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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

NORMA ORTIZ-FERNANDEZ, Plaintiff and Appellant, v. LA CLINICA, Defendant and Respondent.	A162542 (Solano County Super. Ct. No. FCS039298)

Norma Ortiz-Fernandez appeals from a judgment dismissing her complaint against La Clinica, for failure to bring the case to trial within the mandatory time prescribed by Code of Civil Procedure sections 583.310 through 583.360.[1] We affirm.

BACKGROUND

I.

Proceedings from Filing of Complaint Through Prior Appeal

On February 3, 2012, Norma Ortiz-Fernandez (plaintiff) filed a complaint alleging she was severely injured when the back of the chair on which she was sitting gave way. She sued La Clinica (defendant) asserting causes of action for negligence, products liability, and premises liability.

[1] All statutory references are to the Code of Civil Procedure.

The history of the underlying case from the filing of the complaint through October 2016 is summarized in this court's opinion in *Ortiz-Fernandez v. La Clinica* (Oct. 29, 2019, A151141) [nonpub. opn.] (*Ortiz-Fernandez I*), and we do not repeat it here except to state that at a trial management conference on September 29, 2016, 10 days before the scheduled trial date, the court announced that on its own motion it would dismiss the case with prejudice on the grounds that plaintiff violated the local rule requiring her to file a case management report before the trial management conference. (*Ibid.*) The court issued a written order dismissing the case on October 24, 2016. (*Ibid.*)

After the dismissal order was entered, plaintiff filed a motion for reconsideration, which was denied in January 2017. On February 24, 2017, plaintiff filed a notice of appeal seeking to challenge the denial of the reconsideration motion. That appeal was dismissed on March 30, 2017, on the grounds that the underlying order was not appealable, and the resulting remittitur issued on May 30, 2017.

Meanwhile, on April 20, 2017, plaintiff timely appealed the October 2016 order of dismissal (*Ortiz-Fernandez I, supra,* A151141). We held that the dismissal of plaintiff's case was a disproportionately onerous sanction for plaintiff's local rule violation, and on that basis we vacated the dismissal and remanded the matter to the trial court. (*Ibid.*) The resulting remittitur issued on January 2, 2020, and was filed in the trial court on January 15, 2020.

II.

Proceedings After Remand

On January 30, 2020, the superior court served notice that the matter was reassigned for all purposes to the Honorable Alesia Jones, and that a trial setting conference was scheduled for April 30, 2020.

The April 30, 2020 trial setting was held by teleconference due to COVID-19.[2] The court asked plaintiff whether she was still demanding a jury trial. When plaintiff responded that she was, the court explained that jury trials were not currently being set, and stated, "we don't know when we're going to be able to resume jury trials." The court stated that it could not accommodate plaintiff's request for a jury trial in 2020, and later stated, "we're not anticipating that your jury trial will go in 2020; it may not go in 2021. We have no information at this time." The court continued the matter for trial setting to October 15, 2020 "so . . . we can give you what information that we have at that time as to when we can accommodate you for a jury trial." The court asked plaintiff to consider whether she wanted to proceed by court trial or attempt to resolve her claims through mediation and suggested that the parties could inform the court of their decision at the new trial setting date.

Despite the fact that the case had been pending for eight years by this point, neither defense counsel nor the trial court raised the question whether the five-year statute was a consideration in setting a trial date. Plaintiff, who at oral argument stated that she had been unaware of the five-year statute, did not raise the issue, either.

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[2] By that time, the Judicial Council had adopted rule 10(a) of the Emergency Rules of Court, which provides that for civil actions filed on or before April 6, 2020, the time to bring the action to trial is extended by six months.

On May 15, 2020, the Solano County Superior Court issued its Second Amended Standing Order Regarding Civil Matters During Emergency Operations (Effective May 18, 2020), ordering that civil jury trials between May 1 and July 2020 were continued and that all other civil matters would remain as currently calendared.

