicki ("Respondents") Answering Merits Brief ("AMB").

I. INTRODUCTION

It has long been the policy in California legislative and decisional law that the purpose of the five-year statute of limitations is to prevent avoidable delay for too long a period. The five-year statute is not designed arbitrarily to close proceedings at all events in five years and implied exceptions have always been recognized. One of the primary exceptions has been that when a party is unable, from causes beyond his control, to bring the case to trial, either because of a total lack of jurisdiction on the part of a trial court, or because proceeding the trial would be both impracticable and futile, the time during which bringing the case to trial would be impracticable should be excluded from calculation of the five year limitations period. *Christin v. Superior Court (1937) 9 Cal.2d 526, 529-533.*

The aim of the five-year statute of limitations is to promote the trial of cases before evidence is lost, destroyed, or the memory of witnesses becomes dimmed and to protect defendants from being subjected to the annoyance of an

unmeritorious action remaining undecided for an indefinite period of time. However, the court should set reality above artificiality in applying the five-year statute. The purpose of the statute is to prevent avoidable delay. Neither the courts nor litigants have any legitimate interest in preventing a resolution of a lawsuit on the merits if, through plaintiff's exercise of reasonable diligence, the goals of the five-year statute of limitations have been met. The mandatory language of the statute should not be applied in cases where it is impossible, impracticable, or futile due to causes beyond the parties control to bring an action to trial when the five year period. *Moran v. Superior Court (1983) 35 Cal.3d 229, 237-239; Westinghouse Electric Corp. v. Superior Court (1983) 143 Cal.App.3d 95, 102-110.*

In *Westinghouse,* the Court of Appeal defined an abuse of judicial discretion as "...whenever in the exercise of its discretion the court exceed the bounds of reason, all of the circumstances before it being considered." *Westinghouse, supra, at p.101.* After reviewing the history of the limitations and dismissal statutes, the *Westinghouse* court concluded that requiring the plaintiff to sever causes of action against multiple defendants whenever it became impossible or impracticable to proceed against one defendant within the five-year period would be to require unproductive duplication of effort, compel the incurrence of excessive expense, and generally undermine all the policy served by modern theories of consolidation in a substantial number of cases. The court rejected

mechanical application of the five year limitations statute, and attached considerable significance to the fact that no prejudice resulted to any defendant from the delay in bringing the matter to trial. *Westinghouse, supra, at pp.102-110.*

The impracticability period does not have to be the "but for" cause for failing to meet the five-year deadline. *Tamburina v. Combined Ins. Co. of America (2007) 147 Cal.App.4th 323,333-334; New West Fed. Savings & Loan Assn. v. Superior Court (1990) 223 Cal.App.3d 1145, 1151-1153; Sierra Nevada Memorial-Miners Hospital, Inc. v. Superior Court (1990) 217 Cal.App.3d 464, 469-471.*

The Legislature specifically addressed that issue in 1984 when CCP §583.340 codified the case law exceptions to the five-year limitations statute. The Law Revision Commission rejected cases that required a "but for" causal connection and recognized that the time within which an action must be brought to trial is tolled during a period of impracticability regardless of whether a reasonable time remained at the end of the period of the excuse to bring the action to trial. *New West, supra, at pp. 1153-1155.*

In resolving the issues presented in this appeal, this court should look at the undisputed facts in the record and conduct an independent review of the undisputed facts to resolve the legal questions of the applicability of CCP §583.340 (b) and (c) to those undisputed facts. *Tamburina v. Combined Ins. Co.*

of America (2007) 147 Cal.App.4th 323,328; Brown & Bryant, Inc. v. Hartford Accident & Indemnity Co. (1994) 24 Cal.App.4th 247, 251-252. This court should independently determine based on the undisputed facts presented in the record on appeal :

1. Whether the stay agreed to by all the parties in this action, and ordered by the trial court, made it impracticable, if not impossible, to bring this matter to trial during the 120-217 day period of the stay;
2. Whether a causal connection existed between the stay and failing to move the case to trial;
3. Whether appellant Fannie Gaines was reasonably diligent in moving this case to trial under the circumstances presented in this case; and,
4. Whether the trial court abused its discretion in dismissing this action based on the undisputed facts presented by the parties.

Respondents urge this court to go backwards and support the trial court's rigid, mechanical application of CCP §§ 583.310 and 583.340. Respondents fail to address the policies embodied in CCP§ 583.130 anywhere in their opposition brief.

In reply, appellant urges this court to independently review the undisputed facts presented in the record on appeal and uphold the principles

and policies explicitly stated in CCP §583.130 and in the Law Revision Commission comment to CCP §583.340. This court should allow appellant Fannie Gaines to have her day in court, and win or lose, proceed to trial on the merits.

This case involves claims by appellant Fannie Gaines that she was the victim of home equity fraud committed against her and her husband while they were facing foreclosure. Both Mr. and Mrs. Gaines were over 65 years of age and in poor health when the Tornberg defendants took advantage of them to obtain title to their property in July 2006.

Respondents Fidelity and Rybicki assisted the Tornberg defendants in taking advantage of the Gaineses. Rybicki was a personal acquaintance of the Tornberg defendants, and she failed to disclose that relationship to the Gaineses at any time while she served as the escrow agent for the sale transaction between the Gaineses and Tornberg. (I, AA, 0091-0098).

