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IN THE SUPREME COURT OF CALIFORNIA

DANA BRUNS,
Plaintiff and Appellant,

v.

E-COMMERCE EXCHANGE, INC., et al.,
Defendants and Respondents.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FIVE
CASE NO. B201952

REPLY BRIEF ON THE MERITS

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REPLY BRIEF ON THE MERITS

INTRODUCTION

In its opening brief on the merits, E-Commerce Exchange, Inc. (ECX) demonstrated that a partial stay employed as a tool for the efficient judicial management of complex and coordinated actions is not a stay of prosecution of the action and therefore does not automatically toll the requirement in Code of Civil Procedure section 583.310 that actions be brought to trial within five years. In her answer brief on the merits, plaintiff argues any partial stay satisfies the statute's tolling requirements. Plaintiff's arguments are without merit. She ignores both the statute's plain language limiting the tolling exception to stays of prosecution *of the action*, not stays of just one aspect of the action, and the legislative history showing the exception applies only to stays *of the proceeding*, not

stays of just one aspect of the proceeding. Plaintiff's proposed rule would leave the trial courts without guidance as to which partial stays might count as stays of prosecution of the action and which might not. And because plaintiff contends the exception applies regardless of her lack of diligence in prosecuting the action, her proposed rule would defeat the Legislature's goal of promoting the prompt trial of claims. Accordingly, this court should reject plaintiff's proposed rule and reverse the judgment of the Court of Appeal.

ECX also showed that the trial court properly granted the motion to dismiss because: (1) the trial court's active judicial management did not stay the coordinated actions; (2) plaintiff was not reasonably diligent in proceeding to trial; and (3) it was not impossible, impracticable, or futile for plaintiff to proceed to trial within five years. In her answer brief, plaintiff selects isolated facts taken out of context to argue that the trial court's judicial management of the action somehow precluded her from proceeding to trial. But when the entire record is reviewed for substantial evidence, as it must be on appeal, it amply supports the trial court's findings. The judicial management of the action promoted its speedy prosecution; it did not prevent plaintiff from timely trying her claims. For these reasons, the trial court's ruling was a reasonable exercise of its discretion and the decision of the Court of Appeal should be reversed.

LEGAL DISCUSSION

I. THE JUDICIAL MANAGEMENT HERE DID NOT STAY PROSECUTION AND DID NOT TOLL THE MANDATORY DISMISSAL STATUTE.

A. A partial stay that facilitates prosecution of an action is not a stay of prosecution and does not toll the dismissal statute.

As shown in the opening brief on the merits, the five-year period is tolled while "[p]rosecution . . . of the action was stayed or enjoined," not while prosecution of just *part* of the action was stayed or enjoined. (Code Civ. Proc., § 583.340, subd. (b) (section 583.340); OBOM 26-31.) Therefore, plaintiff is incorrect in her contention that partial stays imposed by the trial court for the purpose of complex case management toll the running of the mandatory dismissal statute.

In support of her contrary interpretation, plaintiff cites *Melancon v. Superior Court* (1954) 42 Cal.2d 698, 707-708, which defined the term "prosecution" as being "'sufficiently comprehensive to include every step in an action from its commencement to its final determination.'" Plaintiff characterizes *Melancon* as holding that "prosecution" refers "to individual steps and activities taken during the pendency of a legal action." (ABOM 15.) But in doing so plaintiff confuses the parts with the whole. A stay of just one aspect of an action—such as discovery—is not a stay of prosecution of the

entire action because it is not comprehensive; it does not prevent the parties from prosecuting the action by other means. As a result, such a partial stay does not toll the statute's five-year period.

We pointed out in the opening brief that when the Legislature amended the mandatory dismissal statute to include the exception for a stay of prosecution of the action, both the Senate Committee on Judiciary Analysis and the Senate Republican Caucus Analysis stated that the exception applies only "if the *proceeding* were stayed . . . ." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1366 (1983-1984 Reg. Sess.) as amended Feb. 14, 1984, p. 4; 1 AA 45, emphasis added; Sen. Republican Caucus, Analysis of Sen. Bill No. 1366 (1983-1984 Reg. Sess.) p. 2; 1 AA 48, emphasis added; see OBOM 28.) This legislative history confirms that the five-year period is automatically tolled only for a stay of the whole *proceeding*, not merely for a stay of one of the myriad aspects of litigation that together constitute the proceeding.

Plaintiff's answer brief characterizes our argument on this point as "approach[ing] attempted fraud upon this Court." (ABOM 36.) Yet plaintiff concedes that "[t]he two cited excerpts of legislative history . . . provide additional confirmation that the terms, 'prosecution,' [and] 'proceeding' . . . were used *interchangeably* by the legislature." (ABOM 38, emphasis added.) Because the Legislature used the terms "prosecution" and "proceeding" interchangeably, it is clear that a stay of prosecution requires a stay of the proceeding, not just a partial stay of one step in the proceeding, as plaintiff has argued. By acknowledging that

prosecution and proceeding are equivalent terms, plaintiff has thus conceded the merits of our point.

