S215990

SUPREME COURT COPY

IN THE SUPREME COURT OF CALIFORNIA

MILTON HOWARD GAINES, Plaintiff and Appellant, v. FIDELITY NATIONAL TITLE INSURANCE COMPANY, et al., Defendants and Respondents.	CASE NO. S215990 2nd District Court of Appeal Case No. B244961 Los Angeles Superior Court Case No. BC361768

SUPREME COURT
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On Appeal from the Judgment of the
Court of Appeal, Second District, Division 8
Case No. B244961

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

REPLY OF RESPONDENTS LEHMAN BROTHERS HOLDINGS INC. AND AURORA LOAN SERVICES LLC TO APPELLANT'S LETTER BRIEF

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I.

INTRODUCTION

Respondents Lehman Brothers Holdings Inc. (Lehman) and Aurora Loan Services LLC (Aurora; collectively, Respondents) file this reply to appellant's supplemental brief ("Appellant's Supplemental Brief"). The Supplemental Brief and this response are part of the supplemental briefing requested by this Court in its order of July 29, 2015.

The issue addressed by the supplemental briefing—framed by this Court as

two questions in its order—is whether the trial court's order of April 3, 2008 ("the Trial Court's Order"), "continued" or "stayed" the trial then set for September 22, 2008, for the purposes of . If that order "continued" the trial, then pursuant to Code of Civil Procedure section 583.340(b), the delay of the trial caused by the continuance would not have extended the five year mandatory dismissal period established by Code of Civil Procedure section 583.340(b) (i.e., continuance periods are *not* excluded from the computation of the five year period under section 583.230(b)).[1] If that order stayed the trial, however, then pursuant to Code of Civil Procedure section 583.340(b), the delay of the trial caused by the stay would have extended the five year mandatory dismissal period established by Code of Civil Procedure section 583.340(b) (i.e., trial stay periods are expressly excluded from the calculation of the five year period under section 583.230(b)).

The trial court's order (2 AA 278-279) does not expressly purport to stay or continue the trial. Instead, it took the trial date off calendar and at the same time set a trial setting conference to set the new trial date. As such, the question is whether under the circumstances presented, the trial court's order should be treated as a continuance or a stay of the trial for the purpose of calculating the five year mandatory dismissal statute.

Based on several reported decisions, Respondents explained in their Supplemental Brief that the trial court's interpretation of the Code of Civil Procedure § 583.340(b) was

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[1] As respondents noted in their Respondent's Brief filed July 15, 2014, at page 16: Other cases have concluded that the five-year period is to allow for service of process, pleadings, discovery, court conferences, and like proceedings. (See, e.g., *Sierra Nevada Memorial-Miners Hospital, Inc. v. Superior Court* (1990) 217 Cal.App.3d 464, 472; *Continental Pacific Lines v. Superior Court* (1956) 142 Cal.App.2d 744, 750.) Stipulations to extend the time for performing those tasks do not, by themselves, extend the five year statutory period to bring the case to trial unless it appears that the parties so intended (*J. C. Penney Co. v. Superior Court* (1959) 52 Cal.2d 666, 670-671 ["Despite the addition of another step in the necessary proceedings leading to the trial, the case still must be 'brought to trial within five years after the plaintiff has filed his action. ...'"]), particularly when, as in this case, the extensions of time are agreed to and expire within the five year period. (*Larkin v. Superior Court* (1916) 171 Cal. 719, 722-723.)

proper; that the trial court's order was a "continuance," not a stay; that the trial court properly did not extend the five-year mandatory dismissal period based on the continuance; and that the trial court properly dismissed the underlying action. The legal distinction between a continuance and stay is: (1) that a continuance is simply part of the routine management of the case and trial date which delays the trial date either to a date certain or to a date certain on which the trial date will be set, and (2) a stay freezes the ability of the trial court and the parties to proceed and delays the trial date until the happening of an event, the date of which is not ascertainable when the order delaying the trial is made.

In his supplemental brief, appellant argues: (1) that it was the parties' and the court's intention to stay the trial; (2) that the decision in *Holland* supports the contention that the trial court's order was a stay, not a continuance; (3) that "there is nothing in the record to indicate" that the September 22, 2008 trial date was ever continued; (4) that there is no basis to find that the September 22, 2008 trial date was continued; (5) that no new trial date was ever set; and (6) that the parties took certain actions relying on the trial court's 120 day stay order. As Respondents will explain below, these contentions are wrong and based on a misreading of the law and a construction of the facts that the trial court rejected. As such, the decision of the Court of Appeal should be affirmed.