Respondents altered the deed to add the property description of the subject property without the Gaineses knowledge or consent after the original deed, which did not include a description of the subject property, had been signed by the Gaineses before a notary public. (I, AA, 0072-0073; 0091-0098; 0131-0135). Respondents also paid the Tornberg defendants $90,000 out of the escrow without the Gaineses knowledge or consent. (I, AA, 0091-0098).

The trial court dismissed this action for failure to bring this action to trial within five years from the date of filing the complaint pursuant to CCP §583.310 based on respondents' motion. Appellant has contended at all times that the five year limitations period was extended pursuant to appropriate exclusions of time allowed by CCP §583.340(b) and/or (c). In particular, the trial court failed to exclude a 120-217 day stay of the litigation which was agreed to by all the parties and ordered by the trial court to effectuate the agreement of the parties.

The issues presented in this appeal are:

1) 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)?

2) 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?

As recognized in the dissenting Appellate Court opinion by Justice Rubin, the complicated factual circumstances of this action coupled with the undisputed facts of Mrs. Gaines' *reasonable* diligence in prosecuting this action against several major financial institutions while challenging the clearly fraudulent, illegal conduct of the Tornberg defendants, militate that this matter be allowed to proceed to trial on the merits. *Gaines v. Fidelity National Titile Insurance Company (2013) 165 Cal.Rptr.3d 544, 573.* A trial on the merits would satisfy several significant policies of the law including:

1) the State's overarching policy in favor of trial on the merits as expressed in CCP § 583.130;

2) the State's policy of protecting homeowners in foreclosure from home equity fraud as expressed in Civil Code §1695, et.seq.;

3) the State's policy of protecting the elderly from financial abuse; as expressed in Welfare & Institutions Code §15610.30; and,

4) the State's policy of respecting the right of parties to cooperate and make agreements regarding the litigation of actions as expressed in CCP §583.130.

Respondents' AMB starts, without the benefit of any support from the record on appeal, by contending that it was the Gaineses who were in fact the

perpetrators of the fraud in the transactions that are the subject of this action. Respondents repeatedly contend the following unsupported fictions:

1) The 120-217 day stay from April 3, 2008 to November 6, 2008 was *solely* requested by and in *sole control* of Mrs. Gaines;

2) The stay was only a *partial* stay *because* the stay "contemplated and even encouraged the facilitation of prosecution of the action through mediation," and "allowed for the completion of outstanding discovery" (despite no record of any discovery served prior to the mediation);

3) Mrs. Gaines "sat on her hands" (i.e. was not reasonably diligent) during and after the stay; and,

4) Mrs. Gaines failed to demonstrate impracticality, impossibility, and/or causality of either.

Respondents also make callous assertions that the Gaineses were not "victims," or were done a favor by being scammed out of their equity and by having to spend their last years of their lives fighting to remain in their home. These assertions are also inaccurate and unsupported by the record.

In reply, appellant offers the following arguments and undisputed facts:

1) The record establishes that discussions of staying the litigation were initiated *by defendant Aurora* and were ultimately agreed to by *all of the parties in the action.* The spirit, facilitation, and

contemplation of the stay was expressed and understood in plain language to halt prosecution of the litigation. There *were* no outstanding discovery responses which continued the "prosecution" of the action. No discovery was served to facilitate prosecution during the stay. No litigation to enforce discovery could be started until the stay was lifted. The agreement was solidified pursuant to the trial court's order, in response to appellant's unopposed ex parte application. The stay functioned as a complete stay, was understood as a complete stay, and, therefore, was a *complete* stay under CCP § 583.340 (for at least 120 days, or a maximum 217 days);

2) Even if the stay was considered a *partial* stay, the period of the stay should be excluded because it was impracticable to bring the case to trial during the time that the parties had agreed not to litigate the action until a new trial setting conference was conducted by the trial court;

3) Mrs. Gaines submitted undisputed evidence of her reasonable diligence during the stay and at all times in this litigation;

4) It was clearly impracticable to proceed to trial in this case in which the title to the subject property was at issue without having the party with the largest financial interest in the property, either

Aurora or Lehman, participate in the trial such that all issues could be resolved in one trial. Requiring more than one trial of all of the issues in this case would have been an unreasonable waste of court time, attorney time, witness/party time, and financial resources.

Respondents' repeated attempts to mischaracterize the request for a stay as *a request by appellant only* as opposed to *a request by all parties* reflect respondents' recognition of the manifest injustice which would result from allowing any of the parties to include the period of the stay in the computation of the five-year limitations period for bringing this matter to trial. It would have been an exercise of bad faith, for any of the parties who agreed to the stay to litigate the action during the period of the stay. Similarly, respondents' attempts to cast appellant as the perpetrator of a fraud instead of being the victim of a fraud reflect respondents' recognition that it would be extremely unfair to allow a procedural dismissal to resolve the case in which so many important policies intended to promote fairness were in issue.