At the October 15, 2020 trial setting conference, plaintiff confirmed that she wanted a jury trial but did not rule out the possibility of resolving the matter through mediation or a court trial after she spoke with an attorney. Plaintiff, who had been representing herself in the matter since 2015, stated that she was "having conversations" with an attorney, who was drafting a contract for her to review and sign about the possibility of representation, and that she wanted to get a second attorney as well.[3] Plaintiff told the court that she needed "a month or so" to retain the attorney she was talking to, and during that time would be "still considering, . . . sending emails and phone calls with, . . . other potential attorneys as well." Defense counsel stated that defendant was open to resolving the case through mediation, adding, "We have long wanted to resolve the case. However that could be achieved we would like to do that. [¶] Ms. Ortiz and I had some exchanges during the summer. It didn't go anywhere. She wants counsel. We heard that this morning. Hopefully, counsel can be retained and continue the dialogue." The court put the matter over to January 28, 2021, for trial setting, to allow plaintiff to retain

[3] Plaintiff's initial attorney withdrew with court permission in September 2012. In February 2015, a month before the scheduled trial date, plaintiff's second attorney sought to withdraw, citing "irreconcilable differences." That request was granted in March 2015, and the case was continued four times as plaintiff tried without success to find a new lawyer. Eventually an October 2016 trial date was set. (*Ortiz-Fernandez I, supra,* A151141.)

attorneys, who could then appear and inform the court as to their availability for trial and their position as to conducting a jury or court trial.[4] Again, neither the trial court nor either of the parties raised the subject of the five-year statute at the October 2020 trial setting conference.

In advance of the January 28 trial setting, the parties filed case management statements, as they had been directed to do by the trial court.

Defendant filed its case management statement on January 12. Defendant contended that the case was subject to mandatory dismissal under section 583.310 of the Code of Civil Procedure for failure to bring the case to trial within five years and stated that it had filed a motion on those grounds that was scheduled for hearing on February 9. According to the register of actions, the motion, a memorandum of points and authorities, and a supporting declaration had been filed on January 6. Plaintiff filed an opposition memorandum on January 22.

Plaintiff filed her case management statement on January 27, stating that she was unavailable for trial until after June 16.

At the January 28 trial setting teleconference, the trial court on its own motion proposed continuing the trial setting to the date for the hearing on defendant's motion to dismiss. Defense counsel stated he had no objection, but "just for the record, I don't want to be accused later of being the one that has tried to delay." Plaintiff objected, stating, "I want a trial date today, please." The court overruled the objection and continued the trial setting to February 9.

In advance of the February 9 hearing, the court issued a tentative ruling granting defendant's motion to dismiss. After hearing argument from the parties, the court adopted its tentative ruling, and a written order

[4] Subsequent dates are in 2021 unless otherwise stated.

granting defendant's motion was filed on February 26. The trial court concluded that plaintiff's case, which was filed on February 3, 2012, reached the five-year mark on February 3, 2017, and that dismissal was appropriate on that basis alone.[5] The court further concluded that even if the court had lost jurisdiction over the matter when it entered the dismissal order on October 24, 2016, with the result that the five-year period was tolled starting on that date, the effect of the remand in January 2020 combined with the six-month extension as a result of the COVID-19 emergency meant that plaintiff was required to bring the matter to trial no later than January 4, 2021, but failed to do so.[6] The court concluded that plaintiff had not shown the application of any exception that would extend the time for her to bring the case to trial beyond January 2021. There was no stipulation by the parties to extend the deadline. And plaintiff failed to show that she was diligent in pursuing her duty to expedite the resolution of the case and that it was impossible, impracticable, or futile under the circumstances for her to bring the case to trial within the mandatory period. The court rejected the claim

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[5] As of February 3, 2017, plaintiff had not yet appealed from the October 24, 2016 order dismissing her case or the January 2017 denial of her motion for reconsideration.

