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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MANUEL JOHN SOUZA, JR.,

Plaintiff and Appellant,

v.

KONA COAST RESORT OWNERS  
ASSOCIATION et al.,

Defendants and Respondents.

F062742

(Fresno Sup. Ct. No.  
08CECG03239)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. F. Brian Alvarez, Judge.

Rodney C. Haron for Plaintiff and Appellant.

Law Offices of Thomas J. Burns and Robert Bassett for Defendants and Respondents.

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## **INTRODUCTION**

Appellant Manuel John Souza, Jr., a Central California resident, appeals from an order of dismissal without prejudice in a negligence action arising from personal injuries sustained at a condominium complex in the State of Hawaii. The superior court's December 16, 2010, minute order of dismissal followed the superior court's January 20, 2010, formal order staying the action on the grounds of an inconvenient forum (Code Civ. Proc., §§ 396b, subd. (a), 410.30). We affirm.

## **STATEMENT OF THE CASE**

On September 19, 2008, appellant Manuel John Souza, Jr., filed a first amended complaint in Fresno Superior Court for personal injuries based on premises liability in the State of Hawaii.<sup>1</sup> The first amended complaint named Kona Coast Resort Owners Association, Shell Vacations LLC, Keauhou Gardens, Jerry and Mary Goggin, and Does 1 to 100 as defendants and prayed for monetary relief.

On October 30, 2009, respondents Shell Vacations LLC and Kona Coast Resort Owners Association filed a motion contesting venue.

On January 20, 2010, the court filed a tentative ruling granting the motion of Kona Coast Resort Owners Association and Shell Resorts LLC.

On October 12, 2010, the court continued a case status conference for further proceedings on an order to show cause and advised appellant's counsel that the matter would be dismissed if the defendants were not served or a motion for change of venue was not filed.

On December 15, 2010, appellant's counsel filed a declaration in opposition to the order to show cause.

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<sup>1</sup> Although the record on appeal is not clear on this point, it appears that appellant filed his action approximately two years after the injuries occurred.

On December 16, 2010, the court conducted a contested hearing on the order to show cause and ruled by an order to show cause minute order: “This case is dismissed without prejudice.”

On June 13, 2011, appellant filed a notice of appeal from the December 16, 2010, minute order dismissing the action without prejudice.<sup>2</sup>

On September 27, 2011, appellant filed a motion requesting that this court take judicial notice of the applicable statutes of limitations for the commencement of personal injury actions in the Hawaii and Illinois. On October 14, 2011, respondents filed written opposition to the motion on the ground that application of the statutes of limitation of Hawaii and Illinois was never properly raised before the trial court. On October 18,

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<sup>2</sup> Appellant appealed from the December 16, 2010, minute order dismissing the action without prejudice. An order of dismissal is an appealable judgment if it is in writing, signed by the court, and filed in the action. (Code Civ. Proc., § 581d; *Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 565; *Etheridge v. Reins Internat. California, Inc.* (2009) 172 Cal.App.4th 908, 913.) The order filed December 16, 2010, was not signed by the court and therefore did not comply with the requirements of Code of Civil Procedure section 581d. (*Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1577-1578.) On October 13, 2011, this court filed an order directing appellant to correct his brief to “state that the judgment appealed from is final, or explain why the order appealed from is appealable.” On October 21, 2011, appellant filed an opening brief stating: “The judgment is final. It appears the court dismissed the action for a perceived failure to serve process on all named defendants within two years or commence the action in an alternative forum and/or the failure to bring the action to trial within two years.” Appellant’s corrected statement of appealability did not address the technical requirements of Code of Civil Procedure section 581d. To promote the orderly administration of justice, we will order the trial court to enter a judgment of dismissal nunc pro tunc and will treat the notice as a notice of appeal from the judgment to be entered. (*Evola v. Wendt Construction Co.* (1958) 158 Cal.App.2d 658, 660; *Zellers v. State of California* (1955) 132 Cal.App.2d 56, 57; *Coe v. City of Los Angeles* (1994) 24 Cal.App.4th 88, 91, fn. 3.)