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ARGUMENT

I. THIS COURT MUST DISREGARD ANY ALLEGED FACTS PRESENTED BY RESPONDENTS WHICH ARE IN CONFLICT WITH THE FACTS PRESENTED BY APPELLANT SINCE RESPONDENTS FAILED TO PRESENT ANY FACTS FOR THIS RECORD ON APPEAL

As a preliminary matter, it should be noted that respondents presented no evidence in the record to the trial court to support respondents' motion to dismiss, in reply to petitioner's opposition to Respondents' motion, or in these appellate proceedings. All of the evidence in the record on this appeal has been submitted by appellant. Most of respondents' allegations in their answering brief are unsupported by the record and should be disregarded. "When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two." *Protect Our Water v. County of Merced (2003) 110 Cal.App.4th 362, 364.*

Respondents' contentions *not supported by the record* include:

1. Respondents' contention that the Tornberg defendants were unsuccessful in attempting to arrange refinancing for the Gaineses because the Gaineses did not have sufficient income to obtain a loan. There is no evidence that the Tornberg defendants ever tried to obtain refinancing for the Gaineses.

2. Respondents' contention that the Gaineses agreed to allocate $90,000 to Ray Management for repairs to the property. The Gaineses contended they never authorized the payment, and **no documents are presented in the record on appeal** to support Respondents' contention that the

Gaineses agreed to pay $90,000 to the Tornberg defendants out of escrow. Further, the contentions made by Respondents in their footnote 1 are **totally unsupported by the record and must be disregarded by this court**.

3. Respondents' contention that Mrs. Gaines "... changed her mind, and refused to allow any of the defendants on the property to begin repairs.[2]" Respondents' footnote 2 includes allegations **which are not supported by the record on appeal**. It also appears Respondents are arguing it was a good deal for the Gaineses to have the title to their home, over $200,000 in equity, and $90,000 cash in escrow stolen from them in the transaction which is the subject of this litigation.

4. Respondents have also misinterpreted the statement of issues of this Court in that they contend that petitioner has improperly presented all of the issues previously presented in these proceedings. The website of this Court clearly stated:

> " NOTE: The statement of the issues is intended simply to inform the public and the press of the general subject matter of the case. The description set out above does not necessarily reflect the view of the court, or define the specific issues that will be addressed by the court."

Therefore, respondents' request to be allowed to present additional briefing should be rejected.

5. Respondents' footnote on page 4 appears to present five reasons that prove Mrs. Gaines was done a favor when Tornberg stole her property. In the same breath and footnote, respondents claim that "Fidelity is in no way trying to portray Tornberg as the epitome of upstanding moral character..." However, respondents certainly confirm that they think appellant has received more benefits than she deserves already.

6. Footnote 3 on page 8 of the Respondents' AMB erroneously claims that Appellant "raises a new substantive claim for the first time" referring to the HESCA. However, appellant's claims under the HESCA were presented in the original complaint.

II. RESPONDENTS DO NOT CHALLENGE APPELLANTS' CONTENTION THAT RESPONDENTS SHOULD BE ESTOPPED UNDER THE DOCTRINE OF EQUITABLE ESTOPPEL

Respondents' AMB provides no argument to rebut appellants' contention 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 regarding dismissal motions based on limitations periods. *Waley v. Turkus (1958) 51 Cal.2d 402, 439-40* ("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...plaintiff s reliance is reasonable, an estoppel is essential to prevent defendant from profiting from his own deception."); *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).

Respondents also present no argument or evidence to rebut appellant's contention that the trial court's judicial 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 participated in an agreed upon and

court ordered stay of all proceedings. The record clearly establishes that respondents willingly entered into the agreement along with all the other parties. The record establishes that the action was to be stayed for a period of 120 days. The order granting the ex parte application induced reasonable reliance on the agreement by all parties for at least the time period that the parties all agreed to. A decision in respondents' favor, would allow respondents to benefit from disavowing an agreement which they purportedly entered with all other parties in good faith.

Equitable estoppel and the policy favoring the rights of parties to cooperate and enter into agreements to manage the litigation support that, at a minimum, 120 days of the 217 day stay should have been excluded from the calculation of the five year limitations period. Respondents' failure to rebut should constitute a concession to the merits of this contention.

III. THE STAY AT ISSUE WAS A *COMPLETE* STAY BASED ON THE UNDISPUTED FACTS IN THE RECORD AND THIS COURT MAY EXERCISE ITS INDEPENDENT JUDGMENT ON THIS QUESTION OF LAW SINCE THE FACTS ARE NOT IN DISPUTE

Respondents apparently do not dispute that the word "stay" must be looked at in the context *of each individual case. Bruns v. E-Commerce Exchange, Inc. (2011) 51 Cal.4th 717.* However, respondents fail to review the

undisputed facts in the record to evaluate the stay which occurred in the instant case.

Specifically, respondents' AMB states that the stay imposed in this case "cannot be a complete stay because *the stay contemplated*, and even encouraged, the facilitation of prosecution of the action through mediation and the *allowance for completion of outstanding discovery.*" [AMB pg. 8.] Respondents' AMB cites no evidence in the record to support their conclusion that any outstanding discovery was ever responded to.

If any evidence of the service of any outstanding discovery responses existed during the stay to support respondents' position, then respondent should have cited that evidence *in the record.* Therefore, respondents' contention that discovery responses were served during the stay is unsupported by the record. To the contrary, the record supports a finding that all parties ceased litigating this action during the period of the stay as they all agreed to do.