[6] The court calculated as follows: From February 3, 2012, when the complaint was filed, to October 24, 2016, when the dismissal order was filed, is 4 years, 8 months and 21 days. So, as of October 24, 2016, three months and nine days remained of the initial five-year period established by section 583.310. When the remittitur issued on January 2, 2020, ending the period of tolling, less than six months of the original five-year period remained; therefore, under section 583.350, plaintiff had six months from the end of the tolling period to bring the matter to trial, which moved the deadline to July 3, 2020. Then, on April 6, 2020, the Judicial Council adopted rule 10(a) of the Emergency Rules of Court, which added six months to the time to bring a civil action to trial, for actions filed on or before April 6, 2020. Thus, the deadline for plaintiff to bring her case to trial was January 4, 2021.

that the COVID-19 pandemic allowed plaintiff to avoid dismissal based on its findings that during the pandemic plaintiff never reminded the court of the deadline to bring the case to trial or filed a motion to set the case for trial, and that as late as October 15, 2020, she requested more time to retain counsel.

Plaintiff timely appealed.

DISCUSSION

I.

Applicable Law and Standard of Review

Section 583.310 requires that "[a]n action shall be brought to trial within five years after the action is commenced against the defendant." Sections 583.320 through 583.350 set forth rules for computing the five-year period and provide for extensions of the period under certain circumstances. If the action is not brought to trial within the specified time, the action must "be dismissed by the court on its own motion or on motion of the defendant." (§ 583.360, subd. (a).) The five-year period is "not subject to extension, excuse or exception except as expressly provided by statute."[7] (*Id.*, subd. (b).) Absent such statutory grounds, dismissal for failure to bring the case to trial within the five-year period is mandatory.

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[7] Section 583.320, which applies when a new trial has been granted, and section 583.330, which applies when the parties stipulate to an extension in writing or by oral agreement made in open court, do not apply to this case, and plaintiff does not argue otherwise. Section 583.350, which applied after the issuance of the remittitur in *Ortiz-Fernandez I*, mentioned above, provides that "[i]f the time within which an action must be brought to trial . . . is tolled or otherwise extended pursuant to statute with the result that at the end of the period of tolling or extension less than six months remain[] within which the action must be brought to trial, the action shall not be dismissed pursuant to this article if the action is brought to trial within six months after the end of the period of tolling or extension."

"Under the press of this statutory requirement, anyone pursuing an 'action' in the California courts has an affirmative obligation to do what is necessary to move the action forward to trial in a timely fashion." (*Tanguilig v. Neiman Marcus Group, Inc.* (2018) 22 Cal.App.5th 313, 322.) It is the plaintiff's responsibility to correctly compute the statutory period as the case progresses, and to advise the trial court of any upcoming deadline. (*Taylor v. Hayes* (1988) 199 Cal.App.3d 1407, 1411; see also *Grafft v. Merrill Lynch, Pierce, Fenner & Beane* (1969) 273 Cal.App.2d 379, 384 [" 'The established doctrine in this state is that it is the plaintiff upon whom rests the duty to use diligence at every stage of the proceeding to expedite his case to a final determination. It is true that the defendant may bring about a trial of the case, but he is under no legal duty to do so. His presence in the case is involuntary and his attitude toward it is quite different from that of the plaintiff; he is put to a defense, only, and can be charged with no neglect for failing to do more than meet the plaintiff step by step' "].)

Section 583.340 provides that "[i]n computing the time within which an action must be brought to trial . . . 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."

Our Supreme Court has explained that " '[f]or the tolling provision of section 583.340[, subdivision] (c) to apply, there must be "a period of impossibility, impracticability or futility, *over which plaintiff had no control*," ' because the statute is designed to prevent *avoidable* delay." (*Gaines v. Fidelity National Title Ins. Co.* (2016) 62 Cal.4th 1081, 1102.) " '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 section 583.340, subdivision (c). (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 731.) To avoid dismissal under section 583.340(c), "a plaintiff must prove (1) a circumstance establishing impossibility, impracticability, or futility, (2) a causal connection between the circumstance and the failure to move the case to trial within the five-year period, and (3) that she was reasonably diligent in prosecuting the case at all stages in the proceedings." (*Tanguilig v. Neiman Marcus Group, Inc.*, *supra*, 22 Cal.App.5th at p. 323.)