II.

THE PARTIES DID NOT INTEND THE VACATING OF THE TRIAL DATE TO BE A STAY UNDER SECTION 583.340(b)

The trial court clearly intended to delay the trial date, but at the time the order was entered, it made no finding with respect to whether the delay of the trial was a continuance or stay for the purpose of section 583.340(b). The record here reflects that the order came about as a result of an agreed upon and unopposed ex parte application

filed by plaintiff, who was at liberty to negotiate whatever terms and insert whatever language into her proposed order that she could convince the trial court and the parties to accept. Yet the order is silent as to its effect on the 5-year period to bring the case to trial. Since every intendment and presumption must be indulged to uphold the correctness of the trial court's order of dismissal as to matters where the record is silent (*Denham v. Superior* Court (1970) 2 Cal.3d 557, 564), we must presume that in ruling on the motion to dismiss, the trial court considered whether the trial court order (2 AA 278-279) was a stay under § 583.340(b) and decided it was not. For his part, appellant offers no evidence of the court's intent in issuing the order other than the order itself. Instead, appellant merely argues that the parties agreed to a "stay" without regard to the trial court's finding, based on the plain language and effect of the trial court order, that the so-called "stay" was partial, not complete, and did not fall within the terms of § 583.340(b).

As Respondents demonstrated in their Supplemental Letter Brief, since the order did not completely freeze the entire case, it was not a stay contemplated by § 583.340(b). (Respondents' Supplemental Letter Brief, at p. 6, citing *Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 724.) What is more, the parties in their stipulation expressed no agreement as to how the delay should be characterized for the purposes of § 583.340(b). While it is true that the title of the order the plaintiff prepared and the trial court signed included the words, "STAYING CASE FOR 120 DAYS," that language itself is no talisman for a complete stay as contemplated by § 583.340(b). Instead, the effect of the order controls, and the order here falls far short of freezing the entire action (*Bruns, supra*) until the occurrence of a defined event of unknown duration. (Cf., *Holland v. Dave Altman's RV Center* (1990) 222 Cal.App.3d 477, 482, discussed *infra.*) Appellant has provided no authority or evidence and is simply wrong to suggest otherwise. Appellant's suggestion that the facts of this case are analogous to *Holland* also fails. In *Holland*, a motion to quash service on a defendant who was a Swiss national was granted and was appealed. Not wanting to try the case twice, the plaintiff obtained a trial court

order first continuing the trial and later taking it off calendar while the appeal was pending. As this Court described the *Holland* facts in *Bruns*:

> *Holland* gave examples of time periods during which the case could not be brought to trial. They included the "absence of trial court jurisdiction to try [the case]" and "a court order barring the trial (by a stay or injunction)." (*Id.* at p. 482, 271 Cal.Rptr. 706.) *Holland* did not address whether the "prosecution" of the action was stayed within the meaning of section 583.340 when only a designated proceeding in a case, other than a trial, was stayed or suspended "until the happening of a defined contingency." (*People v. Santana, supra*, 182 Cal.App.3d at p. 190, 227 Cal.Rptr. 51.)

Bruns, supra, 51 Cal.4th at 724-725.

Factually, there was no "court order barring trial (by a stay or injunction)" in this case, nor was there the "absence of trial court jurisdiction to try" the case. Instead, there was merely a breather taken from pleadings and motions—but not discovery—while the parties engaged in mediation, an event which does not "stay" the action for purposes of § 583.340(b). (*De Santiago v. D and G Plumbing, Inc.* (2007) 155 Cal.App.4th 365, 376; see also, Code Civ. Proc., § 1775.7.) Appellant has failed to show that the order plaintiff presented to the trial court to vacate the trial date which set a new trial setting conference within the 120 partial stay period was a "stay" for the purposes of § 583.340(b), and with good reason; it simply was not.

III.