The Law Revision Commission has also explained that this same statutory amendment "codifie[d] existing case law." (Cal. Law Revision Com. com., 16A West's Ann. Code Civ. Proc. (2009 supp.) foll. § 583.340, p. 153.) As shown in the opening brief, the Commission gave a single example of the case law being codified: *Marcus v. Superior Court* (1977) 75 Cal.App.3d 204. (Cal. Law Revision Com. com., 16A West's Ann. Code Civ. Proc. (2009 supp.) foll. § 583.340, p. 153; see OBOM 29.) *Marcus* is informative because it involved no partial stay, but a "motion to stay proceedings." (*Marcus*, at p. 207.) Plaintiff nonetheless speculates that the Commission, without having said so, might have tacitly considered other decisions involving partial stays. (ABOM 46.) The difficulty for plaintiff is that there were no such decisions. Plaintiff has cited, and we have found, no decision holding a limited stay of just part of an action automatically tolls the five-year period (other than the Court of Appeal's decision below).[1] Given that the amendment expressly codified existing caselaw, the absence of any such caselaw applying this exception to partial stays is dispositive.

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[1] Plaintiff characterizes *Bank of America v. Superior Court* (1988) 200 Cal.App.3d 1000, as holding that "a stay of a particular type/category of discovery—depositions—constitutes a stay of proceedings." (ABOM 18, fn. 9.) Yet *Bank of America* considered the impossibility exception to the mandatory dismissal statute, not the stay of prosecution exception. Moreover, the court held that the impossibility exception did *not* apply. (*Bank of America*, at pp. 1013-1016.)

Plaintiff argues the approach of the Court of Appeal's majority would promote certainty. (ABOM 41, fn. 23.) But she has it backwards; the majority's approach would leave *unanswered* the critical question of which partial stays might count as stays of prosecution tolling the five-year period. (See typed opn., 11, fn. 6.) Indeed, the uncertainty of the majority's approach is underscored by its application to these facts. The Court of Appeal majority held a stay of prosecution of the action existed during a nearly two-year period even though, during that period, the trial court repeatedly granted motions and ordered the parties to respond to discovery. (Typed opn., 15-16; see OBOM 39.) Were the majority's approach to become law, trial courts would be left without any guidance about when prosecution ends and a stay of prosecution begins.[2]

Under a separate statutory exception, the five-year period is tolled when it is impossible, impracticable, or futile for the plaintiff to proceed to trial. (Code Civ. Proc., § 583.340, subd. (c).) That exception, however, requires the plaintiff to prove reasonable diligence. (*Moran v. Superior Court* (1983) 35 Cal.3d 229, 238 (*Moran*); cf. *Ocean Services Corp. v. Ventura Port Dist.* (1993) 15 Cal.App.4th 1762, 1775 [no similar requirement exists for the stay of prosecution exception].) As shown in the opening brief, expanding the stay of prosecution exception to encompass partial

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[2] Plaintiff's answer brief highlights this uncertainty. It inconsistently characterizes the majority opinion as holding that "[a]ll stays of prosecution—partial and complete—are excluded from the five-year time computation" (ABOM 34-35) and that the five-year computation excludes only "stays of the elements of pretrial proceedings" (ABOM 41).

stays would vitiate this reasonable diligence requirement because it would permit plaintiffs to seek tolling for a partial stay without showing any diligence, even though with reasonable diligence a plaintiff during a partial stay might proceed to trial. Plaintiff's argument would thus undermine the Legislature's primary purpose of promoting the prompt adjudication of claims. (OBOM 27-28; see *Andersen v. Workers' Comp. Appeals Bd.* (2007) 149 Cal.App.4th 1369, 1375.) The answer brief does not respond to this point. Its silence is telling.

Plaintiff also contends that "[d]efendants extol dismissal over trial." (ABOM 4.) Wrong. Dismissal is the tool that the Legislature adopted to enforce "the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action . . . ." (Code Civ. Proc., § 583.130.) Defendants do not extol dismissal, they seek to vindicate their right to have the claims against them dismissed because those claims were not tried within five years.

In summary, a partial stay does not automatically toll the five-year mandatory dismissal statute. Plaintiff's contorted construction conflicts with the statute's plain language, ignores its legislative history, would create uncertainty, and would undermine the Legislature's goal of promoting the prompt trial of claims.

B. California Rules of Court, rule 3.515 does not assist plaintiff.

In support of her argument that a partial stay tolls the mandatory dismissal statute, plaintiff argues that the statute must be harmonized with California Rules of Court, rule 3.515 (rule 3.515). (ABOM 22-23, 35.) That rule governs stay orders upon the filing of a petition for coordination. As we explain, there is nothing to harmonize because the rule and the statute are consistent. And even if they were inconsistent, the mandatory dismissal statute would control.