For purposes of section 583.340, subdivision (c), the trial court "determine[s] 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.' " (*Bruns v. E-Commerce Exchange, Inc.*, *supra*, 51 Cal.4th at p. 730.) Although the " 'critical factor' " in applying section 583.340, subdivision (c) " 'is whether the plaintiff exercised reasonable diligence in prosecuting his or her case,' " diligence alone is not enough. (*Ibid.*) Diligence "is simply one factor for assessing the existing exceptions of impossibility, impracticability, or futility." (*Id.* at p. 731.) "Determining whether the subdivision (c) exception applies requires a fact-sensitive inquiry and depends 'on the obstacles faced by the plaintiff in prosecuting the action and the plaintiff's exercise of reasonable diligence in overcoming those obstacles.' " (*Ibid.*) It is the plaintiff's burden to prove that the circumstances warrant application of the section 583.340, subdivision (c) exception, and we review the trial court's determination whether the exception applies for abuse of discretion. (*Gaines v. Fidelity National Title Ins. Co.*, *supra,* 62 Cal.4th at p. 1100.)

II.

Principles of Appellate Practice

Before turning to the merits of the case, we summarize standards that apply to appeals where parties represent themselves, as plaintiff does here, as well as to appeals where parties are represented by counsel. (*Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1210 [self-represented litigant is "treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys"].)

We presume that an order challenged on appeal is correct, and it is the appellant's burden to affirmatively show that the trial court erred. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) It is also the appellant's burden to show prejudice from any error, which requires appellant to provide "legal argument as to how the trial court's ruling was prejudicial." (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963.)

III.

Analysis

A. Plaintiff's Argument on Appeal

Plaintiff's opening brief consists primarily of extensive quotations from the record and is difficult to follow. But from the headings in the brief that pertain to argument, we understand plaintiff to argue that in dismissing her case the trial court abused its discretion by "not considering [plaintiff's] diligence in prosecuting the case for trial and not accurately considering the exceptions that apply and tolling," and that plaintiff was prejudiced by the loss of the opportunity to have her case resolved on the merits.

Plaintiff contends that the trial court lost jurisdiction on October 24, 2016 (the date of entry of the order dismissing plaintiff's case for failure to timely file and serve a trial management conference report) and did not regain it until January 15, 2020 (the date on which the superior court filed

the remittitur that issued in *Ortiz-Fernandez I* on January 2, 2020), and that therefore the five-year period was tolled during that time.

Plaintiff further contends that she diligently prosecuted her case from April 30, 2020, when the court informed her that jury trials were not being set, through the time the court dismissed her case for failure to prosecute in February 2021; that it was impossible, impracticable or futile for her to bring her case to trial during that period, under section 583.340, subdivision (c); and that the trial court abused its discretion in dismissing her case. Plaintiff contends that her case was within the statutory limit, considering the tolling period after dismissal, the six months allowed for her to bring the case to trial after the remittitur issued, the additional six months provided by Emergency rule 10(a), and her diligence in prosecuting the action.

B. February 2017 Expiration of Initial Five-Year Period

We turn first to the trial court's conclusion that the plaintiff's case reached the five-year mark on February 3, 2017, and therefore was subject to dismissal on or after February 4, 2017, which was before the plaintiff filed any notice of appeal. Plaintiff's sole challenge to that conclusion is her contention that the trial court lost jurisdiction upon entry of the dismissal order on October 24, 2016, and that the five-year period was tolled from entry of dismissal to the trial court's filing of the remittitur in *Ortiz-Fernandez I.* Plaintiff appears to rely on language in section 583.340 providing that the computation of time in which an action must be brought to trial excludes time when "[t]he jurisdiction of the court to try the action was suspended" (§ 583.340, subd. (a)) and when "[p]rosecution or trial of the action was stayed or enjoined." (*Id.*, subd. (b).) But plaintiff's opening brief includes no argument or authority to support the contention that the trial court lost jurisdiction upon entry of the dismissal order, as opposed to upon the filing of

a notice of appeal, or that any stay of the proceedings resulted from the entry of the dismissal order.[8]

