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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

GREGG BONANO,

Plaintiff and Appellant,

v.

EDDIE MEJORADO, et al.,

Defendants and Respondents.

D065764

(Super. Ct. No. ECU03909)

GREGG BONANO,

Plaintiff and Appellant,

v.

C & G FARMS, INC.,

Defendant and Respondent.

D068210

(Super. Ct. No. ECU03909)

APPEALS from judgments of the Superior Court of Imperial County, Juan Ulloa,
Judge. Affirmed.

Marcus Family Law Center, Ethan Marcus, Case Yousef Kamshad, Diana Maria
Lemons, Moriel Cohen and Erin Kathleen Tomlinson, for Plaintiff and Appellant.

Tencer Sherman and Sam Sherman; Higgs Fletcher & Mack and Victoria E. Fuller; Niddrie, Addams & Fuller and Victoria E. Fuller for Defendant and Respondent C & G Farms, Inc.

No appearance for remaining Defendants and Respondents.

In September 2007, Gregg Bonano brought an action against numerous defendants arising from a 2006 real estate loan. In January 2014, the court ordered the lawsuit dismissed based on Bonano's failure to bring the case to trial within five years. (Code Civ. Proc., § 583.310.)¹ Bonano concedes her lawsuit had been pending for more than five years, but contends the court erred in failing to determine this period was tolled under section 583.340, which extends the statutory period when "[p]rosecution or trial of the action was stayed or enjoined" or when "[b]ringing the action to trial . . . was impossible, impracticable, or futile." (§ 583.340, subs. (b), (c).)

We determine the court did not err in rejecting Bonano's tolling arguments under these statutory factors. We also find unavailing Bonano's contention that the court did not exercise its discretion on these matters. We thus affirm the judgments.²

¹ Undesignated statutory references are to the Code of Civil Procedure.

² The court entered two separate judgments because one defendant had a pending cross-complaint when the first judgment was entered. Bonano filed an appeal from the first judgment, and after the cross-complaint was dismissed, she filed an appeal from the second judgment as to the remaining defendant. We consolidated the appeals because they challenged the same dismissal order. Only one defendant (C & G Farms, Inc.) filed a respondent's brief.

FACTUAL AND PROCEDURAL SUMMARY

A. Background

In February 2006, Bonano borrowed \$288,000 from defendant C & G Farms, Inc. to purchase property located in San Diego County (the Pine Valley property). This loan was secured with deeds of trust on the Pine Valley property and on two properties located in Imperial County, including Bonano's El Centro home. Shortly after escrow closed on the Pine Valley property, Bonano learned this property could not be legally used as a residence because the existing structure had been converted from a barn without permits and the septic system had no permits.

Based on these events, Bonano filed two lawsuits. First, she brought an action in San Diego County Superior Court against the seller of the Pine Valley property and related agents. C & G Farms was one of the parties named in this San Diego County action.

Second, on September 24, 2007 Bonano filed the Imperial County Superior Court action (at issue here) against C & G Farms and two parties who allegedly participated in the Pine Valley loan transaction (Smith Carter Real Estate (Smith Carter) and Eddie Mejorado). Bonano alleged these defendants misrepresented that they (or their agents) had conducted an inspection of the property and the inspection revealed no problems. Bonano also asserted statutory and common law causes of action based on alleged predatory lending activities, including violations of the federal Truth in Lending Act and Home Ownership Equity and Protection Act. (15 U.S.C. §§ 1601-1666.) After Bonano filed this complaint, the court granted Bonano's preliminary injunction motion, enjoining

defendants from enforcing the deed of trust on her El Centro home pending the outcome of the trial.³

After C & G Farms, Smith Carter, and Meorado failed to file answers, the court entered their defaults in November 2007, December 2007, and March 2008 (respectively). On April 17, 2008, the court entered a default judgment against these defendants. These defendants then moved to vacate the judgment based on their attorney's alleged abandonment. Over Bonano's opposition, the court granted the motion two months later, on June 13, 2008.

The next month, in July 2008, Bonano filed an amended complaint, adding additional defendants who allegedly assisted or participated in the Pine Valley loan, including Best Choice Realty and Mortgage, Miguel Enciso, and Samuel Villanueva.