The mandatory dismissal statute and rule 3.515 do not conflict. They both provide for tolling upon a stay of the proceeding, not upon a stay of just one part of the proceeding. Thus, rule 3.515 allows a party to move for an order "*staying the proceedings* in any action being considered for . . . coordination . . . ." (Cal. Rules of Court, rule 3.515(a), emphasis added.) Such an order "suspends all proceedings . . . [unless] limited by its terms to *specified proceedings, orders, motions, or other phases of the action* . . . ." (Cal. Rules of Court, rule 3.515(h), emphasis added.) Finally, "[t]he time during which any *stay of proceedings* is in effect . . . must not be included in determining whether the action stayed should be dismissed for lack of prosecution under [the mandatory dismissal statute]." (Cal. Rules of Court, rule 3.515(j), emphasis added.)

Rule 3.515(j) thus distinguishes between a limited stay of "specified proceedings, orders, motions, or other phases of the action" and a comprehensive "stay of proceedings." By its terms,

only the latter is excluded from the computation of time under the dismissal statute. (Cal. Rules of Court, rule 3.515(j).) A limited stay of certain "specified proceedings," such as discovery, does not operate to toll the five-year period.

Plaintiff cites commentary from a "Staff Draft" Judicial Council report characterizing rule 3.515(j) as tolling the mandatory dismissal statute for "any period during which *any stay* is in effect . . . ." (Judicial Council of Cal. Superior Court Com., Report and Recommendation Concerning Rules for Coordination of Civil Actions Having Common Questions of Fact or Law (Oct. 23, 1973; Staff Draft) p. 7, emphasis added; ARA 11; see ABOM 21.) The draft commentary is irrelevant because the rule's express language unambiguously applies not to any stay, but only to a "stay of proceedings." (See *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 902 ["If the rule's language is clear and unambiguous, it governs"].) Moreover, the same paragraph that plaintiff cites conflicts with her arguments by also characterizing rule 3.515(j) as applying not to any stay, as plaintiff contends, but only to a "stay of proceedings." (ARA 11.) The inconsistent language of the draft report does not trump the clear language of the rule.

Further, if the mandatory dismissal statute and rule 3.515 were in conflict, the statute would control. Rules adopted by the Judicial Council cannot be inconsistent with statute. (Cal. Const., art. VI, § 6, subd. (d); see *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 532.) As discussed above, the statute requires a stay of prosecution of the action, not a partial stay. (See *ante*, pp. 3-7.)

Plaintiff also argues that when the Legislature enacted the mandatory dismissal statute it took into account former California Rules of Court, rule 1514(f) (as amended, now California Rules of Court, rule 3.515(j)). But plaintiff shows only that a California Law Revision Commission *consultant* prepared a study that cited to what is now rule 3.515(j). (ABOM 25-28.) The Commission "assume[d] no responsibility for any statement made in th[at] study" (1 AA 11, emphasis omitted) and there is no reason to believe the Legislature saw it. Moreover, as discussed above, rule 3.515(j) confirms that the mandatory dismissal statute is *not* tolled by a limited partial stay but only by a "stay of proceedings." Whether the Legislature saw the consultant's study is thus beside the point.

C. The Court of Appeal applied the abuse of discretion standard incorrectly by independently deciding a partial stay existed when substantial evidence supports the trial court's finding that there was no stay.

An appellate court reviews for an abuse of discretion a trial court's ruling on a motion to dismiss under the mandatory dismissal statute. (OBOM 31; see, e.g., *Messih v. Levine* (1991) 228 Cal.App.3d 454, 456.) Plaintiff does not dispute this point. (See ABOM 81-82.) Under this standard, the Court of Appeal should have affirmed the trial court's finding that there was no stay of prosecution.

The trial court determined the action was not stayed between the August 17, 2004 initial status conference in the coordinated actions and the January 25, 2007 hearing on defendants' motion to dismiss. (4 AA 960.) But the Court of Appeal made a contrary finding that the action was stayed in part for almost two years during this period. (Typed opn., 5, 13-14.)

As shown in the opening brief, the Court of Appeal erred by independently deciding the preliminary factual question of whether there was a stay, instead of reviewing the record for substantial evidence to support the trial court's finding. (OBOM 31-33.) Substantial litigation activity is evidence of the absence of a stay, and the litigation activity during the period of the purported stay was substantial. Presiding Justice Turner's dissenting opinion takes more than seven pages simply to chronicle that activity. (Typed opn., 1-8 (dis. opn. of Turner, J.).) Substantial evidence thus supports the trial court's finding that there was no stay.

