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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MORDECHAI KACHLON et al., Plaintiffs and Respondents, v. ROBERT GILCHREST et al., Defendants and Appellants.	B271860 (Los Angeles County Super. Ct. No. BC339973)

APPEAL from an order of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Affirmed.

Law Office of Bruce Adelstein and Bruce Adelstein, for Defendants and Appellants.

Law Offices of Stewart Levin and Stewart Levin, for Plaintiffs and Respondents.

Beginning in 2002, three attorneys in succession mishandled legal matters for Mordechai and Monica Kachlon, resulting in a substantial judgment against the Kachlons. The Kachlons filed this legal malpractice action against the attorneys in 2005. The first attorney obtained summary judgment on the ground that the action was time-barred as to him. (*Kachlon v. Spielfogel*, Jan. 6, 2016, B259872 [nonpub. opn.].) The second and third attorneys successfully moved to have the remainder of the dispute sent to arbitration and the civil action against them stayed. After the arbitrator ruled against them in 2015, the attorneys moved to vacate the arbitration award on the ground that it was not entered within five years of commencement of the action, as required by Code of Civil Procedure section 580.310. The trial court denied the motion.

We affirm. The five-year limitation period mandated by Code of Civil Procedure section 580.310 is tolled when prosecution or trial of a civil action is stayed. Here, the action was stayed during arbitration, and the length of time during which the action was not stayed was less than five years.

BACKGROUND

On September 16, 2005, the Kachlons filed this attorney malpractice action against their former attorneys, Daniel Spielfogel, Robert Gilchrest and Salvador LaVina, alleging defendants' negligence exposed them to a substantial judgment obtained by Debra Markowitz. The case against Spielfogel proceeded in parallel with that against Gilchrest and LaVina, with Spielfogel litigating a statute of limitations defense through two motions for summary judgment and two appeals, ultimately prevailing.

a. First Stay—Three Years

In January 2006, the trial court stayed proceedings pending an appeal in the Markowitz matter.

In January 2009, we issued a remittitur in the Markowitz matter, ending the stay.

b. Second Stay—One Year Five Months

In April 2009, LaVina moved to compel arbitration and stay proceedings. The trial court denied the motion, but in July 2009, LaVina appealed, and the matter was again stayed pending appeal.

We reversed the order denying LaVina's motion to compel arbitration, and in December 2010 issued a remittitur, ending the stay on appeal.

c. Third Stay—Four Years Ten Months

In December 2010, the trial court entered an order granting LaVina's motion to compel arbitration. The Kachlons took no steps to initiate arbitration proceedings until July 2013, when they filed an arbitration demand. Even then, arbitration was delayed by agreement of the parties pending resolution of the Spielfogel matter.

Arbitration commenced in March 2015, and in October 2015 the arbitrator awarded the Kachlons $960,868.07 plus costs. Also in October 2015, the Kachlons moved to confirm the award.

Gilchrest and LaVina moved to vacate the award on the grounds that the arbitrator and trial court had lost jurisdiction over the matter, which by this time had been pending for more than 10 years. The court granted the Kachlons' motion to confirm the award and denied Gilchrest's and LaVina's petition to vacate it, finding it had not lost jurisdiction over the matter because the case had been stayed for nine of the 10 years since its

commencement. The court entered judgment against Gilchrest and LaVina, who timely appealed.

DISCUSSION

I. The Civil Case was Prosecuted Within Five Years

Code of Civil Procedure section 583.310 mandates that an action "be brought to trial within five years after the action is commenced against the defendant."[1] Section 583.360, subdivision (a) provides: "An 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." The statute serves to "prevent[] prosecution of stale claims where defendants could be prejudiced by loss of evidence and diminished memories of witnesses" and "to protect defendants from the annoyance of having unmeritorious claims against them unresolved for unreasonable periods of time." (*Lewis v. Superior Court* (1985) 175 Cal.App.3d 366, 375.)

The five-year period begins to run when the action is "commenced against the defendant" and continues until the action is "brought to trial." (§ 583.310.) " 'Commencement' of an action for purposes of section 583.310 and its predecessor, former section 583, is firmly established as the date of filing of the initial complaint." (*Brumley v. FDCC California, Inc.* (2007) 156 Cal.App.4th 312, 318.) It is plaintiff's duty to exercise reasonable diligence to insure a case is brought to trial within statutory time constraints. (*Howard v. Thrifty Drug & Discount Stores* (1995)

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

10 Cal.4th 424, 434; *Sanchez v. City of Los Angeles* (2003) 109 Cal.App.4th 1262, 1270.)

Certain events toll the five-year statute. For example, under subdivision (b) of section 583.340 the statute is tolled when "[p]rosecution or trial of the action was stayed or enjoined." Under subdivision (c) of section 583.340 the statute is tolled when "[b]ringing the action to trial, for any other reason, was impossible, impracticable, or futile."

A stay of a civil action pending arbitration constitutes a stay for purposes of subdivision (b) of section 583.340. (*Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790, 1797 (*Brock*); *Byerly v. Sale* (1988) 204 Cal.App.3d 1312, 1314; *Blake v. Ecker* (2001) 93 Cal.App.4th 728, 737 ["Once the trial court stayed plaintiff's civil action, it was stayed for all purposes during the arbitration proceedings. Defendants' only avenue for redress when plaintiff failed to timely prosecute the arbitration was in the arbitration proceeding"], disapproved on other grounds in *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1107, fn. 5; cf. *Gaines v. Fidelity Nat. Title Ins. Co*. (2016) 62 Cal.4th 1081, 1095-1096 (*Gaines*) [approving but distinguishing *Brock*].)