HOLLAND SUPPORTS A CONTINUANCE, NOT A STAY

The holding in *Holland, supra,* is the focus of much discussion on the issue of a continuance versus a stay. Suffice it to say that it was there held that the delay of the setting of the trial until the conclusion of a pending appeal was a stay of the trial under section 583.340(b), because the trial was ordered delayed until the happening of a future

event, the date of which was not known when the delay order was made. (222 Cal.App.3d at 482.) In this case, the trial court vacated the trial date at the request of the parties and reset a trial setting conference on a specific date within the period of the so-called stay, thus demonstrating that the court intended to remain in full control of the calendaring of the case and did not intend to let the case languish or to await the occurrence of some indefinite contingency. (Cf., *Ocean Services Corp. v. Ventura Port District* (1993) 15 Cal.App.4th 1762, 1773-1775 [Court of Appeal's issuance of a writ of supersedeas staying the action while the appeal of an order in a related action was pending was a "stay" under § 583.340(b), citing *Holland*]; and *Mitchell v. Frank R. Howard Memorial Hospital* (1992) 6 Cal.App.4th 1396, 1404 ["Appellant attempts to avoid the severe consequences of dismissal by relying on a number of cases where circumstances beyond a litigant's control intervened and induced the litigant to refrain from diligent prosecution"—citing *Holland*, among other cases—but the court determined that plaintiff's lack of diligence, as was the case here, was entirely of his own making.].) Appellant cites no other law directly bearing on nature of the order otherwise, and *Holland* does not support his argument. The trial court order was not a stay of the action under § 583.340(b).

IV.

THE FACTORS THAT DISTINGUISH A TRIAL CONTINUANCE FROM A TRIAL STAY SHOW THAT THE DISMISSAL WAS CORRECT

The final question this Court advised it wanted briefing on was the factors that distinguish a stay of trial and a continuance of trial for purposes of Code of Civil Procedure § 583.340(b). Appellant returns to *Holland* for this discussion and does not stray far. Unfortunately, appellant's discussion fails to illuminate the issue.

Looking at the history of the law on the issue, when the predecessor to Code Civ. Proc., § 583.310—former § 583—was adopted in 1905, the only exception it contained

was if the parties entered into a written stipulation extending the time. (*Larkin v. Superior Court* (1916) 171 Cal. 719, 721.)[2] In *Larkin*, the parties appeared for the date first set for trial and orally stipulated to a continuance. After two more orally stipulated continuances before the court, nothing appeared to have occurred until December 20, 1915, nearly six and one half years after the case was filed. Larkin applied to this Court for a writ of mandate to dismiss the case under § 583, and this Court agreed that the mere oral stipulations for a continuance of the trial did not constitute a basis to extend the operation of § 583 and certainly did not satisfy the statutory requirement of a written stipulation extending the time. (See also, *City of Los Angeles v. Superior Court* (1921) 185 Cal. 405 [Written stipulation to continue trial for one year which stated, "plaintiff shall not be held to have failed to prosecute said cause during the said year, and that no part of the said year shall be considered should any question arise in said cause concerning the prosecution thereof" did not extend the 5-year period more than the one year agreed to]; *Rio Vista Mining Co. v. Superior Court* (1921) 187 Cal. 1, 3.)

This Court first recognized an exception to the otherwise hard and fast 5-year rule in *Kinard v. Jordan* (1917) 175 Cal. 13, holding that the 5-year period did not include periods during which an appeal of an erroneous judgment was pending, saying:

> The aforesaid appeals taken therefrom suspended all power of the court below to proceed, and necessarily took the case out of the operation of section 583 while the appeals remained pending. The motion to dismiss was made within less than six months after the decision on the appeal of Huntington became final. With respect to the other defendants their appeal is still pending, and no proceedings could

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[2] As quoted in *Larkin*, and as originally adopted, § 583 measured the 5-year period from the time each defendant's answer was filed. This statute was amended in 1933 to its current measurement from the date the case was filed. (*Christin v. Superior Court* (1937) 9 Cal.2d 526, 528-529.)

be had looking toward the trial as to them until that appeal was disposed of. If nothing more appeared it is clear that the motion to dismiss was not well taken.

Kinard v. Jordan, supra, 175 Cal. at 15.