Because the facts in the record are undisputed, this Court should review those facts independently. *Tamburina v. Combined Ins. Co. of America (2007)147 Cal.App.4th 323,327-328; Brown & Bryant v. Hartford Accident & Indemnity Co.(1994) 24 Cal.App.4th 247, 251-252.*

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A. THE RECORD OF CORRESPONDENCE BETWEEN COUNSEL, THE EX PARTE APPLICATION, AND THE LANGUAGE AND SPIRIT OF THE STAY ORDER REFLECT THE UNDERSTANDING THAT THE STAY WOULD FUNCTION AS A *COMPLETE* STAY WHICH ENCOMPASSED ALL PROCEEDINGS IN THE ACTION AND PROSECUTION WAS NOT CLEARLY CONTEMPLATED BY THE PARTIES NOR FACILITATED BY THE MEDIATION

The plain language of the March 31, 2008 confirmation letter sent by Attorney Randall Kennon, appellant's counsel, to all counsel memorialized the terms of the agreement and indicated the spirit and purpose of the stay was to *halt litigation* for the very reasons *defendant Aurora* initially expressed, and that prosecution during the stay was not clearly contemplated by the parties nor facilitated by the mediation. [II,AA, 267-269]. The letter stated:

> "1. The court *strike the current September 22, 2008 Trial Date*, set this case for a Trial Setting Conference on or after July 16, 2008 and enter its order that except for the matters set forth below, *all other litigation efforts in this case be stayed* until *on or after* the Future Trial Setting Conference.
>
> 2. All previously served and outstanding written discovery shall be responded to... *each serving party's 45 day period to move to compel further responses to that discovery shall commence on the date of the future Trial Setting Conference.*
>
> 3. *No other discovery shall be commenced until after the future Trial Setting Conference.*"

The record does not establish that any outstanding discovery was actually responded to. It appears that language was merely precautionary.

The ex parte application made *on the same grounds and understanding* was unopposed by any defendant. [II,AA,283-284]. It was not *until respondents filed their reply to plaintiff's opposition* to the motion to dismiss that respondents presented an affirmative argument, unsupported by the presentation of any evidence, that the period should not be excluded at all for the period of the stay because the stay was a *partial* stay. The trial court abused its discretion by making findings of fact based on arguments in respondents' reply which were unsupported by any evidence in the record. *Save Sunset Strip Coalition v. City of W. Hollywood (2001) 87 Cal.App.4th 1172, 1181 n.3* (Absent justification for failing to present an argument earlier, the court **will not** consider an issue raised for the first time in a reply brief.); *Reichardt v. Hoffman (1997) 52 Cal.App.4th 754, 764*; *Dixon v. Board of Trustees (1989) 216 Cal.App.3d 1269, 1286 n.26.*

Further, the language of the letter from counsel for defendant Aurora, Scott E. Drosdick, dated March 18, 2008 supports Appellant's position that the spirit and understanding between all counsel was that the stay would function as a *complete* stay to all litigation. [II,AA264-265]

"This confirms our recent telephone conversations and emails over the course of February and March 2008... *and the agreements reached therein*...In

light of the foregoing, it is agreed by and between games and Aurora loan... That:

1) Aurora *Loan shall not be required to enter an appearance, and/or answer, move or otherwise respond to*, Gaines' Fourth Amended Complaint for 120 days from the date of this letter ("Stay");

2) Gaines *shall not file a request for default judgment*... against Aurora Loan during the stay;

4) Aurora loan *agrees to toll* as of February 26, 2008 the "running" of the three-month period provided for in Civil Code section 2924(a)(2);

7) Gaines' counsel will take the necessary steps to petition the Los Angeles Superior Court and request that the Court formally approve the stay." [II,AA 264-265]

Further, the authority cited in Respondents' AMB regarding the "definition of prosecution" is inapplicable, unsupportive, and fails to consider the context and circumstances of the instant case as required. The Court in *Melancon v. Superior Court (1954) 42 Cal.2d 678*, held that *depositions* constitute a step in the prosecution of the action. Appellants do not dispute the holding in *Melancon*. However, Respondents' brief takes the attenuated position that "if a deposition is prosecution, thereby being forbidden during the stay, then any similar form of discovery, including the allowance for the completion of outstanding discovery, must also be prosecution." [AMB. Pg.

15.] The problem with respondents' reasoning remains that there was no evidence presented that any discovery responses were ever served during the period of the stay.

Respondents' AMB also states that because the Order allegedly contemplates the completion of (nonexistent) outstanding discovery and "good faith participation" in a mediation, such allowances involve possible forms of prosecution such as "motions to compel," the "meet and confer process," "further or supplemental responses to discovery," etc. [AMB, pg. 16.] However, it is undisputed *in the record* that even if, hypothetically, there was any outstanding discovery, no party would have been able to engage in any litigation to compel responses as it was agreed that the 45 day period to do so would not begin after the stay was lifted and no party could propound any discovery during the stay. [II,AA267-269] Therefore, such precautionary language when taken into consideration under the totality of the circumstances lacks weight and should not be determinative.

B. THE RECORD DOES NOT SUPPORT RESPONDENTS' CONTENTION THAT THE STAY WAS SOLELY REQUESTED BY PLAINTIFF

Respondents initially, and repeatedly (over ten (10) times in the AMB), place emphasis on their contention that the stay in issue in this appeal was "requested by" plaintiff/petitioner as grounds for denial of Mrs. Gaines' OBM.