B. Abatement Order

The next month, on August 28, 2008, the court entered an order abating the Imperial County action pending the outcome of the San Diego County action, expressly stating "The 5-year statute is tolled." Although C & G Farms had argued the claims in the Imperial County lawsuit were duplicative of the San Diego County action and thus the Imperial County action was barred, the court rejected this argument and found abatement was the proper remedy. The court thus granted defendants' motion for a stay, and denied their demurrer.

³ The second Imperial County property securing Bonano's loan had been sold, and C & G Farms received \$88,400 from the sale as partial repayment for the \$288,000 loan.

In June 2009, Bonano moved to lift the abatement order on the basis that the Imperial County defendants had been dismissed from the San Diego County action and the San Diego County action was no longer pending. Over defendants' opposition, the court granted the motion on September 14, 2009, and scheduled a trial date.

C. Summary of Litigation After Abatement Order Removed

During the next several years, the parties engaged in extensive motion practice in the Imperial County action. Bonano and defendants each obtained several trial continuances. Although we have reviewed the entire 13-volume clerk's transcript, a detailed description of this litigation is unnecessary to our resolution of the statutory tolling issues presented on this appeal. We instead highlight a few key motions and rulings that assist in understanding the parties' arguments pertaining to the tolling periods. We will discuss additional relevant procedural facts in our legal discussion below.

About four months after the abatement period ended, in January 2010, Bonano filed a second amended complaint. During the next two years, the court overruled defendants' demurrers, motion for judgment on the pleadings, and motions to strike this pleading. The court also denied defendants' summary judgment motions, but granted a summary adjudication motion on two causes of action.

In March 2010, C & G Farms filed a cross-complaint against Bonano and a third party cross-defendant.

In September 2010, defense counsel moved to withdraw from the case based on his assertion that his clients had filed lawsuits against each other. The next day, the court vacated the trial date and set the hearing on defense counsel's motion. The next month,

on October 13, the court granted defense counsel's withdrawal motion, and on January 4, 2011 some of the defendants filed a substitution of attorney.

On March 6, 2013, Bonano filed a notice of stay of proceedings based on her filing for Chapter 13 bankruptcy. The notice stated the case was stayed with respect to the "Cross-Complainants." The court ordered a pending motion to compel Bonano's deposition off calendar, and vacated the April 2013 trial date. On June 6, 2013, the bankruptcy court granted relief from the stay.

Two months later, in August 2013, C & G Farms moved to set a trial date, noting Bonano was not paying the outstanding balance owed on the Pine Valley loan and C & G Farms was enjoined from foreclosing on the deed of trust. C & G Farms said it needed additional time to complete discovery but it "does not anticipate a long period of time to conduct this discovery or the possible motion work related thereto." The court granted the motion and set the trial date for December 3, 2013, which it later moved on its own motion to December 9, 2013.

Shortly after the trial dates were set, in September 2013, C & G Farms served Bonano's lead counsel (Patrick O'Connor, a solo practitioner) with a summons adding him as a defendant on the amended cross-complaint. In response, O'Connor's cocounsel (Ann Marie Zimmermann) filed a demurrer on Bonano's behalf and submitted O'Connor's declaration stating he could not work on the case while a party in the action.

While Bonano's demurrer was pending, C & G Farms requested a trial continuance to March 2014. C & G Farms stated that "[t]his continuance is even more necessary as

Mr. O'Connor was recently added as party to this lawsuit" C & G Farms said Bonano had stipulated to the continuance.

On November 25, 2013, the court dismissed O'Connor as a party defendant, finding C & G Farms had known for many years the facts underlying its newly proposed amendment. The court also denied C & G Farms's trial continuance request. The court stated: "The trial has already been continued several times. The court has an interest in the management of its own calendar, and declines to grant further continuances in a case that is over five years old. In light of the sustaining of the demurrer . . . , there has been no showing of good cause [for the continuance]"

D. Motions to Dismiss for Failure to Prosecute

On December 2 and 3, 2013, Bonano and C & G Farms each filed multiple motions in limine in connection with the upcoming trial. The next day, defendant Mejorado, acting in propria persona, brought an ex parte application to dismiss Bonano's action for failure to prosecute the case within the five-year statutory period. (§§ 583.310, 583.360.) Mejorado argued the action had been pending for six years and three months, and stated: "On March 1, 2013, Ms. Bonano filed for bankruptcy protection but a motion for relief from stay was granted on June 6, 2013. This only tolled the case for three months. Therefore, this case has been on the court's docket for six years."

