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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

KURT GREENWAY,

Plaintiff and Appellant,

v.

ROBERT KENT,

Defendant and Respondent.

E054828

(Super.Ct.No. BBCHS00948)

OPINION

APPEAL from the Superior Court of San Bernardino County. Marsha Slough,
Judge. Affirmed.

Law Offices of Peter H. Bonis, Peter H. Bonis; Benedon & Serlin, Douglas G.
Benedon and Gerald M. Serlin for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith and John S. Lowenthal for Defendant and
Respondent.

I

INTRODUCTION

Plaintiff Kurt Greenway appeals from a judgment dismissing his action against

defendant Robert Kent for failure to bring the action to trial within five years. (Code Civ. Proc., §§ 583.310, 583.360.)¹ Plaintiff argues that the trial court abused its discretion in determining that plaintiff had not exercised “reasonable diligence” to bring his case to trial within the statutory period.

We conclude the trial court did not abuse its discretion in dismissing the case based on plaintiff’s failure to bring the case within five years. We affirm the judgment of dismissal.

II

FACTS AND PROCEDURAL BACKGROUND

On April 7, 2006, plaintiff filed an action against defendant for battery and negligence in San Bernardino Superior Court, Big Bear District.

Plaintiff alleges that, during a weekend trip on April 16-17, 2004, defendant consumed an entire bottle of bourbon, grabbed him in a headlock, ran him head first into a wall, and then threw him to the floor and encouraged everyone in the room to join him in “piling on” plaintiff. As a result, plaintiff, a dentist practicing in Riverside County, claims he suffered severe injuries and also economic damages. Defendant, an attorney licensed in California, resides in New York.

After defendant’s motion to strike was denied, defendant filed an answer to the complaint denying all allegations.

¹ Unless otherwise noted, all statutory references are to the Code of Civil Procedure.

Thereafter, a series of case management conferences took place between October 2006 to May 2010, during which discovery was ongoing. On November 18, 2008, defendant filed a motion to compel further responses by plaintiff to special interrogatories, which was granted by the court on January 9, 2009.

Subsequently, defendant made three separate motions requesting monetary and terminating sanctions dismissing the entire action, or in the alternative evidentiary sanctions, for plaintiff's failure to comply with the court's motion to compel. The first motion was filed on March 10, 2009, and the court granted monetary sanctions on May 1, 2009, and ordered plaintiff to comply with the prior motion to compel. Defendant made a second motion requesting monetary and terminating sanctions on June 17, 2009. The court again granted monetary sanctions on July 31, 2009, and ordered plaintiff to comply with the prior motion to compel. On February 11, 2010, the defendant made a third motion, again requesting monetary and terminating sanctions. On May 7, 2010, the court granted defendant's third motion; however, the court did not issue any monetary sanctions this time, and only issued another order for plaintiff to comply with the prior motion to compel.

Also on May 7, 2010, the presiding judge at the sanctions hearing, Judge Gilbert Ochoa, set the trial for October 11, 2011, six months after the expiration of the five-year statutory period.

In the declaration in opposition to defendant's motion to dismiss, plaintiff claims that during the unreported chambers conference held on that day, Judge Ochoa stated: "I am setting the matter for trial in October of 2011 because that was the first trial date I

have available and I have no earlier dates available. I could not hear the case earlier even if I wanted to.” During oral argument before the trial court regarding the dismissal, plaintiff claimed that Judge Ochoa knew he was setting the trial date beyond the statutory period.

On January 6, 2011, the case was reassigned to the Victorville branch of the San Bernardino Superior Court and to Judge Marsha G. Slough.

On May 19, 2011, defendant filed a motion to dismiss plaintiff’s complaint for failure to prosecute the case within five years. Plaintiff opposed the motion, arguing that there was a five-month period where the court did not have jurisdiction over the out-of-state defendant and court congestion made it impractical and impossible to bring the case to trial for the first four years. On July 21, 2011, the court heard and granted defendant’s motion to dismiss, finding that plaintiff did not take affirmative action to demonstrate an effort to bring the matter timely to trial.

Plaintiff filed a notice of appeal on October 21, 2011.