To the extent that it characterizes the stay as being requested by plaintiff/appellant alone, the undisputed evidence presented *in the record* reflects that:

1. The idea of the stay was initiated *by* Attorney Scott Drosdick, *counsel for Aurora,* because a March 18, 2008 letter from *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 AA 264-265).

2. All parties considered and agreed to the terms of the stay; (II AA 267-274).

3. Plaintiff/Appellant simply presented the agreement of all of the parties to the court for court approval of the stay by way of an ex parte application; (II AA 250-276).

4. The trial court granted the ex parte stay application and ordered the stay based on the unopposed ex parte application in which it was represented that the request for the stay was based on the agreement of all parties. (II AA 283-291).

Respondents' repeated attempts to characterize the stay as a request and action taken by Mrs. Gaines alone apparently reflect respondents' recognition of the concept that it would indeed be unfair for the defendants to agree to stay the proceedings and then later oppose exclusion of the time during which the stay was in effect from the calculation of the five-year period pursuant to CCP §583.340.

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C. THE RECORD DOES NOT SUPPORT RESPONDENTS' CLAIM THAT THE DURATION OF THE STAY WAS "FUNDAMENTALLY" WITHIN THE PLAINTIFF'S CONTROL

Respondents also mischaracterize what Appellants' refer to as the "circumstance of impracticability" by representing it [the stay] was "...requested by, and fundamentally with in the control of, plaintiff..." when in fact the initial discussion of a stay was introduced by defendant Aurora, was ultimately agreed to by all parties, and subsequently became a trial court order. The trial court order placed the stay out of the control *of any and all of the parties* until the trial court lifted the stay. [AMB pg. 1] It was clearly impracticable for plaintiff or any other party to bring this matter to trial while the stay was in effect pursuant to the order of the trial court from April 3, 2008 to November 6, 2008.

In fact, the trial court order struck the then scheduled trial date of September 22, 2008. (IIAA, 278-281). Respondent fails to present any facts, means, law or evidence in the record to support the conclusory statement that it was "fundamentally within the control of Plaintiff" to lift the stay *without a courtroom or judge to hear the matter* when the July 16, 2008 trial setting conference was continued by the Court until a new judge was assigned to replace Judge Lee, which did not occur until November 6, 2008. [II,AA236-243, 302-306.]

IV. EVEN IF NOT A COMPLETE STAY, THE PERIOD OF THE STAY SHOULD BE EXCLUDED UNDER CCP § 583.340(C) BECAUSE IT WAS IMPRACTICABLE TO PROSECUTE THIS LITIGATION IN GOOD FAITH DURING THE STAY; APPELLANT WAS REASONABLY DILIGENT BEFORE, DURING, AND AFTER THE STAY; AND APPELLANT HAS DEMONSTRATED IN THE RECORD THAT THERE WAS A CAUSAL CONNECTION BETWEEN SAID IMPRACTICABILITY AND THE ABILITY TO BRING THE MATTER TO TRIAL WITHIN THE FIVE-YEAR STATUTE

Respondents do not appear to dispute the principle that 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.* Appellants do not dispute that a party claiming impracticality must establish: 1) a circumstance of impracticability; 2) a causal connection between that circumstance and the inability to meet the five-year deadline; and 3) *reasonable* diligence. *Tamburina v. Combined Ins. Co. (2007) 147 Cal.App.4th 323, 328.*

The parties disagree whether appellant has presented facts to support the three aforementioned factors. "[I]mpracticability and futility" involve a determination of "excessive and unreasonable difficulty or expense *in light of all the circumstances of a particular case.*" [Emphasis added.] *Bruns (2011) 51 Cal.4th, supra at 730-731; see also Howard v. Thrifty Drug & Discount Stores*

(1995) 10 Cal.4th 424, 438; Tamburina v. Combined Ins. Co. of America (2007) 147 Cal.App.4th 323, 328.

Appellants contend that under the facts and circumstances of this case all of the necessary elements have been met. *At no time* have respondents introduced any arguments or evidence of prejudice in the record or elsewhere being allowed to proceed to trial because there is no prejudice to respondents.

A. THE RECORD SUPPORTS APPELLANT'S POSITION THAT IT WAS IMPRACTICABLE, IF NOT IMPOSSIBLE, TO BRING THE MATTER TO TRIAL DURING THE TIME OF 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 during the stay (complete or partial) from April 13, 2008 until November 6, 2008 because such actions would have violated the court order of the previously assigned judge who was no longer available and the language and spirit of the agreement reached by all the parties to stay. [II,AA 226- 431]. No new judge was assigned, and no trial setting conference was conducted to lift 1he stay until November 6, 2008. It was impossible and impracticable to bring this matter to trial during the original 120 days of the stay and during the 97 day additional period during the

time that no judge or courtroom was assigned to lift the court ordered stay. [II,AA 226-431].

The agreement for the stay subsequently became a trial court order *which took it out of the control of any of the parties* until the trial court lifted the stay. It was clearly impracticable for plaintiff or any other party to bring this matter to trial while the stay was in effect. Respondent fails to present any facts, means, law or evidence in the record to support the conclusory statement that it was "fundamentally within the control of Plaintiff" to lift the stay without a courtroom or judge to hear the matter when the July 16, 2008 trial setting conference was continued by the Court until a new judge was assigned to replace Judge Lee, which did not occur until November 6, 2008. [II,AA236-243, 302-306.] Respondents' claim that it was "fundamentally" within Mrs. Gaines' control to lift the stay is not supported by the record.