The court denied the ex parte motion without prejudice to any party bringing a noticed motion on the five-year dismissal statute. The court set the trial for December 19 on the equitable issues, and the jury trial on the legal issues for January 14, 2014.

The day before the equitable trial was scheduled, C & G Farms moved to dismiss the action for Bonano's failure to prosecute the action within the five-year statutory period. (§§ 583.310, 583.360.) C & G Farms argued the case has been pending for about six years, three months, and that even when taking into account two tolling periods (the abatement and bankruptcy), the case had been pending 43 days more than the five-year period. C & G Farms argued the court should dismiss the action under the mandatory five-year statute (§ 583.310), or under the discretionary two-year dismissal statute (§ 583.420, subd. (a)(2)(B)).

In her opposition to the dismissal motion, Bonano contended the five-year statutory period was tolled during three specific periods: (1) the time between the *entry* of defaults and the order vacating the default judgment; (2) the abatement period; and (3) the time during the bankruptcy stay. Bonano argued these tolling periods totaled 671 days, which she said extended the five-year statute to July 28, 2014. Bonano also argued defendants prevented the timely prosecution of the case by filing numerous motions (including two demurrers, a motion to disqualify Bonano's counsel, a motion for judgment on the pleadings, and a motion to dismiss) and by delaying the proceedings after defense counsel withdrew his representation in October 2010.

In reply, C & G Farms stated it "agrees to two of those tolling periods—the abatement, and the bankruptcy," but argued the default proceedings did not toll the matter because Bonano could have prosecuted the same claims in the San Diego County action. C & G Farms also argued that Bonano was responsible for the numerous delays, including by: (1) moving to continue the trial in 2010 and 2012 for claimed additional

discovery which Bonano never completed; (2) refusing to reasonably cooperate with defendants' discovery requests, requiring numerous motions to compel and sanctions motions; and (3) filing for bankruptcy shortly before the completion of her deposition. C & G Farms argued that Bonano "has gone out of her way to delay the trial" and this delay has substantially "benefit[ed] [Bonano] in that she can continue to live . . . in a home" encumbered by a deed of trust.

E. Dismissal Order and Judgment

On January 13, 2014, the court held a hearing on C & G Farms's dismissal motion. The hearing was not reported by a court reporter or recorded electronically. After the hearing, the court granted C & G Farms's motion to dismiss Bonano's second amended complaint for failure to prosecute. The court minutes state: "[C & G Farms's counsel] states his argument. [¶] [Bonano's counsel] states his argument and argues the 5-year statute. [¶] Matter submitted. [¶] A discussion is held as to the Court's discretion for dismissal per . . . [sections] 583.420 and 583.360. [¶] [The court orders] defense motion to dismiss [second] amended complaint for failure to prosecute is granted for [the] reasons stated." The next month, the court entered a written order dismissing Bonano's complaint against all defendants under section 583.310.

The court later signed the parties' stipulated settled statement regarding the unreported January 13 hearing. That statement read: "The court addressed C&G Farms's . . . motion to dismiss [C & G Farms's counsel] presented argument as to why the motion should be granted. [Bonano's counsel] presented argument as to why the motion should be denied. A discussion was held between counsel and the Court as to the Court's

discretion for dismissal per Code of Civil Procedure [sections] 583.420 and 583.360. The Court found that it had no discretion."

The court later signed an additional order pertaining to the reasons for its dismissal ruling. This order states in relevant part: "The Court [found] that more than five years had elapsed since plaintiff filed the action and that, on those grounds, the court lacked discretion under Code of Civil Procedure sections 583.310 and 583.360 to do anything other than dismiss the complaint."

DISCUSSION

I. *Applicable Law Governing Five-Year Dismissal Rule*

"An action must be brought to trial within five years after it is commenced. (§ 583.310.) If this deadline is not met, the action 'shall be dismissed by the court on its own motion or on motion of the defendant' (§ 583.360, subd. (a).) 'The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute.' (§ 583.360, subd. (b).)" (*Gaines v. Fidelity National Title Ins. Co.* (2016) 62 Cal.4th 1081, 1089-1090 (*Gaines*).