2011, this court deferred ruling on the motion pending consideration of the appeal on its merits.<sup>3</sup>

On December 22, 2011, appellant filed another motion requesting this court take judicial notice of the reporter's transcript of recorded proceedings in this action held in Fresno Superior Court on December 16, 2010. !(Manila Folder)! On January 10, 2012,

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<sup>3</sup> Judicial notice may be taken of the statutory law of any state of the United States. (Evid. Code, § 452, subd. (a).) The reviewing court shall take judicial notice of each matter properly noticed by the trial court. (Evid. Code, § 459, subd. (a)(1).) The reviewing court may take judicial notice of any matter specified in Evidence Code section 452. (Evid. Code, § 459, subd. (a).) If the matter was not previously judicially noticed in the action, the reviewing court may still take judicial notice of the matter. However, the appellate court is required to afford each party a reasonable opportunity to present information relevant to the propriety of taking judicial notice of the matter and the tenor of the matter to be noticed. (*People v. Terry* (1974) 38 Cal.App.3d 432, 439, disapproved on another point in *People v. Gainer* (1977) 19 Cal.3d 835, 846, 852.) Nevertheless, only evidence relevant to a material issue in the case is admissible by judicial notice. (*People ex rel Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422-423, fn. 2; *Scruby v. Vintage Grapevine, Inc.* (1995) 37 Cal.App.4th 697, 701; *Del Mar Terrace Conservancy, Inc. v. City Council* (1992) 10 Cal.App.4th 712, 744, disapproved on another point in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.) In this case, the record does not definitively reflect whether the two-year statutes of limitation for Hawaii and Illinois were presented in the trial court. Respondents maintain the statutes of limitation were not raised in the superior court. Appellant's motion for judicial notice implies the statutes of limitation are relevant to "[t]he central issue of this appeal," i.e., "the dismissal of the underlying action by the trial court when the action was stayed on *forum non conveniens* grounds in a prior ruling by Honorable Judge Franson occurring approximately one year prior to the ultimate dismissal of this action by the Honorable Judge Alvarez." (Original italics.) Reviewing courts generally do not take judicial notice of evidence not presented to the trial court. Normally, when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered. (*Hahn v. Diaz-Barba* (2011) 194 Cal.App.4th 1177, 1193.) Nevertheless, a civil action should not be dismissed on the basis of an inconvenient forum where there is no alternative forum in which the matter can be tried. (*Delfosse v. C.A.C.I., Inc.-Federal* (1990) 218 Cal.App.3d 683, 688-689.) The Hawaii and Illinois statutes of limitation are relevant to such a determination, and the statutes may be judicially noticed in this appeal.

this court deferred ruling on this second motion for judicial notice pending consideration of the appeal on its merits.<sup>4</sup>

### **STATEMENT OF FACTS**<sup>5</sup>

In August 2006, appellant rented a condominium in the Keauhou Gardens Kona Coast Resort (“Resort”) in Kailua-Kona, Hawaii. The Resort offered condominiums on a timeshare basis. Appellant’s rental agreement was for the period September 15 through 22, 2006. On September 19, 2006, appellant descended a staircase in the common area of the Resort. The stair step tilted forward, appellant lost his balance, and he fell down the remaining seven steps to the landing at the base of the staircase. Appellant sustained injuries to his back and ankle, necessitating immediate and long term care and medical treatment.

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<sup>4</sup> Under Evidence Code sections 452, subdivision (d)(1) and 459, subdivision (a), a court may take judicial notice of the records of any court of this state, and the record in question is relevant to appellant’s issue on appeal. Accordingly, we shall grant the motion to take judicial notice of the proffered reporter’s transcript of the recorded proceeding held December 16, 2010.

<sup>5</sup> The record on appeal does not include pleadings or other documents from which the relevant facts might be gleaned. Generally, factual matters that are not part of the appellate record will not be considered on appeal and should not be referenced in the briefs. (*Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 632; *In re B.D.* (2008) 159 Cal.App.4th 1218, 1239.) Nevertheless, although briefs are outside the record, we may take the factual assertions in a party’s appellate brief as admissions. (*Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, 444, fn. 4.) Thus, the facts in this opinion are summarized from appellant’s opening brief on appeal. We note the record on appeal does not independently recite or confirm the date of appellant’s injuries.

## DISCUSSION

### **I. THE SUPERIOR COURT HAD JURISDICTION OVER AN ACTION ARISING FROM PERSONAL INJURIES SUSTAINED IN ANOTHER STATE**

A question arises as to whether the superior court had jurisdiction in this matter because the underlying injuries took place outside the territorial limits of California.

