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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JIMMIE WILLIAM JOHNSON,

Plaintiff and Appellant,

v.

THE CITY OF SAN DIEGO,

Defendant and Respondent.

D058677

(Super. Ct. No. 37-2008-00082849-
CU-WM-CTL)

APPEAL from an order of the Superior Court of San Diego County, Timothy B. Taylor, Judge. Affirmed.

Jimmie William Johnson and his wife filed a petition for a writ of administrative mandamus against the City of San Diego (the City). The Johnsons then failed to take any action on the writ petition for over two years. The court issued an order to show cause (OSC) why the matter should not be dismissed, and ultimately, dismissed the writ petition for lack of prosecution.

Johnson, but not his wife, appeals the order of dismissal, contending the court did not have the authority to dismiss the writ petition, the court failed to consider certain factors in deciding to dismiss the writ petition, and Code of Civil Procedure¹ section 583.310 permits an action to be brought to trial within five years. Because we conclude the court did not abuse its discretion in dismissing the writ petition, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 28, 2008, Johnson and his wife filed an unverified petition for a writ of administrative mandate against the City. The City demurred, and the court sustained the demurrer with leave to amend. On November 26, 2008, the Johnsons filed a verified amended petition. In their writ petition, the Johnsons claimed an administrative hearing officer abused his discretion in rejecting their appeal of a costs assessment for \$9,658.26. The City's cost assessment arose from nuisance abatement proceedings involving real property owned by the Johnsons.

Because no action had been taken on the writ petition, the court issued an OSC why the writ petition should not be dismissed for lack of prosecution. On October 8, 2010, the court held a hearing on the OSC. The Johnsons' counsel admitted the case "ha[d] been pending for a while," but asked the court not to dismiss the matter because he was attempting to work with the City to draft a stipulated judgment. He informed the court that if he was unsuccessful negotiating a stipulated judgment, he would ask for a hearing date on his writ petition. The Johnsons' attorney also admitted he had put the

¹ Statutory references are to the Code of Civil Procedure unless otherwise specified.

writ petition on the "back burner" because he had been dealing with an associated case. Although the associated case was pending before the court, it did not have the associated case's file at that time and continued the OSC hearing to October 29, 2010 so it could "figure out what was going on here."

At the October 29, 2010 hearing, the Johnsons' attorney again admitted to putting the writ petition on the "back burner with all these other issues going on." Although he failed to adequately explain these other issues, apparently he was referring to the associated case between the Johnsons and the City involving a permanent injunction affecting real property owned by the Johnsons. The Johnsons' attorney also stated that he had not been able to discuss resolution of the writ petition with the City since the October 8 hearing. He then requested the court set a hearing on the writ petition. The court appeared disinclined to do so, pointing out that the Johnsons needed "to file papers" to obtain a hearing on their writ petition and "haven't done so in two years." Ultimately, the court took the matter under submission. There is nothing in the record indicating that the Johnsons filed a written response to the OSC or otherwise submitted any evidence in support of their position.

The court issued a written minute order that was amended on November 1, 2010 dismissing the writ petition:

"The Johnsons failed to show cause why the case should not be dismissed. A petitioner in a writ matter must move, either via ex parte application for a peremptory writ or via noticed motion, to bring the case for hearing on the merits. SDSC Local Rule 2.4.8(A); Cal. Civ. Writ Practice (4th Ed.) section 5.9 *et seq.* This case was commenced in April 2008, and the pleadings were settled in December of 2008. Nearly two years have passed, an[d] the

petitioners have failed to move the case forward. The petition therefore is dismissed."²

Johnson timely appealed, but his wife did not.

DISCUSSION

Johnson contends the court abused its discretion by dismissing the writ petition. Specifically, Johnson argues the court lacked the authority to dismiss the writ petition because the court acted prior to the expiration of the two-year minimum period in California Rules of Court,³ rule 3.1340(a). In addition, he argues the court, in dismissing the action, failed to consider ongoing settlement negotiations between the parties and the status of an associated case. Finally, Johnson argues section 583.310 creates a five-year time frame in which to bring an action to trial. We reject all of Johnson's contentions on the merits, and as such, we need not decide whether Johnson forfeited any of these issues on appeal by failing to raise them with the superior court.

"A trial court has discretion to dismiss an action for delay in prosecution (§ 583.410, subd. (a)) when the action is not brought to trial within three years after it is commenced (§ 583.420, subd. (a)(2)(A)), or two years after it is commenced if the Judicial Council adopts rules for such dismissal due to the condition of the court calendar

² At the hearing, the court also addressed the City's motion to modify a 1997 stipulated injunction signed by the Johnsons and the City. For reasons not pertinent to this appeal, the court granted the City's motion, and Johnson appealed. We affirmed this order in *City of San Diego v. Johnson* (Apr. 24, 2012, D058684) [nonpub. opn.]