To the contrary, cases in which courts apply the five-year dismissal statute are consistent with the trial court's conclusion that the five-year period continues to run after a dismissal order is entered, absent a showing of impossibility, impracticality or futility.[9] *Wilshire Bundy Corp. v. Auerbach* (1991) 228 Cal.App.3d 1280 is instructive in this regard. The plaintiffs in that case filed an action on June 23, 1982. (*Id.* at p. 1284.) Defendants filed a motion to dismiss, which the court granted on April 2, 1987, and an order of dismissal was entered the same day. (*Id.* at p. 1285.) Plaintiffs noticed their appeal on April 6, 1987, and the Court of Appeal observed that at that time, 78 days remained before the expiration of the five-year period. (*Ibid.*) If the entry of the order had stopped the five-year clock, then at the time the notice of appeal was filed, 82 days would have remained before expiration.

Berry v. Weitzman (1988) 203 Cal.App.3d 351 (*Berry*), is also instructive. In that case, considering the time when the statutory period was tolled, the time to bring the case to trial was set to expire on July 28, 1986. (*Id.* at p. 357.) On June 9, 1986, the trial court dismissed the case when plaintiffs' attorney arrived two hours late to a mandatory settlement conference. (*Ibid.*) At that point, 49 days remained in the statutory period. (*Ibid.*) But no notice of appeal was filed, and accordingly the five-year clock

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[8] In the trial court, plaintiff acknowledged that the five-year clock would stop upon her filing of a notice of appeal. Here, plaintiff filed her first notice of appeal on February 24, 2017, after the five year period had run.

[9] In connection with her argument that the trial court incorrectly determined that the five-year period had run on February 3, 2017, plaintiff does not seek to invoke section 583.340, subdivision (c), which would exclude from the five-year period any time through that date during which it was impossible, impracticable, or futile for her to bring the action to trial.

continued to run. On July 11, 1986, with 17 days left in the statutory period, plaintiffs filed a motion to vacate. (*Ibid.*) Plaintiffs did not seek an order shortening time, and the hearing on the motion was set for August 1, 1986, after the statutory period expired. (*Id.* at pp. 357-358.) In August the trial court granted the motion to vacate and reset the trial for September 5, 1986. (*Id.* at p. 358.) Defendant then moved to dismiss based on the five-year statute. (*Id.* at p. 353.) The motion was granted, and the Court of Appeal affirmed. (*Ibid.*)

In sum, *Wilshire Bundy* and *Berry* indicate that, contrary to plaintiff's unsupported assertion here, the five-year clock continued to run after the October 24, 2016 entry of the trial court's order of dismissal. And plaintiff does not argue that anything occurred between October 24, 2016, and February 3, 2017, the end of the initial five-year period, that would have stopped the clock from running.

C. January 2021 Expiration of the Extended Time to Trial

Because plaintiff fails to show that the trial court erred in concluding that the time to bring the case to trial expired on February 3, 2017, we could affirm the trial court's dismissal on that basis alone. But we affirm even if we consider plaintiff's challenge to the second basis for the trial court's order granting defendant's motion, which assumed for purposes of argument that the trial court lost jurisdiction on October 24, 2016.

As noted above, the trial court concluded that even if it had lost jurisdiction on October 24, 2016, it regained jurisdiction when the remittitur issued on January 2, 2020. Even assuming, arguendo, that the statute had not previously run and the trial court had regained jurisdiction, at that point plaintiff had an additional six months to bring the case to trial under section 583.350 and the adoption of Emergency rule 10(a) gave her an additional six months (see fn. 6, *ante,* page 6), which meant that the deadline

expired on January 2, 2021—before the court heard and granted defendant's motion to dismiss on February 9, 2021.[10] The court further concluded that section 583.340, subdivision (c) did not apply to extend the time to trial beyond January 2021 because plaintiff had not met her burden "to demonstrate diligence in pursuit of her duty to expedite the resolution of her case at all stages of the proceedings *and* to demonstrate that it was impossible, impracticable, or futile in the light of the circumstances to comply with the statute."