The statutory exceptions are contained in section 583.340, which provides:

"[I]n computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed: [¶] (a) The jurisdiction of the court to try the action was suspended. [¶] (b) Prosecution or trial of the action was stayed or enjoined. [¶] (c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile."

The first two statutory factors (subdivisions (a) and (b)) generally present legal issues that do not involve the exercise of discretion. (See *Bruns v. E-Commerce*

Exchange, Inc. (2011) 51 Cal.4th 717, 726; *Spanair S.A. v. McDonnell Douglas Corp.* (2009) 172 Cal.App.4th 348, 358-359; see also *Gaines, supra*, 62 Cal.4th at p. 1092.) A trial court must exclude from the five-year count any time during which the court had no jurisdiction or the prosecution or trial was stayed or enjoined. (§ 583.340, subs. (a), (b); see *Gaines, supra*, at pp. 1091-1097 [defining the term "stayed" in the context of the dismissal statutes].)

The third statutory factor—bringing the action to trial was "impossible, impracticable, or futile"—is subject to the trial court's broad discretion. (§ 583.340, subd. (c).) "The question of impossibility, impracticability, or futility is best resolved by the trial court, which "is in the most advantageous position to evaluate" "the numerous factual matters relevant to the delay issues. (*Gaines, supra*, 62 Cal.4th at p. 1100.) "[T]he trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." [Citation.]" (*Ibid.*)

The plaintiff has the burden to establish this tolling period. (*Gaines, supra*, 62 Cal.4th at p. 1100.) In determining whether this burden was met, the trial court must focus on "whether the plaintiff exercised reasonable diligence in prosecuting his or her case," "and the extent to which the plaintiff had control over the delay. (*Id.* at pp. 1100, 1102-1103.) But even where the plaintiff acted reasonably and had no control over the delay, a postponement or interruption in the litigation does not necessarily constitute a valid tolling period. The delay must be "substantial" and outside the "ordinary incidents" of the pretrial litigation process. (*Id.* at pp 1101, 1102.) " "[E]very 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.' . . ." ' . . . ' "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." ' . . . This rule reflects the Legislature's understanding that a reasonably diligent plaintiff should be able to bring the case to trial within the relatively lengthy period of five years notwithstanding such ordinary delays. [Citation.] To hold otherwise would allow plaintiffs to litigate piecemeal every period, no matter how short, in which it was literally impracticable to try the case, thus rendering the statute 'utterly indeterminate, subjective, and unadministerable.' [Citation.]" (*Id.* at p. 1101.)

In considering tolling arguments, " 'the policy favoring trial or other disposition of an action on the merits [is] generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action. . . .' (§ 583.130.)" (*Gaines, supra*, 62 Cal.4th at p. 1090.) But where the action is pending longer than the mandatory five-year deadline and is not subject to tolling, the mandatory dismissal rule must be followed. (*Id.* at p. 1105.) The rule " 'prevent[s] prosecution of stale claims where defendants could be prejudiced by loss of evidence and diminished memories of witnesses [and] to protect defendants from annoyance of having unmeritorious claims against them unresolved for unreasonable periods of time.' " (*Sagi Plumbing v. Chartered Construction Corp.* (2004) 123 Cal.App.4th 443, 447.) The rule also protects the public by "expedit[ing] the administration of justice by declogging court

calendars" and compelling diligent prosecution of litigation. (*Reid v. Balter* (1993) 14 Cal.App.4th 1186, 1195-1196.)

II. Appellate Rules

Before reaching Bonano's particular arguments, we briefly summarize applicable appellate rules governing our review. It is a fundamental tenet of appellate law that the lower court's judgment is presumed to be correct. (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.) We make all reasonable inferences favoring the court's order, and affirm the judgment if any possible grounds exist for the trial court to have reached its factual conclusions. (*Ibid.*; *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630-631.) Any ambiguity in the record is resolved in favor of the judgment. (*Hirschfield v. Schwartz* (2001) 91 Cal.App.4th 749, 765-766; *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 631.)