A court of this state may exercise jurisdiction on any basis consistent with the Constitution of California or the United States. (Code Civ. Proc., § 410.10.) This statute manifests an intent to exercise the broadest possible jurisdiction, limited only by constitutional considerations. The federal constitution permits a state to exercise jurisdiction over a nonresident defendant if the defendant has sufficient minimum contacts with the forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. The substantial connection between the defendant and the forum state necessary for a finding of minimum contacts must come about by an act of the defendant purposefully directed toward the forum state. (*Snowey v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1062; *Roman v. Liberty University, Inc.* (2008) 162 Cal.App.4th 670, 677-678; *Archdiocese of Milwaukee v. Superior Court* (2003) 112 Cal.App.4th 423, 435.) Stated another way, the forum state may not exercise jurisdiction over a nonresident unless his or her relationship to the state is such as to make the exercise of such jurisdiction reasonable. (*Integral Development Corp. v. Weissenbach* (2002) 99 Cal.App.4th 576, 583.)

California law reflects an overriding state policy of assuring California residents an adequate forum for the redress of grievances. (*Van Keulen v. Cathay Pacific Airways, Ltd.* (2008) 162 Cal.App.4th 122, 129.) On October 30, 2009, respondents filed a motion contesting venue, as opposed to the jurisdiction of the superior court.<sup>6</sup> On

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<sup>6</sup>The record on appeal does not include a copy of the original complaint, first amended complaint, the motion contesting venue, or responsive pleadings to that motion.

January 13, 2010, the Honorable Donald R. Franson, Jr., judge of the superior court, heard arguments on the motion and adopted his tentative ruling, which stated:

“Defendants have incorrectly characterized and addressed this motion as one contesting venue based on California Code of Civil Procedure (CCP) section 396b. CCP section 410.30(a) states: ‘When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just.’ A state court cannot transfer venue to another state; it must dismiss the action (outright or conditionally) or stay the action. (*Thomson v. Continental Ins. Co.* (1967) 66 Cal.2d 738, 744.) The preference is for stay rather than dismissal. (*Ferreira v. Ferreira* (1973) 9 Cal.3d 824, 841.)

“There are two general categories of inconvenient forum factors. They are: (1) whether the alternate forum is a suitable place for trial; and if so, (2) the private interest of the litigants and the interest of the public in retaining the action for trial in California. (*Stangvik v. Shiley* (1991) 54 Cal.3d 744,750.) As to the first factor and a defendant’s choice to incorporate or do business in California, there is a presumption of convenience to a defendant that follows from residence in California, but it is not conclusive, and a resident defendant may overcome it by evidence that the alternate jurisdiction is a more convenient place for trial. (*Id.* at 756.) As to the second factor, the private interest issues are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. (*Id.* at 751.) The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation. (*Ibid.*) The cumulative connection of

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We only have summary descriptions of these pleadings, as set forth in a superior court docket query report. A judgment or order of the trial court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent. The appellant has the affirmative duty to show error by an adequate record. (*Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435.)

the defendant and its conduct within the state is relevant in deciding whether retention of an action would place an undue burden on the courts, a court cannot look only to such circumstances; matters like the complexity of the case, whether it would consume considerable court time, and the condition of the court's docket also are relevant to the issue. (*Id.* at 761.)

“For the first factor, although plaintiff is a resident of Fresno and his medical treatment has been conducted in Fresno, this is a premises liability action[,] the premises are in Hawaii, the premises need to be inspected, and defendants' witnesses are in Hawaii. Thus, these facts show that the alternate forum is very suitable for trial. Also, defendants are not California residents. Kona Coast is a nonprofit association with a principal place of business in Kailua-Kona, and Shell is a Delaware limited liability company, with a business address in Illinois. Thus these facts show that the alternate forum is suitable for trial. As to the second factor, Hawaiians have a stronger interest in a premises liability action involving plaintiff's vacation at a Hawaiian condo, and defendants have much more extensive contacts with Hawaii than with California.”

Code of Civil Procedure section 904.1, subdivision (a)(3) states: “An appeal, other than in a limited civil case, may be taken from any of the following: ... (3) From an order ... granting a motion to stay the action on the ground of inconvenient forum ....” In this case, appellant did not appeal from the superior court's January 13, 2010, law and motion minute order or January 20, 2010, formal order granting respondents' motion to stay the action on the ground of inconvenient forum. Rather, on June 13, 2011, appellant appealed from the December 16, 2010, minute order dismissing the action.