Plaintiff argues a stay existed because the trial court's management of the coordinated proceedings purportedly "prevented Plaintiff from conducting all of the pretrial activities to which she was entitled." (ABOM 80.) But plaintiff has not shown that the trial court refused any request by plaintiff to take discovery or file motions. At most, plaintiff has shown a conflict in the evidence—one that the trial court in its discretion resolved against plaintiff. Accordingly, under the abuse of discretion standard, the Court of Appeal should have affirmed the trial court's finding that there was no stay.

D. Partial stays that facilitate the management of complex and coordinated actions are not stays of prosecution and do not automatically toll the mandatory dismissal statute.

As demonstrated in the opening brief, the Court of Appeal further erred by holding that judicial management of complex and coordinated matters constitutes a stay of prosecution tolling the five-year dismissal statute.

Plaintiff does not dispute that a complex matter "requires exceptional judicial management" and that the goals of judicial management include expediting the case. (Cal. Rules of Court, rule 3.400(a); ABOM 48-49 & fn. 27; see OBOM 33.) Further, plaintiff does not dispute that discovery can be the greatest source of cost and delay in civil litigation, that good judicial management includes the staging of discovery, and that it is "*possible* to 'stage' discovery through the use of partial stays." (ABOM 54, original emphasis; see OBOM 35-36, 46-47.) For all of these reasons, partial stays during judicial management of complex actions, like those employed here, promote the prosecution of those actions and are not the sort of stays that automatically toll the five-year period.

Plaintiff nonetheless questions whether partial stays are *necessary* to stage discovery; she suggests that "trial courts are amply able to prioritize, time and direct discovery, *i.e* [*sic*], stage discovery, without use/imposition of stay orders." (ABOM 54.) But plaintiff does not explain how a trial court can compel the parties to conduct only one type of discovery without staying other types of

discovery. Indeed, absent some type of stay, a trial court's order staging discovery would be only a suggestion. And without the binding effect of an order, discovery in complex actions could become an unmanageable free-for-all.

Despite acknowledging that partial stays can help stage discovery (ABOM 54), plaintiff inconsistently argues that any such partial stay "impedes case development" (ABOM 55). Wrong. As the Judicial Council's Deskbook recognizes, a partial stay for the purpose of staging discovery does not impede case development but *promotes* it: "The court should consider staging of discovery to facilitate early resolution of legal issues." (Judicial Council of Cal., Deskbook on the Management of Complex Civil Litigation (2007) § 2.40, p. 2-27 (Deskbook).)

Plaintiff also acknowledges that the order scheduling the initial case management conference "should generally . . . [o]rder the *suspension* of all discovery and motion activity pending further order of the court." (Deskbook, *supra*, § 2.21 at pp. 2-18 to 2-19, emphasis added; see ABOM 51.) Plaintiff argues that this partial stay "is merely to preserve the status quo pending the initial case management conference, is intended to be brief, and is to be lifted at the close of the conference." (ABOM 51.) But the partial stay here was no different. The court briefly stayed discovery for 23 days in connection with the case management conference and lifted the stay after the conference. (1 RA 231; 2 RA 283.) Doing so allowed the court to identify the key issues and "to avoid unnecessary and burdensome discovery procedures in the course of preparing for trial

of those issues." (Cal. Rules of Court, rule 3.750(c).) This brief stay did not impede case development.

Moreover, in the rare circumstance when a partial stay makes it impossible for a reasonably diligent plaintiff to proceed to trial, the plaintiff can seek an order tolling the five-year statute under the statute's exception for impossibility, impracticability, and futility. The problem that plaintiff envisions of a partial stay that facilitates discovery but somehow impedes case development thus already has a solution in the statute. This court need not accept plaintiff's invitation to create an additional solution by enlarging the statutory stay of prosecution exception.

Plaintiff argues that defendants have "hyp[ed] the significance and role of partial stays of prosecution . . . ." (ABOM 51, fn. 32.) But the Judicial Council and the courts, rather than defendants, have recognized the importance of partial stays as judicial management tools. (OBOM 33-36.) What is more, plaintiff cites no authority criticizing the use of partial stays for this purpose.

Plaintiff also refutes an argument that defendants did not raise; she disputes that the Court of Appeal majority's approach would cause trial courts to "*forfeit* their ability to manage and control complex litigation." (ABOM 3, emphasis added.) That is beside the point. As ECX has shown, the majority's approach would *discourage* trial judges from active case management and thus undermine the Legislature's goal of promoting the prompt trial of claims. (See OBOM 36.)

Finally, plaintiff argues that the mandatory dismissal statute does not "exempt[] complex or coordinated civil lawsuits from the tolling provisions of section 583.340." (ABOM 4.) Plaintiff misses the point. The trial court did not find this action to be exempt from the mandatory dismissal statute's tolling exceptions. Instead, the trial court found that plaintiff did not bring her action to trial within five years and that the statute's tolling exceptions did not excuse that failure. (4 AA 964.) Accordingly, it is plaintiff, not ECX, who would re-write the statute.