The trial court did not explain its reasons for rejecting Bonano's tolling arguments. But the court was not required to do so. (*Wilson v. Sunshine Meat & Liquor Co.* (1983) 34 Cal.3d 554, 563 (*Wilson*)). We are required to presume the court had a factual basis to support the exercise of its discretion. (*Ibid.*) As the party seeking reversal, it is Bonano's burden to provide an adequate record to overcome the presumption of correctness and show prejudicial error. (See *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

III. Analysis

Bonano acknowledges that more than five years elapsed between the time she filed the complaint and the order dismissing the action. To be precise, the elapsed time was

six years, three months, and 20 days, or a total of 2,303 days. But she contends the court erred in dismissing the action because there were two stay periods under section 583.340, subdivision (b), and several other tolling periods under section 583.340, subdivision (c)'s "impossib[ility]" factors. We conclude there was only one valid stay period under subdivision (b) (the abatement period), and the court did not abuse its discretion in concluding that the asserted impossibility circumstances were insufficient to toll the statute beyond the five-year period.

A. Prosecution or Trial of the Action Stayed or Suspended

Bonano contends the trial was "stayed" twice within the meaning of section 583.340, subdivision (b): (1) during the time the matter was abated while the San Diego County action was litigated; and (2) during the bankruptcy stay.

We agree with the first argument. From August 28, 2008 through September 14, 2009 (382 days), the entire action was stayed pending the resolution of the parallel San Diego lawsuit. The abatement order expressly stated the five-year statute would be tolled. The only matter that was not included in the stay was the preliminary injunction order preventing a foreclosure sale of Bonano's home. But this does not affect the tolling because the parties were prohibited from moving forward on any aspect of the case that would or could have affected this preliminary injunction.

We disagree with the second (bankruptcy) argument. For purposes of section 583.340, subdivision (b), a plaintiff's bankruptcy filing does not stay the period for the plaintiff to bring his or her own case to trial. (*Lauriton v. Carnation Co.* (1989) 215 Cal.App.3d 161, 164; *Danielson v. ITT Industrial Credit Co.* (1988) 199 Cal.App.3d 645,

652-653; see *A. Groppe & Sons Glass Co., Inc. v. Fireman's Fund Ins. Co.* (1991) 232 Cal.App.3d 220, 225; see also *Shah v. Glendale Fed. Bank* (1996) 44 Cal.App.4th 1371, 1375.) A bankruptcy filing automatically stays any proceeding "*against* the debtor" until the debtor receives an adjudication, dismissal, or relief from the stay. (*Danielson, supra*, 199 Cal.App.3d at p. 652.) But with exceptions not applicable here, there is "nothing in the Bankruptcy Act that tolls a *debtor's* cause of action." (*Ibid.*, italics added; accord *Lauriton, supra*, 215 Cal.App.3d at pp. 164-165.) Once the debtor files for bankruptcy, the causes of action vest in the trustee, and the trustee has standing to prosecute the action. (See *Lauriton, supra*, at p. 164.)

The factual record here is consistent with these principles. The bankruptcy order expressly stated that Bonano's filing stayed the *cross-complaint* (the claims asserted *against* Bonano), but there was nothing in the order providing that Bonano's affirmative claims against C & G Farms and the other defendants were stayed.

Based on the applicable law and the factual record, the bankruptcy stay order did not trigger a section 583.340, subdivision (b) tolling period. In reaching this conclusion, we are aware defendants conceded in their papers below that the bankruptcy stay did toll the five-year period. We are also aware that as a practical matter, no litigation actions were taken during the bankruptcy stay. However, because a trial court has the responsibility and authority to independently assess the section 583.340 factors, and may dismiss an action on its own motion for failure to timely prosecute (§ 583.360, subd. (a)), the court was not bound to accept defendants' concessions and could properly apply

settled law that a bankruptcy petition filed by the plaintiff does not stay the plaintiff's action for purpose of applying the section 583.340, subdivision (b) stay provision.

Based on the analysis set forth above, the five-year statute was tolled under section 583.340, subdivision (b) for a total of 382 days. That number is not sufficient for relief in this case. The matter was pending for a total of 2,303 days (six years, three months, and 20 days). Subtracting 382 days from 2,303 days equals 1,921 days. Five years equals 1,825 days. Subtracting 1,825 days from 1,921 days equals 96 days. Thus, the case was pending for 96 days over the five-year time limit.