“California follows a ‘one shot’ rule under which, if an order is appealable, appeal must be taken or the right to appellate review is forfeited.” (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 761, fn. 8.) The powers of a reviewing court do not include the power to review any decision or order from which an appeal might have been taken but was not. (*Id.* at p. 761, fn. 8, citing Code Civ. Proc., § 906.) If a judgment or order is appealable, an aggrieved party must file a timely appeal or forever use the opportunity to obtain appellate review. (*Silver v. Pacific American Fish Co., Inc.* (2010) 190 Cal.App.4th 688, 693.)

Appellant did not file a timely notice of appeal from the superior court's January 13, 2010, minute order or January 20, 2010, formal order granting respondents' motion to stay the action on the ground of inconvenient forum. Thus, review of the stay order is no longer available. However, review of the dismissal order is available.

**II. THE SUPERIOR COURT DID NOT ERRONEOUSLY DISMISS THE STAYED ACTION WHERE IT COULD NOT BE PROSECUTED IN AN ALTERNATE FORUM**

Appellant contends the trial court erroneously dismissed the stayed action because it could not be prosecuted in an alternate forum.

Appellant specifically contends a motion for forum non conveniens presupposes that a suitable alternate forum exists. He maintains that, at the time the action was stayed, neither Hawaii nor Illinois was a suitable alternate forum because the respective two-year statutes of limitation had run in those states. He further contends that proof that all defendants are subject to jurisdiction in the alternate forum is a prerequisite to granting a motion for forum non conveniens. Appellant's contention creates a quandary at this stage of the proceedings because appellant did not timely challenge the trial court's January 20, 2010, stay order, which was independently appealable.

**A. Declaration of Appellant's Counsel in Opposition to Order to Show Cause**

On December 15, 2010, appellant's counsel filed a declaration in superior court stating:

“2. [Plaintiff has] been trying to resolve this dilemma. First, extensive legal research was done on the issue of transferring this matter to Federal Court, unfortunately, said transfer motion can only be filed by the Defendant and only then if it is done within sixty days of service;

“3. We researched the viability of transferring this matter to Simi Valley[,] California, the last address of an in state designated agent for service of process, said agent having resigned prior to the filing of this action, or

alternatively to Sacramento, California where the Secretary of State resides and is proper agent for service of a corporation without a designated agent within the State. However, since this corporate agent has been served and appeared without making a special appearance, it would appear that the proper venue in this matter is actually Fresno[,] California as to the moving defendants but the court has ruled it an inconvenient forum.

“4. Ultimately, we see no way to transfer venue in this matter given [J]udge Franson’s order staying the matter. It appears to us the only avenue left open to us is to serve [t]he remaining defendants, and ask that they file a motion to transfer this matter to federal court. Such transfer motion is only available to the defendant and is not available to the plaintiffs. Further, the moving defendant must make such a motion within thirty days of service or they [lose] their ability to do the same. That would mean[] the only defendants that can possibly file a motion to transfer are the remaining defendants. However, again, there is currently a stay of this matter in place and we are unable to serve the other defendants to accomplish this.

“5. Therefore, the plaintiff respectfully requests that the Honorable Judge Alvarez lift the stay to allow the plaintiffs to serve all other defendants in this matter. Otherwise, the plaintiff’s hands are tied.”

At the December 16, 2010, contested hearing, appellant repeatedly requested the court for permission to appear before Judge Franson to address the issue of the stay. However, the trial court noted that December 16 was Judge Franson’s last day on the trial bench and granted the dismissal without prejudice.

**B. Substantive Law of Forum Non Conveniens**

“Forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere. [Citations.]” (*Stangvik v. Shiley, Inc., supra*, 54 Cal.3d at p. 751.) The doctrine has been codified in Code of Civil Procedure section 410.30. The party bringing a motion to stay or dismiss based on forum non conveniens bears the burden of proof (*Stangvik v. Shiley, Inc., supra*, 54 Cal.3d at p. 751) and must show that “California is a seriously

inconvenient forum.” (*Ford Motor Co. v. Insurance Co. of North America* (1995) 35 Cal.App.4th 604, 611.)