III

DISCUSSION

A. General Principles

1. Five-Year Dismissal Statute

Under section 583.310, “[a]n action shall be brought to trial within five years after the action is commenced against the defendant.” Section 583.360 goes on to state that “(a) [a]n action shall be dismissed by the court on its own motion or on motion of the defendant, after notice to the parties, if the action is not brought to trial within the time

prescribed in this article. [¶] (b) The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute.”

Section 583.340 provides for excuses or extensions of the five-year period, stating: “In 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.*” (Italics added.) Plaintiff’s argument on appeal for dismissal of the trial court’s judgment rests on section 583.340, subdivision (c).

2. “Reasonable Diligence” Required for the Impracticability Exception to Apply

Under section 583.340, subdivision (c), “the trial court must determine what is impossible, impracticable, or futile ‘in light of all the circumstances in the individual case, including the acts and conduct of the parties and the nature of the proceedings themselves. [Citations.] The critical factor in applying these exceptions to a given factual situation is whether the plaintiff *exercised reasonable diligence in prosecuting his or her case.*’ [Citations.] (Italics added.)” (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 731.) What is impossible, impracticable, or futile is determined in light of all the circumstances of a case, and must be liberally construed, consistent with the policy favoring trial on the merits. (*Sanchez v. City of Los Angeles* (2003) 109 Cal.App.4th 1262, 1270.) The plaintiff has the burden to: (1) prove a circumstance of impracticability; (2) demonstrate a causal connection between that circumstance and

failure to move the case to trial; and also (3) *prove that he has “exercised ‘reasonable diligence’ in prosecuting [his or her] case.”* (*Tamburina v. Combined Ins. Co. of America* (2007) 147 Cal.App.4th 323, 336.)

B. Standard of Review – Abuse of Discretion

The determination “of whether the prosecution of an action was indeed impossible, impracticable, or futile during any period of time, and hence, the determination of whether the impossibility exception to the five-year statute applies, is a matter within the trial court’s discretion. Such determination will not be disturbed on appeal unless an abuse of discretion is shown. [Citations.]” (*Hughes v. Kimble* (1992) 5 Cal.App.4th 59, 71.) Reversible abuse of discretion “exists only if there is no reasonable basis for the trial court’s action, so that the trial court’s decision exceeds the bounds of reason. [Citations.]” (*Sanchez v. City of Los Angeles, supra*, 109 Cal.App.4th at p. 1271.) Thus, the issue before us is whether plaintiff has shown that there was no reasonable basis for the trial court to dismiss the action for failure to bring the claim within the statutory period.

C. Issues Raised by Plaintiff on Appeal

Plaintiff raises three contentions on appeal. First, he argues that it was impossible and/or impracticable to bring the case to trial within the five-year statutory period. Second, plaintiff argues that he met his burden to show reasonable diligence in qualifying for the extension under section 583.340, subdivision (c). Lastly, plaintiff asserts that the trial court abused its discretion in determining that he did not meet his burden of

reasonable diligence because plaintiff did not file a motion specifically to set the trial date.

D. Scope of Review is Limited to Reasonable Diligence Analysis

Our review of the trial court's action focuses on whether there was sufficient basis for the trial court to conclude that plaintiff failed to exercise reasonable diligence in bringing the case to trial. Although plaintiff makes additional arguments in his appeal, the issue of reasonable diligence is dispositive of the other claims.

The trial court did not delve in-depth into the first and second factors of the *Tamburina* analysis, which deal with whether there was proof of a circumstance of impracticability, and whether there was a causal connection between that impracticability and the delay in bringing the case to action within the statutory period. The court's dismissal rested primarily on the third factor: whether plaintiff proved that he had "exercised 'reasonable diligence' in prosecuting [his or her] case." (*Tamburina v. Combined Ins. Co. of America, supra*, 147 Cal.App.4th at p. 336.) We assume that the trial court accepted plaintiff's claim that there was impracticability causally connected to the delay.

E. Motion to Specially Set the Trial Date

Plaintiff argues that the court abused its discretion by holding that he should have brought a motion to specially set the case for trial before Judge Ochoa before the expiration of the statutory period. In particular, plaintiff emphasizes the trial court's statement that in order for plaintiff to show reasonable diligence and avoid dismissal, he

would have had to bring a motion to set his case specially for trial and let that motion be denied.

