Appellate Reports

Gaines v. Fidelity National Title Insurance *makes avoiding dismissal under the 5-year rule more difficult and analyzes the rules about which periods during a lawsuit are excluded*

By Jeffrey I. Ehrlich

Gaines v. Fidelity National Title Ins. Co.

(2016) __ Cal.4th __ (Cal. Supreme)

Who needs to know about this case? Lawyers who litigate cases in California courts.

Why it's important: Analyzes the "5-year rule" and the corresponding rules about which periods during a lawsuit are excluded from the 5-year calculation; holds that a court order purporting to "stay" the lawsuit while the parties pursued mediation did not automatically toll the statute, and that the period while the "stay" was in effect did not qualify for exclusion as time when it was "impossible, impracticable, or futile" to bring the case to trial.

Lesson to be learned: A plaintiff must at all times be aware of the 5-year date, and bear responsibility for either obtaining an express agreement from the defense to toll the 5-year date, or to obtain a trial date within the 5-year period. A "stay" that does not hold in abeyance *all* activity in a lawsuit is not really a "stay" for the purposes of the 5-year statute.

Analysis: Facing foreclosure on their home, Mr. and Mrs. Gaines entered into an agreement with Tornberg to purchase the house, with an option to lease and repurchase it. Tornberg obtained loans on the property that were later transferred to various entities. In November 2006 the Gaineses sued Tornberg and others arising out of the transactions. The case had a tortured procedural history.

In April 2008, Gaines applied for an order to vacate a September 2008 trial date. The application stated that all parties had agreed to vacate the trial date, to stay the action for 120 days, and to participate in mediation. But the application also stated that the parties agreed that responses to pending discovery requests would not be stayed. Consistent with this agreement, the trial court's order: (1) "struck" the pending trial date; (2) "stayed the case for 120 days except that the parties were to respond to all previously served and outstanding written discovery; (3) set a post-mediation and trial-setting conference on July 16, 2008; and (4) directed "all parties ... to participate in good faith in a mediation of all claims in this case within the next 90 days." The ensuing mediation conducted on May 30, 2008, was not successful. At a November 6, 2008, status conference, the mediation stay was lifted and an August 29, 2009, trial date was set. The original stay was ordered to last 120 days, but was actually lifted after 217 days. The longer period was occasioned, in part, by judicial reassignments.

(All statutory citations are to the Code of Civil Procedure.) In May 2012, when the action had been pending for 5.5 years, defendant Fidelity Title moved to dismiss for failure to bring the case to trial within 5 years as required by section 583.310. The trial court granted the motion; the dismissal was affirmed on appeal, and the Supreme Court granted review and affirmed.

Section 1775.7 expressly addresses the effect of mediation on the running of the five-year period. That section provides that submission of an action to mediation under the title's provisions *shall not toll* the running of section 583.310's five-year period except when the action is or remains submitted to mediation more than four years and six months after the action is filed. That tolling did not apply here because the case was not submitted to mediation in the last six months of the five-year period.

Under section 583.340(b), a stay of the trial halts the running of the five-year period. By contrast, a continuance generally does not. An order's characterization of whether the court is issuing a "stay" or a "continuance" is not controlling; the issue is the substance of the order. The long-standing judicial understanding of the term stay in the context of the five-year statute is that it refers to those postponements that freeze a proceeding for an indefinite period, until the occurrence of an event that is usually extrinsic to the litigation and beyond the plaintiff's control.

By contrast, stipulated continuances that are not tied to any matter outside the parties' control more logically fall under section 583.330. That section provides that the parties may extend the five-year period during which an action must be brought to trial by written stipulation or oral agreement made in open court.

By its terms, the April 3, 2008, order was not a complete stay used to stop the prosecution of the action

altogether. It directed that some discovery continue, and that the parties participate in mediation. The tolling provided by Section 583.340(b) was therefore inapplicable.

Rather, the order striking the trial date at the parties' request was construed as a continuance of the trial of the action rather than a stay. The trial was not continued indefinitely. Instead, the date was struck pending two defined contingencies: a definite 90-day period for mediation to occur and a 120-day stay of the proceedings. Neither of the contingencies was extrinsic to the litigation. Both were agreed to by the parties and totally within their control. Neither necessitated a stay of the trial, which was over five months distant.

The Court stated that its construction of section 583.340(b) should encourage, rather than deter, agreements to partial stays and to continuances of the trial within the five-year period as the parties deem necessary. Plaintiffs who desire tolling for the relevant period can achieve it by obtaining defendants' written stipulation or express oral ageement in court. Conversely, defendants will have the predictability of knowing that, absent such agreement, a stipulated continuance of the trial date or a partial stay of the proceedings will not later be construed to automatically toll the statute.

A circumstance that does not qualify for automatic tolling under section 583.340(b) may nonetheless be excludable from the five-year period if the circumstance makes it "impossible, impracticable, or futile" to bring the action to trial. (§ 583.340(c).) Trial courts have discretion to decide the issue of impossibility, impracticability, or futility.

Prior cases have established that "every period of time during which the plaintiff does not have it within his power to bring the case to trial is not to be excluded in making the computation." Hence, time consumed by the delay caused by ordinary incidents of proceedings, like disposition of demurrer, amendment of pleadings, and the normal time of waiting for a place on the court's calendar are not within the contemplation of these exceptions.