The court deciding the motion must first determine whether the alternative forum proposed by the moving party is a “ ‘suitable’ ” place for trial. (*Stangvik v. Shiley, Inc., supra*, 54 Cal.3d at p. 751.) This threshold requirement is satisfied if the defendant is subject to or agrees to submit to the jurisdiction of the alternative forum, the statute of limitations has not expired in the alternative forum, or the defendant agrees not to rely on it, and some remedy is available in the alternative forum. (*Id.* at pp. 752, 753; *Roulier v. Cannondale* (2002) 101 Cal.App.4th 1180, 1186.) The court’s determination on this issue is reviewed de novo. (*Roulier v. Cannondale, supra*, at p. 1186.)

If the court finds the alternative forum suitable, “the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California.” (*Stangvik v. Shiley, Inc., supra*, 54 Cal.3d at p. 751.) Courts reviewing the public and private interest issues have listed as many as 25 factors to be considered. (*Great Northern Ry. Co. v. Superior Court* (1970) 12 Cal.App.3d 105.) The California Supreme Court has summarized the key factors:

“The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation. [Citations.]” (*Stangvik v. Shiley, Inc., supra*, 54 Cal.3d at p. 751.)

The choice of a California forum by a resident plaintiff is an important private interest factor. An action brought by a California resident may not be dismissed on forum non conveniens grounds except in “extraordinary circumstances.” (*Century*

*Indemnity Co. v. Bank of America* (1997) 58 Cal.App.4th 408, 411.) Even in considering only a stay, the court must give substantial weight to a resident plaintiff's choice of forum. (*Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1675; see also *Ford Motor Co. v. Insurance Co. of North America, supra*, 35 Cal.App.4th at p. 610; *Northrop Corp. v. American Motorists Ins. Co.* (1990) 220 Cal.App.3d 1553, 1561.) The court's balancing of the public and private interest factors is entitled to substantial deference, and we review it for abuse of discretion. (*Stangvik v. Shiley, Inc., supra*, 54 Cal.3d at p. 751; *Roulier v. Cannondale, supra*, 101 Cal.App.4th at p. 1188.)

“A court has exercised its discretion appropriately when ‘the act of the lower tribunal is within the range of options available under governing legal criteria in light of the evidence before the tribunal.’ [Citation.] In exercising its discretion, however, the court must bear in mind that the moving party bears the burden of proving that California is an inconvenient forum.... [¶] ... [¶] [T]he inquiry is not whether [the other state] provides a *better* forum than does California, but whether California is a *seriously inconvenient* forum. [Citation.] Unless defendants met their burden, the trial court necessarily abused its discretion.” (*Ford Motor Co. v. Insurance Co. of North America, supra*, 35 Cal.App.4th at pp. 610-611, original italics.)

### **C. Procedural Law of Appeal**

With respect to the order of dismissal, the defendant has the burden of proof in a forum non conveniens motion. In analyzing such a motion, the first step is determining whether the alternate forum is a suitable place for trial. (*Hahn v. Diaz-Barba, supra*, 194 Cal.App.4th at p. 1187.) The availability of a suitable alternative forum for the action is critical. (*Morris v. AGFA Corp.* (2006) 144 Cal.App.4th 1452, 1464.) If it is a suitable place, the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California. The threshold issue of whether an

alternative forum is suitable is nondiscretionary, subject to de novo review. The threshold issue of suitability is determined by a two-pronged test. First, there must be jurisdiction over the defendant. Second, there must be assurance that the action will not be barred by a statute of limitations. A forum is suitable where an action can be brought, although not necessarily won. (*Hahn v. Diaz-Barba, supra*, 194 Cal.App.4th at p. 1187.)

“It is well settled under California law that the moving parties satisfy their burden on the threshold suitability issue by stipulating to submit to the jurisdiction of the alternative forum and to waive any applicable statute of limitations. Our courts rely on the Judicial Council comment to section 410.30, which declares that a forum is suitable if the defendant can be subjected to the jurisdiction of the courts in the alternative forum and the statute of limitations poses no bar. [Citations.]” (*Hahn v. Diaz-Barba, supra*, 194 Cal.App.4th at p. 1190.)