Plaintiff asserts that in a chambers conference, Judge Ochoa stated in no uncertain terms that October 11, 2011, was the first date available on his schedule to try the case, and that he could not hear it earlier if he wanted to. Plaintiff claims that the trial court imposed a burden to bring a futile and potentially frivolous motion, and this was an abuse of discretion.

The discussion with Judge Ochoa regarding the scheduling of the trial date was held in chambers and the appellate record contains no transcript of the conference. Thus, it is impossible for this reviewing court to evaluate plaintiff's claim. (*In re Marriage of Lionberger* (1979) 97 Cal.App.3d 56, 61.) Judge Slough held that there was "absolutely no reason to dispute that that is exactly how [the discussion regarding scheduling] came down." We defer to the trial court's holding that there is no reason to dispute the contents of the in-chambers discussion with Judge Ochoa.

However, even accepting that October 11, 2011, was the earliest date that Judge Ochoa could have heard the case, plaintiff is not absolved of his duty to exercise reasonable diligence. In *Wales v. Rodriguez* (1988) 206 Cal.App.3d 129, the plaintiff's attorney requested a trial date and was told no earlier date was available. Subsequently, the plaintiff's attorney did nothing further to obtain a trial date within the statutory period. The *Wales* court concluded that the plaintiff "was not entitled to assume that a motion to specially set would have been futile. His failure to so move was fatal." (*Id.* at

p. 133.) As in *Wales*, plaintiff is not entitled to assume that a motion to specially set would have been ineffective.

Plaintiff argues that making the motion after Judge Ochoa had specifically stated he could not hear the case any earlier would have been unwise. Plaintiff claims that imposing this burden would expose him to contempt and sanctions. However, “counsel must make his record for the Court of Appeal at the risk of a measure of annoyance to the trial judge.” (*Gaspar v. Georgia Pac. Corp.* (1967) 248 Cal.App.2d 248, 254.) As the trial court held, making the motion would have shown an affirmative action by plaintiff on the record demonstrating that plaintiff was trying to bring the matter to trial within the statutory period.

F. Plaintiff Did Not Act with Reasonable Diligence

The level of diligence required of plaintiff increases as the five-year deadline approaches. (*Tamburina v. Combined Ins. Co. of America, supra*, 147 Cal.App.4th at p. 336.) Judge Ochoa set the trial date at the hearing on May 7, 2010, 11 months before the five-year statutory deadline. During the 11-month interim, plaintiff did not make any effort to advance the trial date in compliance with the statutory period. Plaintiff failed to meet the heightened level of diligence required to bring the case to trial prior to the expiration of the five-year deadline.

The *Sanchez* court held that, irrespective of the plaintiff’s acceptance of the selected trial date, “there was still ample time after that conference to bring a motion to advance the trial date. Plaintiffs missed that opportunity as well. ““When a plaintiff possesses the means to bring a matter to trial before the expiration of the five-year period

by filing a motion to specially set the matter for trial, plaintiff's failure to bring such motion will preclude a later claim of impossibility or impracticability." [Citation.]' [Citation.]" (*Sanchez v. City of Los Angeles, supra*, 109 Cal.App.4th at pp. 1273-1274.) Plaintiff should still make a motion to ensure he is doing everything he can to avoid dismissal. (*Central Mutual Ins. Co. v. Executive Motor Home Sales, Inc.* (1983) 143 Cal.App.3d 791, 795.)

We conclude that the trial court did not abuse its discretion in dismissing plaintiff's action for failure to bring the claim within five years. There was a reasonable basis for the trial court's finding that plaintiff failed to show that he acted with reasonable diligence in bringing the case to trial as required under section 584.340, subdivision (c) to show that it was "impossible, impracticable or futile."

IV

DISPOSITION

The judgment is affirmed. Defendant and respondent Robert Kent is awarded his costs on appeal.

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CODRINGTON

J.

We concur:

HOLLENHORST

Acting P. J.

McKINSTER

J.