³ All further rule references are to the California Rules of Court unless otherwise indicated.

or for other reasons affecting the conduct of litigation or the administration of justice.^[4]

(§ 583.420, subd. (a)(2)(B).) Dismissal pursuant to section 583.410 must be made in accordance with the criteria prescribed in California Rules of Court, rule [3.1342](e).^[5]

(§ 583.410, subd. (b).) The factors to be considered under rule [3.1342](e) include: (1) The extent to which the parties engaged in settlement negotiations or discussions; (2) the diligence of the parties in pursuing discovery or other pretrial proceedings, including extraordinary relief; (3) the nature and complexity of the case; (4) the law applicable to the case[, including the pendency of other litigation under a common set of facts or determinative of the legal or factual issues in the case]; (5) the nature of any extensions of time or other delay attributable to either party; (6) [the condition of the court's calendar and] the availability of an earlier trial date if the matter was ready for trial; (7) whether the interests of justice are best served by dismissal or trial; and (8) any other fact or

⁴ Rule 3.1340(a) provides: "The court on its own motion or on motion of the defendant may dismiss an action under Code of Civil Procedure sections 583.410-583.430 for delay in prosecution if the action has not been brought to trial or conditionally settled within two years after the action was commenced against the defendant." The substance of rule 3.1340 was adopted as rule 372 by the Judicial Council of California, effective January 1, 1990. Rule 372 was renumbered as rule 3.1340, effective January 1, 2007.

⁵ The substance of Rule 3.1342 was adopted by the Judicial Council as rule 373, effective January 1, 1984. Rule 373 was renumbered as rule 3.1342, effective January 1, 2007.

circumstance relevant to a fair determination of the issues."^{6]} (*Wagner v. Rios* (1992) 4 Cal.App.4th 608, 611 (*Wagner*), fn. omitted.)

"Although California has a strong policy in favor of disposing of cases on their merits, this policy prevails only when the plaintiff makes a showing of excusable delay." (*Tustin Plaza Partnership v. Wehage* (1994) 27 Cal.App.4th 1557, 1562.) "[T]o avoid a dismissal for delay in prosecution, the plaintiff must show a reasonable excuse for such delay; once that showing is made, the trial court must consider all pertinent factors, including those under rule [3.1442](e) and any prejudice to the defendant from the delay, before deciding whether to dismiss." (*Wagner, supra*, 4 Cal.App.4th at pp. 611-612.)

In reviewing a discretionary dismissal, we must presume the trial court's order was correct, and it is the plaintiff's burden to overcome that presumption and establish an abuse of discretion. (*Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 443.) An abuse of discretion occurs only if the trial court's decision exceeds the bounds of reason. (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 698.) Unless a clear case of abuse is shown and there has been a miscarriage of justice, we will not substitute our judgment for that of the trial court. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

⁶ Section 583.410 provides: "(a) The court may in its discretion dismiss an action for delay in prosecution pursuant to this article on its own motion or on motion of the defendant if to do so appears to the court appropriate under the circumstances of the case. [¶] (b) Dismissal shall be pursuant to the procedure and in accordance with the criteria prescribed by rules adopted by the Judicial Council."

Johnson agrees that a court can dismiss an action for lack of prosecution if at least two years have elapsed since the action commenced. (See Rule 3.1340(a).) However, he argues that the minimum two-year period had not expired when the court dismissed the writ petition. Johnson is mistaken.

Johnson filed his original writ petition in April 2008. Thus, he commenced his action against the City at that time. (See *Warren v. Atchison, T. & S. F. Ry. Co.* (1971) 19 Cal.App.3d 24, 37-38.) The court dismissed this action on November 1, 2010, more than two years after it commenced. Despite this clear passage of time, Johnson claims the court's mention in its minute order that "nearly two years have passed" evidences the court did not believe the two-year minimum period had passed. Johnson misreads the order. The court's reference to "nearly two years" is based on when the pleadings were finalized. However, rule 3.1340(a) allows the court to "dismiss an action . . . for [delay in prosecution] if the action has not been brought to trial . . . within two years after the action was commenced against the defendant." Johnson provides no authority that the two-year time period begins when the pleadings are finalized, and our independent research has uncovered no authority supporting his position. Therefore, when the pleadings were finalized they had no affect on the court's authority to dismiss the action under rule 3.1340(a). The two-year period begins when the action is commenced. (See Rule 3.1340(a).)

Johnson also argues the court did not consider two of the factors under rule 3.1342(e) prior to dismissing his writ petition. Specifically, Johnson asserts the court ignored the parties' settlement discussions and the impact of an associated case that

included a common set of facts and was determinative of the legal or factual issues in the instant action. We disagree.