Further, as previously discussed, it would have been an unreasonable waste of resources to conduct this litigation without including the party claiming the largest financial interest in the property. That party was initially Aurora, the same party that initiated discussions regarding the stay. The stay was intended to allow Aurora, and the other parties, an opportunity to assess their various positions and attempt to resolve the litigation without incurring the time, expense, and effort of litigation involving up to 10 defendants.

B. THE RECORD REFLECTS THAT APPELLANTS DEMONSTRATED *REASONABLE* DILIGENCE BEFORE, DURING, AND AFTER THE STAY

Determining whether the CCP 583.340 (c) exception applies requires a *fact-sensitive inquiry* and depends "*on the obstacles faced by the plaintiff in prosecuting the action and the plaintiff's exercise of reasonable diligence in overcoming those obstacles.*" *Bruns (2011) 51 Cal.4th, supra at 731.* Respondents' AMB implicitly takes the hindsight position of perfect diligence, which is not the standard. Respondents also argue with willful blindness towards the context and circumstances of the instant case including, but not limited to, the various obstacles and misrepresentations that Mrs. Gaines with her limited means had to overcome throughout the period of the litigation of this matter.

It is difficult to understand the logic behind Respondents' circular position of on one hand arguing that Mrs. Gaines was not reasonably diligent [AMB, pg. 33-34], yet on the other hand claiming that Mrs. Gaines' diligence in preparing and declaring readiness for trial in August 2009 a year after the stay was lifted in November 2008 somehow establishes that it was not impracticable to bring the matter to trial during the time of the stay and/or the time that Lehman Brothers, an indispensable party, was not attached to the lawsuit due to Aurora's mistake and misrepresentations. [AMB. Pg. 33].

Impracticability to the Gaineses was far different than it was to Countrywide, Aurora, Fidelity, or Lehman Brothers. For this reason, Appellant requests of this Court to look at the record with an unbiased eye, reasonably consider all of the circumstances, and will find that appellants have been reasonably diligent not only during the stay, but during the prosecution of the matter.

C. THE RECORD REFLECTS THAT THE STAY, COMPLETE OR PARTIAL, ESTABISHED A CAUSAL CONNECTION TO MRS. GAINES' INABILITY TO BRING THE MATTER TO TRIAL WITHIN FIVE YEARS

Regarding a "causal connection," the Appellate Court thoroughly examined the scope of the issue of causation as it pertained to impracticality and explained that, the "causal connection" required may be established through two separate methods: 1) A "but for" analysis generally reserved for instances of the impracticality which occur immediately prior to trial; or 2) If "an unusually lengthy" circumstance of impracticality deprives the plaintiff of a "substantial portion" of the five-year period for prosecuting the lawsuit even if there is ample time after the period of impracticability in which to go to trial. *Tamburina, supra* at 335; *Sierra Nevada Memorial–Miners Hospital, Inc. v. Superior Court (1990) 217 Cal.App.3d 464,473*; *New West Fed. Savings & Loan Assn. v. Superior Court (1990) 223 Cal.App.3d 1145, 1155*; *Sanchez v. City of Los Angeles (2003) 109 Cal.App.4th 1262, 1271–1273.*

In *Tamburina*, the parties stipulated in July 2002 that the plaintiff's poor health precluded the set trial date of August 12, 2002. Id. at 329. The parties stipulated repeatedly thereafter over a period that continued to June 2003 to continue several trial setting conferences due to plaintiff's health problems. Id. Then in June 2003 plaintiff's trial counsel became ill, which prompted another stipulation that continued the trial setting conference to September 2003. Id. In the summer of 2004, plaintiff requested a trial setting conference date, which the trial court in December 2004 slated for August 15, 2005. According to plaintiff's opening brief, the "discrepancy [between the stipulated July 1, 2005, trial date extension and the August 15, 2005, trial setting conference date went unnoticed by counsel." Id. at 327-28.

The defendant moved to dismiss for failure to bring action to trial within the five-year statutory period, and the trial court entered judgment of dismissal. Id. at 323. In *Tamburina*, the Appellate Court held that *the parties' willing stipulations* to continue trial due to plaintiff's and his counsel's illnesses were sufficient to demonstrate 424-day total period of impracticability as required to support tolling exception under CCP 583.340 (c). Id. 328-333. Further, the Appellate Court held that the trial court improperly utilized. only the "but for" principle of a causal connection, and that plaintiff demonstrated the requisite "causal connection" between those illnesses and his failure to satisfy five-year requirement by applying the

principle that an unusually lengthy period of impracticability that deprives the plaintiff and/or his counsel of a substantial portion of the five-year period for moving the case to trial should be excluded. Id. at 333-336.

Similarly, Mrs. Gaines and Respondents entered into agreements, the spirit and meaning of which are discussed herein to stay the litigation of the action for at least 120 days and an unusually lengthy circumstance of impracticability led to the stay lasting 217 days wherein Mrs. Gaines could not prosecute the action until the court lifted the stay. If the trial court would have considered and excluded *any* portion of the stay (120 days of the Court Order, 217 days of the actual stay, or 97 days after the 120 wherein no Court was available to lift the stay) Mrs. Gaines action would have been within the five-year statute by a minimum 15 days, medium of 38 days, and/or maximum of 135 days.