E. Plaintiff has not met her burden of showing a stay of prosecution on the facts here.

1. The partial stay from May 24, 2000 to June 16, 2000 did not prevent plaintiff from prosecuting her action.

As shown in the opening brief, a 23-day discovery stay during the negotiation and preparation of the case management order was part of judicial management intended to promote the action's prosecution and did not stop plaintiff from pursuing her action. (OBOM 36-37.)

This temporary suspension of discovery from May 24 to June 16, 2000 advanced the prosecution of the case. Among other things, the case management order established a document depository, created procedures for the exchange of documents, and required all parties to respond to a set of interrogatories. (2 RA

281-286.) In addition, plaintiff during this period filed a joint evaluation conference statement (1 RA 262) and a second amended complaint (3 AA 725-737; 1 RA 241), and defendants filed a demurrer and motion to strike portions of that complaint (1 RA 264-278). These facts, which plaintiff does not dispute, demonstrate that prosecution of the action was not stayed.

Plaintiff argues that the discovery stay ended July 12, 2000, rather than June 16, 2000. (ABOM 60-61.) Both the trial court and the Court of Appeal, however, properly rejected her argument. (See 4 AA 953; typed opn., 12-13.) On June 16, 2000, the trial court entered an order expressly lifting the stay: "The stay on discovery is hereby lifted." (2 RA 283.) The stay of discovery ended on June 16, not July 12, 2000, as plaintiff contends.

Plaintiff denies the trial court stayed discovery as part of its case management; she argues the court did so because it had sustained a demurrer to one of plaintiff's claims. (ABOM 65, 93.) Plaintiff is wrong. The trial court ordered the parties to prepare a case management order and stayed discovery until the entry of that order. (1 RA 231 ["Discovery is ordered stayed until entry of CMO"].) The stay was therefore part of the court's case management.

Plaintiff also argues that the stay could not have been in furtherance of case management because "there was no case management order in this action until June 16, 2000 [citation], and, this action was [not] deemed 'complex' until July 12, 2000." (ABOM 65; see also ABOM 91-92.) But common sense dictates that judicial management of complex actions need not wait until *after* the case

management conference. The Deskbook advises that trial courts stay discovery and motion activity *before* that conference. (Deskbook, *supra*, § 2.21 at pp. 2-18 to 2-19; OBOM 35.) The trial court did so here.

Plaintiff argues that the trial court "improperly commingled" the exceptions to the five-year statute and supposedly ruled that a stay of prosecution exists only when it is impossible, impracticable, or futile to bring an action to trial. (ABOM 63.) The trial court made no such mistake. Instead, it quickly dispatched with the argument that a discovery stay is a stay of prosecution: "I think, frankly, in terms of statutory construction the focus on any stay is incorrect. It's any *stay of proceeding* . . . ." (3 RT Q-29, emphasis added.) The trial court then rejected plaintiff's alternative argument that the discovery stay made it impossible, impracticable, or futile to proceed to trial. (4 AA 953.)

2. The partial stay from December 3, 2003 to January 15, 2004 did not halt the prosecution of the action.

As shown in the opening brief, a discovery stay lasting from December 3, 2003 to January 15, 2004 was also part of judicial management intended to promote the action's prosecution and did not stop plaintiff from pursuing her action. (OBOM 37-38.)

Discovery was suspended upon the filing of a petition for coordination. (2 RA 353, 355-356, 359.) Plaintiff then filed her opposition to that petition (2 RA 347-354), defendants answered

plaintiff's fourth amended complaint (2 RA 368), plaintiff filed discovery motions (2 RA 370-394, 398-418), and plaintiff filed a review conference statement (2 RA 424). Plaintiff does not dispute these facts. (See ABOM 68-69.) This litigation activity rebuts plaintiff's argument that during this period there was any stay of prosecution.

3. The judicial management from August 17, 2004 to July 11, 2006 did not stop the prosecution of the action.

The opening brief demonstrates that the judicial management of the coordinated proceedings from August 17, 2004 to July 11, 2006 likewise did not stay prosecution of the action. (OBOM 38-39.)

During this period, the trial court repeatedly ordered that defendants respond to discovery (see, e.g., 2 AA 413-416; 1 RA 81-85, 88-108; 2 RA 533-534; 3 RA 577), the court repeatedly heard and granted plaintiff's discovery motions (1 RA 109-110; 4 RA 1075; 5 RA 1217-1219), and the court at plaintiff's request even extended the discovery cut-off to allow the taking of depositions (2 RT F-25 to F-27).