Additionally, when the delay involves the time necessary for the parties to conduct ordinary incidents of proceedings leading up to the trial, the interference must deprive the plaintiff of a "substantial portion" of the five-year period for prosecuting the lawsuit in order to qualify as a circumstance of impracticability. This is because ordinary delays, even ones beyond the plaintiff's control, are already accounted for in the five-year period.

The Court held that, "On this record, the trial court was within its discretion to conclude that the time attributable to the partial stay did not qualify for tolling under section 583.340(c)." Even after the order was entered, Gaines largely retained control over the proceedings. The purpose of mediation is to resolve disputes "in a fair, timely, appropriate, and cost-effective manner" without derailing the litigation. (§ 1775, subd. (a).) Parties participate voluntarily and may withdraw at any time. Unless the parties have agreed to a binding award, any party who voluntarily enters mediation may revoke its consent and withdraw from the dispute resolution process. Upon the filing of a statement of nonagreement by the mediator, Gaines was entitled to request that the original trial date be reinstated, or that she receive priority for a new trial date. (§ 1775.9, subd. (b).) There is no reason to believe that the stay, entered at the parties' request, could not have been similarly vacated at their request.

Short(er) takes:

Litigation costs; Code Civ. Proc. § 1032; prevailing party; settlements: *Desaulles v. Community Hospital of the Monterey Peninsula* (2016) __ Cal.4th __ (Cal. Supreme).

Code of Civil Procedure section 1032, subdivision (a)(4) defines the "prevailing party" in litigation to include "the party with a net monetary recovery" and "a defendant in whose favor a dismissal is entered." A "prevailing party," so defined, "is entitled as a matter of right to recover costs in any action or proceeding." Is a plaintiff who voluntarily dismisses an action after entering into a monetary settlement a prevailing party under these provisions, and therefore entitled to an award of costs? The Supreme Court answered this question "yes" in this case. "When a defendant pays money to a plaintiff in order to settle a case, the plaintiff obtains a "net monetary recovery," and a dismissal pursuant to such a settlement is not a dismissal "in the defendant's favor." But this is simply the *default rule*; settling parties are free to make their own arrangements regarding costs. (*Hence, the* ***lesson*** *from this case is: the parties should specify how costs will be handled in their settlement agreement*.)

Code Civ. Proc. § 998; conditional offers; pre-offer expert costs; 2016 amendment to § 998: *Toste v. Calportland Construction* (2016) __ Cal.App.4th __ (2d Dist. Div. 6).

The jury in a wrongful-death action ruled in favor of the defendant. While the case was pending, the defendant made a section 998 demand for $201,000, which was conditioned on court approval of settlement as a "good-faith settlement." The plaintiff rejected the offer. Later, the defendant made a second 998 offer of $750,000, which had no conditions. The trial court granted the defendant's expert-witness costs under section 998. Reversed in part.

The initial 998 offer was conditional and therefore invalid. Section 998 offers cannot require conditions other than an execution of a dismissal and general release. The second offer was valid because it was not conditional. A 2015 amendment to section 998, effective January 1, 2016, changed the statute so that if the plaintiff rejects a defendant's valid offer and later fails to recover a more favorable judgment

or award, the court may, in its discretion, "require the plaintiff to pay a reasonable sum to cover *post-offer costs* of the services of expert witnesses . . . actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration." Before the amendment, the statute allowed defendants to recover all expert costs, but restricted plaintiffs to recovery of post-offer costs. Hence, the amendment changed the statute to treat both plaintiffs and defendants in the same way with respect to shifting expert costs. Because the trial court's award of expert costs included both pre and post-offer costs, it was vacated and the case remanded to allow the trial court to determine the amount recoverable expert costs incurred by the defense after the offer was made.

Negligence per se; requirement for proof of causation: *Toste v. Calportland Construction* (2016) __ Cal.App.4th __ (2d Dist. Div. 6) (same case as above).

The decedent was the project general contractor on a construction project. He was killed when the driver of a truck on the site backed up and hit the decedent. The truck driver had smoked marijuana two days before the accident and had marijuana metabolites in his system. But the evidence at trial did not reveal any evidence that he was impaired at the time he was operating the truck on the day of the accident, or at the time of the accident. The plaintiff relied in part on a negligence per se theory, based on the driver's violation of a federal regulation that prohibited truck drivers from using marijuana.

The jury found that the driver was negligent, but that his negligence was not a substantial factor in causing the death. On appeal, the plaintiffs argued that the jury was required to find causation as a matter of law based on the violation of the regulation. It argued that if the driver violated the federal safety regulation by using marijuana, it did not matter whether he drove safely. Rather, "the mere fact that he drove at all is what matters" and that causation exists as a matter of law.

The appellate court disagreed, explaining, "The jury impliedly found that Michaelson's use of marijuana was not a substantial factor in causing the traffic fatality because there was no drug impairment." The jury reasonably could have concluded that the fatality was caused by the decedent's inattentiveness and careless conduct, rather than the driver's marijuana use. When reasonable minds can differ as to the inferences to be drawn from the evidence, causation must be decided by the jury as an issue of fact. Citing Witkin, the court noted, "If the accident would have happened anyway, whether defendant was negligent or not, then his or her negligence was not a cause in fact, and of course cannot be the legal or responsible cause." This was the jury's implied finding. "That is to say, this accident would have happened whether or not defendant driver was under the influence of marijuana. Decedent was run over because he was just not paying attention to the hazards of the job site." Affirmed.


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