Ordinarily an action cannot be dismissed on the ground of inconvenient forum. This rule reflects an overriding state public policy that assures California residents that they can obtain redress for their grievances in California courts, which are maintained for their benefit. (*Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 487.) The record on appeal in this case does not include respondents’ motion to contest venue and supporting papers, appellant’s written opposition to the motion and supporting papers, or a reporter’s transcript of the contested hearing conducted by Judge Franson on January 13, 2010. Therefore, we cannot precisely ascertain what source materials led the superior court to grant the stay, stating in relevant part: “ ... Hawaiians have a stronger interest in a premises liability action involving plaintiff’s vacation at a Hawaiian condo, and defendants have much more extensive contacts with Hawaii than with California.”

Although appellant’s counsel claimed his client’s hands were “tied” after Judge Franson’s ruling, the record does not reflect any specific action by appellant to address the stay between January 20, 2010 (the date of Judge Franson’s formal order) and

December 15, 2010 (the date of appellant’s counsel’s declaration in opposition to order to show cause). The superior court docket does not indicate that appellant moved for reconsideration, applied for some other form of relief in the trial court, or filed a notice of appeal to challenge Judge Franson’s order, as permitted under Code of Civil Procedure section 904.1, subdivision (a)(3). Moreover, to conclude that the trial court erred in granting the stay would require some measure of speculation on the limited record on appeal before us in this appeal.

At the contested December 16, 2010, hearing before Judge Alvarez, respondents’ counsel observed that a motion for reconsideration or a transfer of the matter to federal court could have been accomplished within the preceding year. Respondents’ counsel further acknowledged: “Quite frankly, this case should have been brought in Hawaii where this accident happened .... And so at this point ... that’s the issue that keeps coming up. And there’s been ample time for this Court. [T]here was a notation on the last court entry in the docket, that if this matter wasn’t transferred, that it was going to be dismissed today.” Respondents’ counsel went on to say: “I respectfully request that the matter be dismissed as to all defendants without prejudice ....”

As with any rule based in equity, there may be rare situations in which dismissals are warranted even though there is no alternative forum.<sup>7</sup> (*Delfosse v. C.A.C.I., Inc.-Federal, supra*, 218 Cal.App.3d at p. 690, fn. 5.) “[W]hile California’s policy favors trial on the merits, there comes a time when that policy is overridden by California’s policy requiring dismissal for failure to prosecute with reasonable diligence. As this is true for any action prosecuted in California courts, it must be true for an action initially filed in California court but stayed on forum non conveniens grounds. In short, California’s

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<sup>7</sup> We note that respondents’ counsel acknowledged at the December 16, 2010, hearing “that there is a proper forum” for appellant’s case and urged appellant’s counsel to “go find it without all of our clients’ and the Court’s time.”

interest in assuring an adequate forum for a California plaintiff is not absolute, and can be overcome when the plaintiff is unreasonably dilatory in prosecuting the action in the convenient forum. If, by a California plaintiff's lack of reasonable diligence in prosecuting its action, California has lost its interest in providing an adequate forum, an action originally stayed on forum non conveniens grounds may therefore be dismissed.” (*Van Keulen v. Cathay Pacific Airways, Ltd.*, *supra*, 162 Cal.App.4th at p. 130, original italics.)

On October 12, 2010, the superior court issued a minute order stating: “Motion for continuance granted[.] Court orders motion for continuance granted as to 12-16-10 9:06 Rm 401for OSCD, this will be the last continuance, if not served or a mtn for change of venue is done case will be dismissed.” At the December 16, 2010, hearing, defense counsel stated: “[T]his has been on the dismissal calendar for a year. All of these issues that are being discussed were addressed in the underlying motion. ...I have contacted my client after each of the dismissal hearings – and I believe there's been four or five. I contacted my client in regards to this case. [¶] ... And I would request that the Court go through – there was a notation on the last court entry in the docket, that if this matter wasn't transferred, that it was going to be dismissed today. And I would ask that the Court follow through with it.” Although the trial court did not expressly raise the issue of failure to prosecute, the court did observe at the December 16, 2010, hearing: “[T]his matter is 820 days old. And ... there's never been any service.”