As a threshold matter, it is not clear from the record that Johnson provided a "reasonable excuse" for his delay in prosecuting the writ petition. (See *Wagner, supra*, 4 Cal.App.4th at pp. 611-612.) As we note above, the record does not contain any written response to the OSC from Johnson. Johnson does not appear to have presented the court with any evidence to explain the over two-year delay in prosecuting the writ petition. Instead, the only explanation for the delay is Johnson's attorney's comments at the October 8 and 29, 2010 hearings. If Johnson did not provide a reasonable excuse for the delay, the court need not consider the factors under rule 3.1342(e). (*Wagner, supra*, at pp. 611.612.))

In an effort to address the lack of any evidence in the record to support his reason for delay, Johnson includes a declaration from his former attorney with his opening brief. Among other things, the declaration describes, in cursory fashion, the attorney's settlement discussions with the City and his focus on the associated case. This declaration is not part of the record before us, and we do not consider it for purposes of this appeal.⁷ (See *CIT Group/Equipment Financing, Inc. v. Super DVD, Inc.* (2004) 115 Cal.App.4th 537, 539, fn. 1 ["As to respondent's use of facts not in the record, it is well

⁷ Likewise, we do not consider the City's declaration it filed in response to Johnson's motion to augment the record although the City cites to this declaration in its respondent's brief.

established that a reviewing court may not give any consideration to alleged facts that are outside of the record on appeal."].)

Even if we assume Johnson's attorney provided a "reasonable excuse" for the delay, we are satisfied the court did not abuse its discretion in dismissing the writ petition. At the October 8 hearing, Johnson's attorney stated he put the writ petition on the "back burner for a while because there is an associated case with this having to do with a longstanding stipulated agreement regarding the properties that [the Johnsons] own. And we have been dealing with this issue over the past year or so." Johnson's attorney further stated he was attempting to resolve the writ petition with the City, and if he was not able to do so, he would seek a hearing date. The court did not take any action at the October 8 hearing, but instead, continued the OSC hearing to October 29. Thus, although we find Johnson's attorney's explanation wanting in that it does not provide a justification for a two-year delay, the court clearly considered what Johnson said and continued the hearing so it could review the file of the associated case, which was pending in the same court.

At the October 29 hearing, Johnson's attorney again stated he put the writ petition "on the back burner with all these other issues going on." In addition, Johnson's attorney stated he had been discussing resolution of the writ action with the City, but had not had any communication with the City on that issue since October 8. He then requested the court set a hearing on the writ petition. In response, the court pointed out that Johnson could not merely orally request a hearing, but had to apply ex parte or file a noticed

motion to obtain a hearing and had done neither in two years. The court then took the matter under submission.

We determine the record evidences that the court considered the settlement negotiations prior to dismissing the writ petition. Johnson's attorney's description of the settlement negotiations was perfunctory at best. He provided no details for the court to determine when the parties began to negotiate settlement, whether any demands or offers had been made, what were the possible terms, or how much longer was needed to complete settlement. In addition, Johnson's attorney essentially conceded settlement was not probable at the October 29 hearing when he asked for a date for the writ petition. Further, in any event, the settlement discussions offer no explanation regarding why Johnson delayed in prosecuting the writ petition from the time the pleadings were finalized (December 2008) until the October 8, 2010 hearing. Simply put, Johnson's mere reference to settlement negotiations without any supporting evidence explaining the impact of the settlement negotiations on the prosecution of the writ petition provides no explanation for the delay. The record indicates the court listened to Johnson's argument and, correctly, found Johnson's settlement excuse lacking.

We also conclude the court considered the associated case prior to dismissing the writ petition. Johnson failed to adequately explain to the court how the associated case prevented him from prosecuting or otherwise justified his delay in prosecuting the writ petition. Instead, he merely argued he was focused on the other matter and put the writ petition on the "back burner." Unlike us, the court had the benefit of the entire file for both the writ petition and the associated case. Indeed, the court continued the October 8,

2010 OSC hearing so it could review the associated case's file. After reviewing the files and hearing argument, the court was unconvinced by Johnson's contentions. The court's finding was reasonable.

Finally, Johnson argues section 583.310, which requires an action to be brought to trial within five years, applies to administrative mandamus proceedings. Section 583.310, however, does not modify a court's discretion to dismiss an action under section 583.420, subdivision (a)(2)(B). Alternatively stated, section 583.310 is not instructive regarding the issue before us.

In summary, the court dismissed the writ petition over two years after it was commenced. To the extent Johnson offered any explanation for his delay in prosecuting the writ petition, the court adequately considered his arguments. We see no abuse of discretion.

DISPOSITION

The order is affirmed. The City is awarded its costs on appeal.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

AARON, J.