In her answer brief, plaintiff acknowledges that "during the stay period, there were hearings, conferences and litigation activity." (ABOM 78.) Plaintiff nonetheless trivializes this fact; she accuses defendants of "mak[ing] much ado" of the litigation activity. (*Ibid.*) But the point is not trivial; it is dispositive. There cannot be

a *stay of prosecution of the action*, as required for the tolling exception, while *significant prosecution of the action is ongoing.*

Plaintiff also argues that after January 3, 2005 the trial court's orders purportedly "'prevented plaintiff from fully conducting all of the pretrial activities to which she was entitled.'" (ABOM 79, quoting typed opn., 16.) But the record refutes her claim. Plaintiff has never shown that during this nearly two-year period the trial court refused *any* request that plaintiff made to take discovery or to bring motions.

The prosecution during this period is irrefutable evidence that there was no stay of prosecution, and thus there can be no tolling under the exception for a stay of prosecution of the action.

II. IT WAS NOT IMPOSSIBLE, IMPRACTICABLE, OR FUTILE FOR PLAINTIFF TO BRING HER ACTION TO TRIAL WITHIN FIVE YEARS.

A. The tolling exception for impossibility, impracticability, or futility requires proof of causation and reasonable diligence.

As shown in the opening brief, a plaintiff has the burden of proving it was impossible, impracticable, or futile to bring an action to trial within the statutorily mandated five-year period. (OBOM 40; see, e.g., *Perez v. Grajales* (2008) 169 Cal.App.4th 580, 590.) The trial court's finding on this factual issue is reviewed for an abuse of discretion. (OBOM 40-41; see, e.g., *Howard v. Thrifty Drug &*

Discount Stores (1995) 10 Cal.4th 424, 438 (*Howard*); *Perez*, at pp. 590-591.) The critical factor is the plaintiff's reasonable diligence. (OBOM 41; see, e.g., *Moran, supra*, 35 Cal.3d at p. 238.) The answer brief does not dispute any of these points.

As also shown in the opening brief, the plaintiff must prove a causal connection between the circumstances constituting the purported impossibility and the failure to bring the case to trial. (OBOM 42; see, e.g., *Tamburina v. Combined Ins. Co. of America* (2007) 147 Cal.App.4th 323, 333.) Plaintiff responds that this court should not ignore "delays in prosecution which occur early in litigation . . . ." (ABOM 94-95.) Plaintiff misses the point. She must show causation, regardless of when the period of alleged impossibility occurs. She is not excused from doing so merely because the period of alleged impossibility occurs early in the litigation.

B. Substantial evidence supports the trial court's finding that only plaintiff's lack of reasonable diligence prevented her from trying her case within five years.

1. Plaintiff acknowledged that she had "substantially completed" pretrial preparations in January 2004, more than three years before her action's dismissal.

The trial court found it "clear that [p]laintiff did not use 'due diligence to expedite [her] case to a final determination.'" (4 AA 961.) Ample evidence supports that finding.

In January 2004, three years before the January 2007 hearing on the motion to dismiss, plaintiff opposed a petition for coordination by representing to the trial court that she had substantially completed her pretrial activities. (2 AA 349.) Plaintiff was not reasonably diligent when she failed to request a trial at any point during the next three years although, by her own admission, her pretrial activities were substantially completed.

In her answer brief, plaintiff argues that her representation was "dependent upon certain assumptions" including that she would obtain additional discovery. (ABOM 105.) But plaintiff did not disclose those assumptions when opposing the petition for coordination. She instead opposed the petition on the ground her case had been "aggressively litigated, with extensive discovery and law and motion undertaken" and "[p]re-trial activities . . . largely completed." (2 AA 349.) The trial court did not abuse its discretion

by crediting plaintiff's contemporaneous representation to the court that her pretrial activities were substantially completed, rather than her after-the-fact representation that she had been denied critical discovery.

Plaintiff also complains that "defendants have gone to herculean lengths to avoid, delay and frustrate discovery." (ABOM 89, fn. 60.) Yet ECX complied with its discovery obligations. Among other things, ECX answered written discovery requests within two months of plaintiff filing this action. (Compare 1 AA 148-153 with 2 AA 296-304.) And although plaintiff makes much of her many discovery motions, not one was against ECX. (See, e.g., 1 RA 109-110, 230; 4 RA 1075; 5 RA 1217-1219.) ECX has not avoided, delayed, or frustrated discovery; it was entitled to dismissal of the action when plaintiff did not proceed to trial within five years.

2. Plaintiff inexplicably failed to take the necessary steps to move her action toward class certification and trial.

The trial court found "there were periods of time where [p]laintiff was clearly dragging her feet in this matter." (4 AA 961.) Ample evidence supports that finding.

Plaintiff was dilatory in not moving to certify a class when doing so was a prerequisite to trying her claims. (OBOM 43; see, e.g., *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1074.) Further, plaintiff was dilatory in not taking depositions despite the

trial court's orders requiring defendants to make witnesses available for deposition. (OBOM 44; see, e.g., 2 AA 413-415.)