Six years later, in *Miller & Lux v. Superior Court* (1923) 192 Cal. 333, plaintiffs had filed a series of cases concerning the rights of various parties in land beginning in 1905. The parties stipulated to a series of waivers of the 5-year rule, and they also agreed that one of the cases, denominated the Turner case, would be tried before the others. That case was tried to judgment, appealed, reversed in part, and returned to the trial court for retrial of various issues. By then—viz., August 1919—the parties entered into their last written stipulation to extend the time to bring the cases to trial. More than a year later, defense counsel, who represented the defendants in all of the cases, moved to dismiss the cases for want of prosecution. The trial court denied the motion on the grounds that the request of the defendants to try the Turner case first and the setting of the other cases for trial on September 28, 1920, based on the defendants' motion, "constituted, in effect, a continuance at the defendants' request." (192 Cal. at 337.) Defendants filed an application to this Court for a writ of mandate directing the trial court to dismiss the actions. This Court there held that "written stipulations entered into within the 5-year period continuing the trials from time to time within the statutory period did not have the effect of extending the time beyond the 5-year period." (192 Cal. 337-338, citing *Larkin* and *Rio Vista Mining Co.*) Other cases have similarly concluded that a stipulation entered into within the statutory period extending the time to do an act or continuing the trial—whether to a date certain or indefinitely—does not extend the 5-year period unless the parties express an intention to waive the rule. (*Boyd v. Southern Pacific R. Co.* (1921) 185 Cal. 344 [oral stipulation to continue trial date indefinitely which was not reset until after 5-year period expired did not extend the period]; *Bank of America NT&SA v. Harrah* (1942) 54 Cal.App.2d 37 [defendant's motion to take trial off calendar did not

extend the 5-year period]; *J.C. Penney Co. v. Superior Court* (1959) 52 Cal.2d 666, 668-670 [written stipulation to continue the pretrial conference to permit the completion of discovery did not extend the 5-year period; "The filing of an amended complaint or the deciding of preliminary motions or demurrers may also be necessary prerequisites to the trial, and a stipulation postponing the time for doing either would necessarily extend the time for trial. It has never been held, however, that such a stipulation extends the time for trial beyond the five-year period, absent a showing that the parties so intended."].)

By contrast, numerous cases hold that actions that stay the trial court's ability to act in a case do extend the 5-year period. The early cases dealt with situations where the actions of the trial court were stayed by suspension of the court's jurisdiction since the finer lines between the two had not been drawn (e.g., *Kinard v. Jordan, supra* [stating that the trial court was without power to act while an appeal was pending but not distinguishing between a stay and want of jurisdiction]; *In re Morrison's Estate* (1932) 125 Cal.App. 504 [time between the date on which parties contesting a will had been fraudulently induced to dismiss their contest and court entered order vacating the dismissals not included within the 5-year period due to court's jurisdiction being suspended].) Later cases draw the line more distinctly, starting with *Christin v. Superior Court, supra,* a seminal case holding that the time during which it was impossible or impracticable to bring case to trial due to pending appeal and trial court's erroneous order transferring Los Angeles case, and therefore the case file, to San Francisco was not included in 5-year period. (See also, *Pacific Greyhound Lines v. Superior Court* (1946) 28 Cal.2d 61 [time during which action was stayed by the operation of the Soldier's and Sailor's Relief Act[3] as to a key defendant necessary for the defense is excluded from the 5-year period as to all defendants, but oral stipulation that matter would remain off

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[3] The Soldier's and Sailor's Relief Act has since been renamed the Servicemembers Civil Relief Act. (50 U.S.C. Appx., § 501, et seq.)

calendar until such defendant returned to civilian status did not extend 5-year period]; *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 916-917 [recognizing that trial of case was effectively stayed while determination of complex factual issues was in the hands of a referee pursuant to a reference under the Water Code; such time was excluded from the 5-year period]; *Reeves v. Hutson* (1956) 144 Cal.App.2d 445, 453-454 [case could not be brought to trial while default judgment was in effect; period between its entry and defendant's notice of compliance with conditions of lifting default judgment should be omitted from 5-year period]; *Brunzell Construction Co. v. Wagner* (1970) 2 Cal.3d 545 [period during which case was stayed by order of Nevada court may be omitted from 5-year period, even as to parties against whom action was not stayed]; *Marcus v. Superior Court* (1977) 75 Cal.App.3d 204, 212-213 [time during which a stay for arbitration between third parties is in effect tolls the 5-year period].)