B. *Statutory Discretionary Factors*

Bonano argues this extra time (the 96 days) did not require dismissal because numerous additional factors made it impossible, impractical, or futile to bring the action to trial during the five-year period. (§ 583.340, subd. (c).) The trial court rejected this argument. Applying the deferential review standard, we conclude Bonano did not meet her burden to show an abuse of discretion.

First, Bonano argues that even if her March 2013 bankruptcy filing did not constitute a stay under section 583.340, subdivision (b), the court could have viewed this stay as a period when the bringing of the action was "impossible, impracticable, or futile" under section 583.340 subdivision (c). However, there is nothing in the record showing the court was required to conclude the bankruptcy filing precluded her from timely moving her case to trial. There was ample evidence supporting that Bonano had the practical ability to prepare her own case during the 93-day bankruptcy stay of the cross-

complaint, including agreeing to complete her deposition on matters pertaining to her affirmative claims.

Second, Bonano argues it was impossible for her to prosecute her case during the time between the entry of default and/or default judgment and the time the default judgment was vacated. We agree the time between the default judgment and the vacation of the default judgment generally must be tolled under section 583.340, subdivision (c). (*Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 438; *Hughes v. Kimble* (1992) 5 Cal.App.4th 59, 68 (*Hughes*).) As the California Supreme Court has explained: "The determination whether it was 'impossible, impracticable, or futile' to bring a case to trial within a given time period is generally fact specific, depending on the obstacles faced by the plaintiff in prosecuting the action and the plaintiff's exercise of reasonable diligence in overcoming those obstacles. . . . Nonetheless, there are some circumstances in which it can be said almost invariably that the exception applies. Such is the case when a default judgment has been entered in favor of the plaintiff, effectively bringing the litigation to a standstill." (*Howard, supra*, 10 Cal.4th at p. 438.) This rule applies regardless whether the default judgment is valid, voidable or void. (See *Maguire v. Collier* (1975) 49 Cal.App.3d 309, 313.)

This conclusion, however, does not show trial court error. The default judgment was entered on April 17, 2008, and the default judgment was vacated 57 days later on June 13, 2008. Subtracting 57 days from the 96 remaining days still leaves 39 days over the statutory five-year period.

We reject Bonano's argument that the "default" tolling period should be calculated from the dates of the *entry* of default, rather than the default *judgment*. Default was entered on: November 28, 2007 for C & G Farms; December 12, 2007 for Smith Carter; and March 12, 2008 for Mejorado. This would add a total of 94 to 199 days to the tolling period (depending on the particular defendant). But the courts have declined to apply an automatic tolling rule to an entry of default (as opposed to a default judgment), reasoning that an entry of default does not bring an action to a standstill until the *judgment* is entered. (*Hughes, supra*, 5 Cal.App.4th at p. 68.) An entry of default tolls the five-year statutory period only if the plaintiff used reasonable diligence to move the case forward to a default judgment. (*Id.* at pp. 68-71.)

The court had a valid basis to find Bonano did not act with reasonable diligence in obtaining the default judgments after the defaults were entered. Bonano waited nearly six months after obtaining C & G Farms's default to obtain a default judgment. Bonano does not point to anything in the record explaining this delay, nor have we found any explanation on our independent review of the record. To the contrary, the record supports that Bonano had control over the timing of converting the defaults into a default judgment. The court did not abuse its discretion in concluding this avoidable delay during the default period was insufficient to constitute tolling under section 583.340, subdivision (c).

We also find unavailing Bonano's contention that additional procedural circumstances made it impossible to move her case forward: (1) defendants' unsuccessful motion to disqualify one of Bonano's counsel (Zimmermann) (filed on May 20, 2010;

denied on June 21, 2010; total of 32 days); (2) defense counsel's successful motion to withdraw (defense counsel relieved on October 13, 2010; attorney substitution on January 4, 2011; total 83 days); and (3) defendants naming Bonano's lead counsel as a cross-defendant (counsel sued on September 25, 2013; counsel dismissed as party on November 25, 2013; total 61 days). None of these circumstances elevated an ordinary delay to the type of interruption that was "so exceptional, extenuated, or beyond [Bonano's] control as to qualify as a circumstance of impossibility, impracticability, or futility under section 583.340[, subdivision] (c)." (*Gaines, supra*, 62 Cal.4th at p. 1105.)