Appellant contends that the stay, whether considered complete or partial, satisfies both the "but for" and "substantial portion" analysis re: "causal connection" as established by evidence and arguments set forth in Appellant's OMB and herein regarding the spirit and understanding of the agreement, the facts and circumstances of the instant case, and was recognized in Justice J. Rubin's dissenting opinion. *Gaines (2013) 222 Cal.App.4th supra* at 57 (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.).

D. THE TRIAL COURT AND APPELLANT AGREED THAT IT WAS IMPRACTICABLE TO BIFURCATE THE TRIAL OF A REAL ESTATE MATTER WITHOUT THE TITLE HOLDER OF THE PROPERTY PRESENT IN THE ACTION AND APPELLANT'S DECISION TO NOT FILE A MOTION TO BIFURCATE DOES NOT REFLECT A LACK OF REASONABLE DILIGENCE

Respondent contends that Appellant demonstrated a lack of diligence because Appellant did not "attempt to bifurcate" the trial of the matter. However, Respondents' brief fails to acknowledge the impracticality and undue expense of trying the matter twice due to a titleholder's bankruptcy as well as the plain and straightforward language of the court *set forth in the record of two status conferences on August 20, 2010 and November 18, 2010* wherein the court explicitly indicated that it would not bifurcate the action. [II,AA 384-384, 391-392].

August 20, 2010 Status Conference Dept. 19 Hon. Rex Heeseman

Mr. Wyatt: *your Honor, I would propose that we put this over for a couple months, give us time to make a motion to bifurcate as to Lehman Brothers, Proceed against the other defendants.*
The Court: *I'll do that, but don't hold your breath on that. Look I feel like I'm a juggler up here, you know?*

Mr. Wyatt: *Right*
The Court: *I've got a whole bunch of trials there, and you heard what I did Monday.*
Mr. Wyatt: *Right.*
The Court: *Start a one on Tuesday and sent the other one out. I mean... so the point of it is, I'm not going to look with a great deal of favor on bifurcating things.*
Mr. Wyatt: *Okay.*
The Court: *I'm not saying I'm going to deny your motion, I'm just sending up the yellow flag.* [II,AA384-385].

Further, in a status conference on November 18, 2010, counsel for Aurora, Mr. Steve Garcia, admitted that trying the matter without Lehman Brothers as the title holder would entail two trials and the trial court demonstrated an even stronger position against bifurcation.

November 18, 2010 Status Conference Dept. 19 Hon. Rex Heeseman

Mr. Garcia: *Aurora loan services is simply the servicing agent and cannot you know it doesn't hold any interest in the deed of trust itself. That interest is held by Lehman Brothers. So to the extent that Mr. Wyatt wants to go forward and have the trial and obtain a judgment that purports to affect the deed of trust, that won't happen at a trial in this case. So he effectively what he's looking at here, absent a relief from stay application from the court in New York, is having to try this case twice.*
The Court: *"Well, we're not going to do that."*

In further response to Mr. Garcia's claims that a declaration from Aurora substantiate that Lehman Brothers was the titleholder (which appellant's counsel reasonably determined did not constitute proof of interest in lieu of an erroneous verified answer asserting an

interest in the subject property), the trial court explicitly stated:

The Court: *"Well, we're not going to try this case twice. Okay? There's no doubt about that."* [II,AA 392].

Petitioner was not in a position to spend substantial sums of money attempting to obtain relief from defendant Lehman's bankruptcy only to find out that Aurora was, again, mistaken and/or wrong about who was the actual title holder to the subject property. Petitioner reasonably required documented proof that Lehman was the holder of the title to the property before taking any steps to obtain relief from the bankruptcy stay.

In light of the option of bifurcation being strongly and reasonably discouraged by the trial court, appellants' decision to not file a motion for bifurcation does not and should not be held to reflect a lack of reasonable diligence as opposed to appellant's counsel merely seeing the "writing on the wall" with respect to the court's position on the issue and not frivolously wasting each parties' and the court's time and resources to hear such a motion. For these reasons, respondents' contentions set forth in the AMB regarding a motion to bifurcate clearly lack merit when reviewed in conjunction with the record of the circumstances in this case

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E. PETITIONER WAS REASONABLE AND DILIGENT TO REJECT AURORA'S REPRESENTATIONS THAT LEHMAN BROTHERS HAD TITLE TO THE SUBJECT PROPERTY ABSENT DOCUMENTED PROOF OF OWNERSHIP

Despite not necessarily being at issue, Respondents like to characterize the period of 16 months from August 2009 until December 2010 as a period during which petitioner was not diligent in prosecuting this action. To recap, when Appellant announced ready for trial in August 2009, Countrywide decided to settle and required time to make a good-faith settlement of the matter. At that point, defendant Aurora, for the first time, indicated that Lehman Brothers held title to the subject property despite a verified answer from Aurora stating an interest. Lehman Brothers was in bankruptcy at the time.

In a status conference on August 20, 2010, the record reflects that Mr. Steven R. Garcia, counsel for defendant Aurora, represented that Aurora would try to get voluntary relief from stay pass-through.