The policy of preferring to dispose of litigation on the merits only comes into play when a plaintiff makes a showing of some excusable delay. A reviewing court may not reverse a trial court's order granting dismissal for dilatory prosecution unless the plaintiff meets the burden of establishing manifest abuse of discretion resulting in a miscarriage of justice. An appellate court may not substitute its own discretion for that of the trial court

and must uphold the dismissal order if the trial court has not abused its discretion. (*Van Keulen v. Cathay Pacific Airways, Ltd., supra*, 162 Cal.App.4th at p. 131.)

Respondent observes: “[A]t the time of the action’s dismissal, almost four and a half years after Appellant’s accident and almost two and a half years after the commencement of the case, Appellant had failed to file any motion to transfer venue, had failed to serve half of the defendants, and had failed to file any motion to lift the stay imposed by the trial court in January 2010. There is no evidence in the record showing that Appellant gave a reasonable explanation to the trial court as to why he could not proceed in Hawaii (or elsewhere), nor any evidence that he could not, in fact, have proceeded in an alternate forum....”

Appellant contends the trial court lacked authority to dismiss the stayed action for a failure to service when the action was pending for only 16 months. Appellant acknowledges “[a] trial court has discretion to dismiss an action for delay in prosecution if service is not made on defendant within two years of the filing of the original complaint or if the matter is not brought to trial within two years. (*Code Civ. Proc.*, § 583.420, subd. (a)(1), (2)(B).)” (Original italics.) Appellant nevertheless contends at length that the trial court has no discretion to dismiss an action pending for less than two years and that any computation of time for service must exclude any period where the action was stayed. (*Code Civ. Proc.*, § 583.420, subds. (b), (d); 583.420, subd. (b).) Appellant’s contention overlooks the trial court’s October 12, 2010, order, which at the very least suggested that service of unserved defendants or seeking of an alternate forum was still permissible, despite the stay. Appellant’s argument about the effect of the stay essentially relates back to the trial court’s January 20, 2010, order granting the stay. Appellant declined to seek review of that order and we have no power to review a

decision or order from which an appeal might have been taken but was not.<sup>8</sup> (*In re Baycol Cases I & II, supra*, 51 Cal.4th at p. 761, fn. 8; *Silver v. Pacific American Fish Co., Inc., supra*, 190 Cal.App.4th at p. 693.)

Moreover, in California, there is no requirement that the trial court make any express ruling on motions to stay or dismiss. With respect to such a motion, the appellate court reviews judicial action and not judicial reasoning. (*Hahn v. Diaz-Barba, supra*, 194 Cal.App.4th at p. 1188.) The minute order of December 16, 2010, did not set forth the trial court's reasoning but simply stated: "This case is dismissed without prejudice." In reaching this conclusion, the trial court could have reasonably concluded that appellant did not prosecute the action with reasonable diligence and failed to make a showing of some excusable delay. Although the clerk's transcript is somewhat sketchy, a docket report in the transcript does reflect that appellant initially filed his complaint on September 17, 2008, and filed a first amended complaint two days later. The docket entry dated October 12, 2010, advised plaintiff the action would be dismissed if the defendants were not served or venue was not changed. On December 15, 2010, plaintiff's counsel responded with a declaration stating that his client's hands were "tied" and service could not be effected because of the effect of the stay. Once again, the stay order was independently appealable but no appeal was taken from the formal order filed January 20, 2010.

Given the passage of time between the initial filing of the complaint in September 2008 to the dismissal in December 2010, the trial court did not abuse its discretion. This is particularly true in light of the stay order of January 20, 2010, the lapse of almost nine

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<sup>8</sup> Appellant contends on appeal that "[t]he order staying the action was facially valid which precluded Appellant from serving the amended complaint on the remaining defendants or otherwise prosecuting the action. [Citation.]" Judge Franson's ruling did not expressly set forth such prohibitions and appellant did not further question or challenge the ruling by timely motion in the superior court or by appeal in this court.

months after that stay order, the failure of appellant to timely challenge the stay order in the trial court and in this court, and the grant of another two-month continuance in October 2010. The latter continuance – expressly described by the superior court as “the last continuance” – clearly advised appellant to serve the defendants or move for a change of venue, subject to penalty of dismissal. No abuse of discretion occurred.

**DISPOSITION**

The trial court is directed to enter a judgment of dismissal nunc pro tunc. The judgment of dismissal is affirmed.

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Poochigian, J.

WE CONCUR:

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Wiseman, Acting P.J.

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Levy, J.