With respect to the 32 days when defendants were seeking to disqualify counsel Zimmermann, the record shows that at the time Bonano was also represented by attorney Patrick O'Connor, who worked for a separate law firm. There is nothing in the record showing that O'Connor could not have moved the litigation forward during that time. Moreover, this type of brief interruption is not the type of "substantial" delay that qualifies for the statutory tolling period. (*Gaines, supra*, 62 Cal.4th at p. 1102.) "[O]rdinary delays, even ones beyond the plaintiff's control, are already accounted for in the five-year period." (*Ibid.*)

Likewise, with respect to the period between the court order allowing defense counsel to withdraw and defendants obtaining a new attorney, the court had an ample basis to find that these circumstances did not halt the litigation or make it impossible or impracticable for Bonano to move the case to trial. Bonano's counsel could have (and apparently did) use this time to prepare motions, including a motion for reconsideration of an earlier summary adjudication order. Bonano was able to prepare additional

discovery requests and take other trial preparation measures while defendants were retaining substitute counsel. And if defendants did not obtain substitute counsel in a reasonable period, Bonano's counsel was free to complete discovery and obtain a trial date.

On the 61-day period during which Bonano's lead counsel (O'Connor) was named as a defendant, this action similarly did not prevent the matter from being timely brought to trial. First, as noted above, Bonano had a second counsel (Zimmermann) from a different law firm and the record shows Zimmermann was available to work on the case (as she was the attorney who successfully challenged the addition of O'Connor to the cross-complaint). Additionally, the court had a reasonable basis to find that this circumstance occurring in late 2013 did not in fact cause any trial delay since the trial date remained unchanged and trial preparations should already have been completed by that time.

C. Court's Statement Regarding its Discretion

Bonano alternatively contends the court erred in ruling on her "impossibility" tolling arguments because it failed to exercise its discretion on these issues. (*Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 392 [abuse of discretion for a trial court to fail to exercise discretion vested in it].) In support, Bonano directs us to the portion of the settled statement stating: "A discussion was held between counsel and the Court as to the Court's discretion for dismissal *per [sections] 583.420 and 583.360. The Court found that it had no discretion.*" (Italics added.)

Section 583.420 provides for discretionary dismissal of actions not brought to trial within two or three years after filing, and for mandatory dismissal after five years. (§ 583.420, subds. (a)(2), (b).) Section 583.360 states that a dismissal for failure to timely bring an action to trial is "mandatory" and is "not subject to extension, excuse, or exception except as expressly provided by statute." (§ 583.360, subd. (b).)

Viewing the court's "no discretion" statement in light of its citation to these statutes, the court was communicating that it was dismissing Bonano's lawsuit under the five-year mandatory dismissal statute, as opposed to the two- or three-year discretionary rule. Dismissal for failure to bring an action to trial within five years is generally described as mandatory and is often contrasted with the discretionary dismissals for two- or three-year delays set forth in section 583.420. (See *Hughes, supra*, 5 Cal.App.4th at p. 71; see also 6 Witkin, Cal. Procedure (5th ed. 2008), Proceedings Without Trial, § 315, pp. 769-770.) Read in this context, the court's statement that it lacked discretion did not negate that the court had initially complied with applicable statutes in calculating whether the five-year rule applied, including whether any of the asserted tolling periods made it "impossible, impracticable, or futile" to bring the case to trial. (§ 583.540, subd. (c).) Once the court determined these tolling periods did not sufficiently reduce the period to below the five-year rule, the court found that dismissal was mandatory and it had no discretion to select a different result. This conclusion was proper.

Moreover, it has long been settled that a trial court has discretion in determining the "impossible, impracticable, or futile" tolling factor (see *Moran v. Superior Court* (1983) 35 Cal.3d 229, 237-238; *Hughes, supra*, 5 Cal.App.4th at pp. 66-67; *Brunzell*

Constr. Co. v. Wagner (1970) 2 Cal.3d 545, 555), and we are required to presume this experienced trial judge understood that it had this discretion. (See *Wilson, supra*, 34 Cal.3d at p. 563.) A court's judgment is presumed correct, and a silent or ambiguous record does not establish the failure to consider the relevant factors. (*Ibid.*)

DISPOSITION

Judgments affirmed. Appellant to bear respondents' costs on appeal.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.