August 20, 2010 Status Conference Dept. 19 Hon. Rex Heeseman

The Court: So where are we with the bankruptcy issue and all that?

Mr. Garcia: Lehman Brothers continues to be in bankruptcy in the Southern District of New York. *I have been working trying to, as we represented we would, trying to get a voluntary relief from any stay pass-through.* There are issues behind the scenes happening with Lehman Brothers that make it so that they're not willing to do that."

Respondents' AMB contends that the trial date was continued several times *because Appellant* failed to bring a motion for relief from stay in the

Lehman bankruptcy matter. However, such was not the case and clearly is an attempt to, again, "pass the buck" to the actual victim of this matter. **The trial date was continued several times during the Lehman "bankruptcy issue" because defendant Aurora failed to provide sufficient proof of Lehman's interest and expected plaintiffs to accept Aurora's statement as accurate based on a proposed declaration although Aurora had previously mistakenly claimed an interest in the subject property in a verified answer.** Considering that Lehman then became an indispensable party to the litigation and the court expressed reasonable reservations regarding bifurcation of the matter, it was therefore impossible/impracticable to move forward with trial without sufficient proof of ownership from Lehman Brothers.

It would have been unreasonable and foolish for petitioner to invest time and money in obtaining relief from Lehman's bankruptcy stay if Lehman did not actually hold an interest in the subject property. It would have been unreasonable and foolish for petitioner to accept the representations of Aurora regarding the holders of interest in the subject property without documented proof after Aurora had already proved to be an unreliable source for information regarding the identity of people and/or entities that held an interest in the subject property. After all, Aurora had previously submitted a verified answer dated January 16, 2009 in which it claimed an $865,000 interest in the subject property. (II AA 293-301, at ¶ 9). Later, Aurora submitted a verified

answer dated August 19, 2010 in which it denied holding the same $865,000 interest which it claimed it held. (II AA 344-353, at ¶ 9).

Aurora/Lehman finally produced a written instrument which confirmed Lehman's interest in the subject property, entitled "Assignment of Deed of Trust and Request for Special Notice" dated December 10, 2010. (II AA 355). No other document establishing Lehman's interest in the subject property has ever been produced in these proceedings. The undisputed record on appeal is that Lehman's interest in the subject property commenced on December 10, 2010.

There were no bases for petitioner to attempt to obtain relief from the automatic bankruptcy stay prior to December 10, 2010 when Aurora/Lehman finally produced a written instrument which established that Lehman held an interest in the subject property. Appellant was not in financial position to expend money attempting to obtain relief from the bankruptcy stay of defendant Lehman, only to find out that Aurora was again mistaken about the actual title holder's identity. Petitioner reasonably required documented proof from Aurora. Aurora offered to procure and provide that proof. Petitioner reasonably waited until the proof was provided before spending the time, money, and effort necessary to obtain relief from an automatic bankruptcy stay in New York.

V. THE RECORD OF THE PROCEEDINGS REQUESTED FOR JUDICIAL NOTICE IS RELEVANT TO SHOW THE PROTRACTED NATURE OF THE LITIGATION

Respondents contend that the request for judicial notice is "irrelevant." However, respondents are adamant that appellant was not diligent. The Los Angeles Superior Court record is relevant because Justice Rubin explicitly referenced the record in his dissent in the Appellate Court opinion as an indication of the litigation activity and judicial assignments which occurred while this action was pending.

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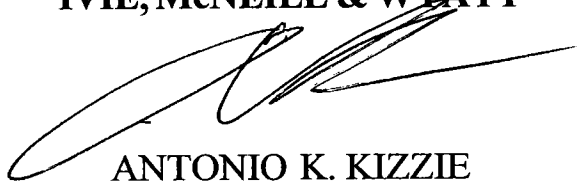
VI CONCLUSION

Based upon the foregoing, Mrs. Gaines, contends that this Court should uphold the spirit and history of both the legislative and decisional law in California and determine on that Fannie Gaines is entitled to proceed to trial on the merits against all of the defendants in this matter. The decision of the trial court dismissing all of the defendants should be reversed and this case should be remanded for trail against all of the defendants including respondents fidelity and Rybicki.

Respectfully submitted,

IVIE, McNEILL & WYATT



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Attorneys for Plaintiff and Appellant
FANNIE MARIE GAINES

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

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

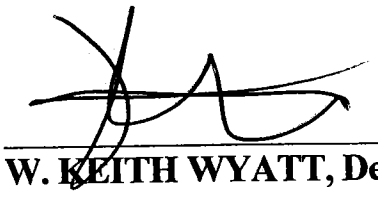
I am a member in the law firm of Ivie, McNeill & Wyatt, which represents plaintiff and appellant, Fannie Marie Gaines, in this case.

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

This opening brief was produced with a computer. It is proportionately spaced in 14 point Times Roman typeface. The brief is 8,166 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 July 8, 2014, at Los Angeles, California.



W. KEITH WYATT, Declarant

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

Case Name: Fannie Marie Gaines vs. Joshua Tornberg, et. al.

Case No.: Second Civil B244961

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 July 8, 2014, I served on interested parties in said action the within APPELLANT'S REPLY BRIEF 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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I declare, under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed on July 8, 2014 at Los Angeles, California.

M. CHRISTINA MUNOZ