Plaintiff argues that "[t]he staging of discovery for optimal utility is within counsel's discretion." (ABOM 116.) But that is no answer. Plaintiff seeks tolling of the mandatory dismissal statute on the ground she purportedly lacked the information needed to try her claims. Plaintiff cannot also argue that she was justified in failing to take any depositions to seek that information. To allow plaintiff to avoid the five-year dismissal statute based on the unilateral decisions of her counsel would effectively nullify the statute. Plaintiff was not reasonably diligent.

3. Plaintiff's lack of diligence increased as the end of the five-year period neared.

As the end of the five-year period approached, plaintiff seemed indifferent to the need to bring her case to trial. (OBOM 44-45.) Her indifference underscores the correctness of the trial court's ruling.

In June 2006, within months of the five-year deadline, plaintiff added seven new defendants. (3 AA 697-698; see 5 RA 1293-1295.) Plaintiff blames her delay in doing so on CSB's former counsel; she alleges that the former counsel concealed the identity of these additional defendants. (ABOM 117; 3 AA 589-590.) But CSB's former counsel informed plaintiff of the identity of at least two of these defendants as early as April 2000—six years before plaintiff named them. (Compare 3 AA 697-698 with 3 AA 800-801.)

Plaintiff was not reasonably diligent when she delayed naming some defendants until six years after learning of their existence.

Moreover, plaintiff did not request that the trial court either clarify the calculation of the five-year period or specially set the action for trial at any time before the period expired. Plaintiff's failure to do so was not the result of ignorance. Plaintiff acknowledges now that she was "well aware of her obligation to bring the action to trial within five years." (ABOM 117.) The trial court could reasonably find that plaintiff's knowing failure to raise the five-year statute showed not diligence, but a lack of it.

The trial court characterized the 23-day discovery stay that lasted from May 24 to June 16, 2000 as involving significant litigation activity. (4 AA 953.) Plaintiff argues that "[i]mplicit in the trial court's finding . . . is the determination that Plaintiff was diligent." (ABOM 88, fn. 57.) But the litigation activity during this brief period did not show plaintiff was reasonably diligent in proceeding to trial. A trial court need not wear blinders in assessing diligence. "What is impossible, impracticable or futile must be determined in light of *all the circumstances in the individual case* . . . ." (*Moran, supra*, 35 Cal.3d at p. 238, emphasis added.) The trial court properly considered not just the circumstances of this 23-day period, but all the circumstances of the case, in determining plaintiff's lack of diligence.

C. The partial stays from May to June 2000 and December 2003 to January 2004 and the voiding of some discovery requests at the beginning of the case did not make it impossible, impracticable, or futile to bring the case to trial within the statutory period.

In addition to finding that plaintiff did not exercise reasonable diligence in prosecuting her action, the trial court found that the partial stay from May to June 2000 in connection with the initial case management conference, the voiding of some earlier discovery requests also in connection with that conference, and the partial stay from December 2003 to January 2004 in connection with the petition for coordination, did not make it impossible, impracticable, or futile for plaintiff to proceed to trial. (See OBOM 46-47.) The trial court's findings were not an abuse of discretion.

Discovery was stayed from May 24 to June 16, 2000 in connection with the initial case management conference. (1 RA 230-231.)[3] The purpose of the conference was "to develop . . . a plan for the just, *speedy*, and economical determination of the litigation." (Deskbook, *supra*, § 1.04, p. 1-4, emphasis added.) The conference

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[3] Plaintiff argues that the trial court made these rulings in connection with a demurrer. (ABOM 65, 93.) As discussed above, however, her argument conflicts with the plain language of the trial court's order. (1 RA 231 ["Discovery is ordered stayed until entry of *CMO*" (emphasis added)]; see *ante*, p. 16.) Plaintiff also argues that the stay ended on July 12, rather than June 16, 2000. (ABOM 65.) But this argument also conflicts with the plain language of the trial court's order. (2 RA 283 [June 16, 2000 order: "The stay on discovery is hereby lifted."]; see *ante*, p. 16.)

did exactly that. It streamlined discovery by creating a document depository, establishing a method for exchanging documents, and requiring that all parties respond to interrogatories. (2 RA 280-286.) In connection with that conference, and consistent with the Deskbook's recommendation that the conference *precede* "any adversary activity . . . such as . . . discovery requests" (Deskbook, *supra*, § 1.04, p. 1-4) the court ordered that all prior discovery "if deemed necessary or advisable to the propounding party, would need to be re-served." (4 AA 837.) Because the purpose and effect of the conference was to develop a plan for the speedy determination of the litigation, the time spent in connection with the conference did not make it impossible, impracticable or futile for plaintiff to proceed to trial.