To demonstrate the reasonable diligence required for the application of section 583.340, subdivision (c), a plaintiff must show she "use[d] every reasonable effort to bring the matter to trial" within the statutory period. (*Lauriton v. Carnation Co.* (1989) 215 Cal.App.3d 161, 164.) Plaintiff contends that she exhibited diligence by conducting legal research, preparing pretrial documents, and appearing at the court April 2020, October 2020, January 2021 and February 2021 hearings. But plaintiff does not dispute the trial court's finding that before the expiration of the five-year deadline, plaintiff did not remind the court of the deadline or file any motion to set the case for trial. And she fails to show that the trial court abused its discretion in concluding that her failure to remind the court of the five-year deadline or to file any motion to set the case for trial constituted a lack of the diligence

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[10] Plaintiff asserts that the trial court did not regain jurisdiction until January 15, 2020, the date on which the remittitur was filed in the trial court. But it is of no matter whether the trial court regained jurisdiction on January 2 or January 15, 2020. Either way, unless plaintiff could show that the time for her to bring the case to trial was extended under section 583.340, subdivision (c), the deadline would have expired before the court heard and granted defendant's motion to dismiss in February 2021. Therefore, even if the trial court erred in determining that it regained jurisdiction on January 2, plaintiff cannot show prejudice from the error.

that is required for the application of section 583.340, subdivision (c). (See *De Santiago v. D & G Plumbing, Inc.* (2007) 155 Cal.App.4th 365, 375 [plaintiff is not reasonably diligent when he acquiesces to court setting trial date beyond five-year mark, fails to alert the trial court of the expiration of the statutory period, and fails to request earlier trial date].)

Plaintiff asserts that after her case was remanded to the trial court in January 2020, the five-year period was tolled starting on April 30, 2020, when the trial court informed her that her request for a jury trial could not be accommodated in 2020. At that point, however, it was plaintiff's responsibility to alert the court to the fact that even with the six-month extension of the five-year period following remand, plus the six-month extension because of the COVID-19 pandemic, the five-year period would have effectively expired by the end of 2020.[11] Plaintiff did not do that, and as a result she cannot show that it was impossible, impracticable or futile for her to bring the case to trial within the statutory period. The case of *Wale v. Rodriguez* (1988) 206 Cal.App.3d 129 is instructive on this point. There, the plaintiff was told that no trial date was available within the statutory period. (*Id.* at p. 133.) Plaintiff's failure to call the court's attention to the fact that this posed a problem under section 583.310 was fatal to his attempt to show diligence and to claim that bringing the case to trial within the statutory period was impossible or impracticable. (*Ibid.*)

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[11] Plaintiff asserts that COVID-19 "has brought several challenges" in bringing the case to trial. We understand this as a contention that COVID-19 has made it impossible, impractical or futile to bring the case to trial. But plaintiff does not explain why the six-month extension to the statutory period provided by Emergency rule 10(a) does not suffice to address the exigencies created by the pandemic for her case.

At the April 2020 trial setting, plaintiff did not alert the court to the upcoming deadline, request a trial date or object to continuing the trial setting to October 2020. And at the October 2020 trial setting conference, she again failed to alert the court to the deadline or request a trial date. Instead, she sought time to continue her search for an attorney and did not object to continuing the trial setting to January 28, 2021, which was beyond the statutory period. It was not until the January 2021 trial setting, after the statutory period had expired and after defendant had moved to dismiss the case for failure to prosecute, that plaintiff asked the court to set a date for the case to be tried.