It is noteworthy that while *Holland* referred to Mr. Witkin's venerable treatise to arrive at the definition of a continuance,[4] that definition is not entirely consistent with the definitions that the courts (see, e.g., *Miller & Lux v. Superior Court, supra; Larkin v. Superior Court, supra; City of Los Angeles v. Superior Court, supra; Boyd v. Southern Pacific R. Co., supra;* and *J.C. Penney Co. v. Superior Court, supra*) or the rules (see, e.g., Rule 3.1332, Cal. Rules of Court) use. First of all, by using the term "automatically resumes," Witkin[5], and by extension *Holland*, presume that the trial or other event has begun, but as the cases show, the continuance usually occurs before the trial has begun

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[4] "By contrast, '[a] continuance is a postponement of the trial of a pending action to a later date, at which time it automatically resumes.' (7 Witkin, Cal. Procedure (3d ed. 1985) Trial, § 6, p. 23.)" (*Holland v. Dave Altman's RV Center, supra*, 222 Cal.App.3d at 482; the citation continues in the current edition, 7 Witkin, Cal. Procedure (5th ed. 2008) Trial, § 7, p. 35.)

[5] Witkin's definition of continuance, i.e. to a date certain when the trial automatically resumes, might have some bearing as to the need for notice, but not where the continuance would be open ended. (*City of San Diego v. Walton* (1947) 80 Cal.App.2d 206, 212-213.)

under the statute. Second, a continuance for the trial to "automatically resume" would necessarily take the term out of the operation of § 583.310 or its exceptions because the trial resuming would have already begun, so consideration of dismissal for failure to bring the case to trial would be a moot point. And third, the cases recognize that continuances sometimes are open-ended, requiring a request of the trial court to set the case or some other act by the parties. (See, e.g., *City of Los Angeles v. Superior Court, supra* [request to court and 90-days notice to defendant of trial setting required by terms of written stipulation]; *Leet v. Union Pac. R. Co.* (1944) 25 Cal.2d 605, 616-617 [motion for an indefinite continuance of trial].)

In short, a continuance in reality is moving a date to a later time. Professor Mellinkoff suggests that "continuance" in legal parlance is simply another word for a delay or postponement without the automatic resumption component suggested by Witkin. (Mellinkoff's Dictionary of American Legal Usage, West Publishing Co. (1992), **delay**, page 161.) As used in the cases as well as in the rules of court, Professor Mellinkoff's definition appears to be more accurate than that of Mr. Witkin. For the purposes of § 583.340(b), however, based on the above analysis, a continuance is a delay to a later time when the parties or the court may take up resetting the matter while a stay is an absolute bar to all proceedings until the happening of an defined contingency that will occur at an unknown time but which is out of the control of the parties and sometimes the court. (See, *Bruns v. E-Commerce Exchange, supra.*)

With this definition, derived from the above authorities, in mind, it is clear that the trial court order vacating the trial date and setting the case for a trial setting conference within the 120 day period of the partial stay was not a stay under § 583.340(b) but was a continuance of the proceedings. As such, § 583.340(b) did not come into play due to the order. The Court of Appeal's judgment should therefore be affirmed.

V.

CONCLUSION

Appellant has failed to show that the trial court's order vacating the trial date and setting a trial setting conference within the 120 partial stay period was a stay of the trial under § 583.340(b). The facts and the law show that it was a continuance. This Court should rule accordingly.

Dated: September 20, 2015 GARCIA LEGAL, A PROFESSIONAL CORPORATION

BY: _____
Steven Ray Garcia, Attorney for Respondents
Lehman Brothers Holdings Inc. and Aurora Loan Services LLC

CERTIFICATE OF COMPLIANCE WITH RULE 8.204(c)(1), CAL. RULES OF COURT

I, Steven Ray Garcia, counsel for respondents Lehman Brothers Holdings Inc. and Aurora Loan Services LLC, certify that the foregoing brief is prepared and proportionally spaced Times New Roman 13 point type and based on the word count of the word processing system used to prepare the brief, exclusive of tables, is 3,815 words long.

Dated: September 17, 2015 GARCIA LEGAL, A PROFESSIONAL CORPORATION

BY:_____
Steven Ray Garcia, Attorney for Respondents Lehman Brothers Holdings Inc. and Aurora Loan Services LLC

PROOF OF SERVICE BY GOLDEN STATE OVERNIGHT

Gaines v. Tornberg, et al.

State of California Supreme Court, Case Number S215990

I am over 18 years of age and not a party to the above entitled action. I am employed in the County where the mailing took place. My business address is 301 North Lake Ave., Seventh Floor, Pasadena, CA 91101. On September 17, 2015, I mailed from Pasadena, California, the following document:

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I served the documents by enclosing them in an envelope and placing the envelope for collection and mailing following our ordinary business practices. I am readily familiar with this businesses practice of collecting and processing correspondence for mail. On the same date that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with Golden State Overnight in a sealed envelope with postage fully prepaid.

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