Plaintiff attacks as "sophistry" the suggestion in the opening brief that discovery was out of control before the case management conference. (ABOM 93; see OBOM 46.) But she does not dispute that at the time of that conference she had already noticed 10 discovery motions against defendants other than ECX. (OBOM 46; ABOM 93; 4 AA 821-822; 1 RA 230.) The trial court's attempted resolution of these disputes through the case management conference did not make it impossible, impracticable, or futile for plaintiff to try her claims.

Plaintiff also ignores the objective progress made in the litigation during this 23-day period. Plaintiff filed a joint evaluation conference statement (1 RA 262) and a second amended complaint (3 AA 725-737; 1 RA 241), and defendants filed a demurrer and a motion to strike portions of that complaint (1 RA 264-278). As

shown by this litigation activity, the brief stay of discovery did not make it impossible, impracticable, or futile to proceed to trial.

The trial court also stayed discovery from December 3, 2003 to January 15, 2004 in connection with the filing of a petition for coordination. (2 RA 353, 355-356, 359.) During this period, plaintiff filed her opposition to the petition for coordination (2 RA 347-354), defendants answered plaintiff's fourth amended complaint (2 RA 368), plaintiff filed discovery motions (2 RA 370-394, 398-418), and plaintiff filed a review conference statement (2 RA 424). The brief discovery stay that preceded the ruling on the petition for coordination did not make it impossible, impracticable, or futile to proceed to trial.

Plaintiff argues that the trial court incorrectly equated the impossibility, impracticability, and futility exception "with strict impossibility." (ABOM 87, 103; see also ABOM 105 ["literal impossibility"].) But those are plaintiff's words, not the trial court's. The trial court understood that the exception was for impossibility, impracticability, or futility, not "strict impossibility." (4 AA 952.) The trial court applied the correct standard; plaintiff could not meet it.

D. The assignment of the coordination trial judge did not make it impossible, impracticable, or futile to bring the case to trial.

It was not impossible, impracticable, or futile for plaintiff to proceed to trial between the May 6, 2004 assignment of the

coordination trial judge and the August 2, 2004 setting of an initial conference before that judge. (OBOM 48-50.)

The Court of Appeal held the five-year period was tolled for part of this time because plaintiff's counsel apparently telephoned the trial court to inquire about resetting discovery motions for hearing but "was told that the Court was awaiting transfer to it of the court files from the various lawsuits and that the Court couldn't do anything until it had the files." (4 AA 826; see typed opn., 21-22.)

As shown in the opening brief, this delay does not establish impossibility, impracticability, or futility because plaintiff failed to avail herself of procedures for expediting the litigation. Plaintiff could have, but did not, advance the litigation by requesting a preliminary conference with the coordination trial judge or by submitting a proposed agenda addressing outstanding issues. (See Former Cal. Rules of Court, rule 1541(a), amended and renumbered rule 3.541(a), eff. Jan. 1, 2007; OBOM 49-50.) Therefore, contrary to plaintiff's argument that the file transfer delay "paralyzed this lawsuit" and "was wholly outside Plaintiff's control" (ABOM 98), the effect of that delay is unquantifiable because plaintiff's counsel did not follow the specific procedures governing initial proceedings before coordination trial judges.

E. The entry of default against ECX and CSB did not make it impossible, impracticable, or futile to bring the case to trial.

As demonstrated in the opening brief, the Court of Appeal and the trial court both correctly held that the five-year period was not tolled when default was entered against ECX and CSB. (OBOM 50-53.) Plaintiff does not dispute this point.

F. The court's management of the complex and coordinated actions did not make it impossible, impracticable, or futile to bring the case to trial.

As the opening brief demonstrates, the partial stays that resulted from the trial court's active management of the coordinated proceedings from August 17, 2004 to July 11, 2006 do not establish impossibility, impracticability, or futility. (OBOM 53-54.) Plaintiff nonetheless argues that she is entitled to tolling because the trial court's order temporarily staying the case for 15 days in advance of the August 15, 2004 status conference supposedly remained in effect long after that conference and "prevented Plaintiff from performing pretrial activities such as pleading activity and propounding/conduct new discovery." (See ABOM 74.)

Plaintiff's argument contradicts the record. As even she acknowledges, the order in question did not prevent "hearings, conferences and litigation activity." (ABOM 78.) Moreover, plaintiff does not show that the trial court relied on this order to deny any

request that plaintiff made to take discovery or file motions. As a result, the order did not make it impossible, impracticable, or futile for plaintiff to try her action.

CONCLUSION

For the foregoing reasons and the reasons stated in the opening brief on the merits, the Court of Appeal's judgment that the trial court erred in granting defendants' motion to dismiss should be reversed.

January 21, 2010

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.520(c)(1).)

The text of this brief consists of 6,855 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

January 21, 2010

Robert H. Wright

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On January 21, 2010, I served true copies of the following document(s) described as **REPLY BRIEF ON THE MERITS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on January 21, 2010, at Encino, California.

Jill Gonzales

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