In the circumstances here, plaintiff has not demonstrated that the trial court abused its discretion when it declined to apply section 583.340, subdivision (c) to further extend the time for plaintiff to bring her case to trial.

D. Waiver and Estoppel

At several points in her opening brief, plaintiff asserts that defendant waived the application of the five-year statute or is estopped from asserting that the statute applies. Plaintiff claims that defendant waived the application of the statute by not objecting on October 15, 2020, to the continuance of trial setting to January 28, 2021, and that defendant is estopped from seeking dismissal under the statute because defendant did not object on January 28, 2021, to the continuance of trial setting to February 9, 2021. We disagree.

As we noted above, it was plaintiff's responsibility at the October 2020 hearing to alert the court to the time limit for bringing the case to trial. (See *Berry*, *supra*, 203 Cal.App.3d at pp. 356-357.) She did not do so, and the subject of the application of the five-year statute was never addressed at the hearing. None of the cases that plaintiff cites suggest that in such

circumstances a defendant's failure to object to a continuance of trial setting constitutes a waiver of the five-year statute.

Plaintiff suggests that by appearing at the January 28, 2021 hearing, defendant somehow waived application of the five-year statute or lulled her into a false sense of security about the statute's application. But by the time of the January 28, 2021 hearing, the five-year period had already expired, and defendant had filed its motion to dismiss, which defendant confirmed was set for hearing on February 9.

The waiver and estoppel cases cited in plaintiff's brief do not advance plaintiff's case. For example, the facts here are unlike those in *Bayle-Lacoste & Co. v. Superior Court of Alameda County* (1941) 46 Cal.App.2d 636. In *Bayle-Lacoste*, the Court of Appeal held that the defendant, who "notwithstanding the absence of service of summons upon him, [made] a general appearance, filing, after the five-year period, an answer in which he [sought] affirmative relief in damages, . . . thus voluntarily becoming a party to the litigation," had waived its right to dismissal under the five-year statutes. (*Id.* at pp. 640-641.) Defendant here did nothing similar to that. And this case is unlike *Borglund v. Bombardier, Ltd.* (1981) 121 Cal.App.3d 276, in which this court recognized equitable estoppel as a defense to the five-year statute, remanded for the trial court to determine whether defendant "made statements or engaged in conduct likely to induce appellant to permit the running of the five-year statute." (*Id.* at p. 281.) According to a declaration submitted to the trial court by the plaintiff in *Borglund*, defense counsel had represented that the five-year statute did not apply to out-of-country plaintiffs, had stated he would not move to dismiss if the case progressed beyond the five-year mark, and had taken "numerous actions . . . after the statutory period that evidenced an intention to proceed

to trial in spite of the running of the five-year statute." (*Id.* at p. 278.) Plaintiff points to nothing like that in the record here.

In conclusion, we note that it appears that neither the trial court nor the parties gave any thought to the five-year statute after the case was remanded. At oral argument, plaintiff stated that she was unaware of the statute until she received defendant's motion to dismiss. It is unfortunate that the trial court did not mention the upcoming five-year deadline at the October 2020 trial setting conference or, indeed, much earlier, but it is the plaintiff's responsibility to know the five-year rule, whether or not the plaintiff is represented. That is because the law, as it currently stands, is that self-represented parties are held to the same restrictive procedural rules as attorneys. (*Burkes v. Robertson* (2018) 26 Cal.App.5th 334, 344-345; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247.) Our Supreme Court has said that "[a] doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 985.)

We are aware that the application of these principles can be harsh, and we are sympathetic to the plight of unrepresented litigants unfamiliar with rules like the five-year statute that can result in the loss of the right to take a case to trial. The number of in propria persona litigants in the trial and appellate courts of this state has increased considerably over the years. However, we are bound by precedent and are not competent to create new policies.

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal.

STEWART, P.J.

We concur.

MILLER, J.

MARKMAN, J.*

Ortiz-Fernandez v. La Clinica (A162542)

* Judge of the Alameda Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.