Several cases predating *Brock* held that a lawsuit that has been stayed pending arbitration is still subject to mandatory five-year dismissal under sections 583.310 and 583.360. (See *Lockhart-Mummery v. Kaiser Foundation Hospitals* (1980) 103 Cal.App.3d 891 [tolling inapplicable where plaintiff failed to exercise reasonable diligence in prosecuting arbitration]; *Boutwell v. Kaiser Foundation Health Plan* (1988) 206 Cal.App.3d 1371 [bringing an action to trial is not impossible, impracticable, or futile where plaintiff failed to exercise reasonable diligence in prosecuting arbitration]; *Young v. Ross-Loos Medical Group, Inc.*

(1982) 135 Cal.App.3d 669, 673 [arbitrator may dismiss arbitration for plaintiff's non-diligence].) These cases were discussed and disapproved by *Brock*, which in turn was cited with approval by the Supreme Court in *Gaines*: "Contractual arbitration is a remedy distinct from an action at law. Its assertion constitutes a plea in abatement to the civil suit. [Citation.] A party seeking to enforce contractual arbitration is statutorily entitled to a stay of pending legal actions. [Citation.] 'Once a court grants [a] petition to compel arbitration and stays the action at law, the action at law sits in the twilight zone of abatement with the trial court retaining merely a vestigial jurisdiction over matters submitted to arbitration' to determine, upon conclusion of the arbitration proceedings, whether an award on the merits requires dismissal of the legal action. [Citation.] This is so, in part, because the whole point of contractual arbitration is to obviate the need for an action at law. The court in *Brock* found the distinction between an action at law and a contractual arbitration proceeding critical in deciding that a stay pending contractual arbitration tolled the five-year period under section 583.340(b)." (*Gaines*, *supra*, 62 Cal.4th at p. 1096.)

A trial court's ruling on a motion to dismiss for failure to prosecute is reviewed for abuse of discretion to the extent it is based on an evaluation of factual matters relating to whether it was impossible, impracticable, or futile to bring the case to trial. (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 731 (*Bruns*).) To the extent the court's ruling involves purely a question of law, however, our review is de novo.

The instant case was pending for approximately 10 years from its commencement in 2005 to "trial" (i.e., the Kachlons' motion to confirm the arbitration award) in 2015. The matter

was stayed for approximately nine of those years due to the pendency of two appeals and the arbitration itself. Because the duration of these stays is not counted toward the five-year requirement, the time to prosecute the action did not expire.

Gilchrest and LaVina concede that stays during the two appeals tolled the five-year period. However, they argue the arbitration stay constituted only a partial stay, which did not toll the five-year period. (See *Bruns*, *supra*, 51 Cal.4th at pp. 729-730 ["subdivision (b) of section 583.340 governs only complete stays that are 'used to stop the prosecution of the action altogether' "].) When a civil action is only partially stayed, they argue, subdivision (c) of section 583.340 (tolling due to impossibility) applies, not subdivision (b) (tolling due to a stay in proceedings). Under subdivision (c), they argue, the partial stay in this action effected no tolling because prosecution of the action was not impossible; rather, the long delay in arbitration was occasioned solely by the Kachlons' dilatory conduct. We reject the argument.

Once the trial court determined the civil action must be arbitrated rather than tried, "it was indisputably impossible for plaintiffs to bring their action on the complaint to trial." (*Byerly v. Sale* (1988) 204 Cal.App.3d 1312, 1314; *Brock*, *supra*, 10 Cal.App.4th at p. 1801 ["[plaintiffs] legal action was stayed during the arbitration proceedings and thus the time during that stay should have been excluded for purposes of computing the five-year period"]; see *Gaines*, *supra*, 62 Cal.4th at p. 1096 ["A party seeking to enforce contractual arbitration is statutorily entitled to a stay of pending legal actions. [Citation.] 'Once a court grants [a] petition to compel arbitration and stays the action at law, the action at law sits in the twilight zone of abatement"].) The stay was thus complete for all relevant

purposes, as the Kachlons had no ability to move the proceedings toward trial.

Defendants argue that the civil action here was never completely stayed, because while proceedings against *them* were stayed, the case against Spielfogel continued, albeit on a different track. The argument is without merit. The stay was complete as to the Kachlons, who had no ability to proceed at law against defendants. That the action continued as to Spielfogel is irrelevant.

Defendants argue that neither the parties nor the trial court acted as if the civil action was stayed, but instead participated in at least one status conference and at least one law and motion matter. They also note that some portions of LaVina's motion to compel arbitration, including its prayer for relief, included no mention of a stay; our remittitur mentioned no stay; and the trial court's order sending the parties to arbitration mentioned no stay. Defendants infer from these facts that the matter was not actually stayed. The arguments are without merit. When a multi-party action is stayed and sent to arbitration as to some parties but continues as to others, the arbitrating parties' participation in status conferences and law and motion proceedings unrelated to the arbitration does nothing to empower them to abandon arbitration and prosecute the action at law. In such a case the stay remains complete as to matters referred to arbitration.

We conclude that defendants, who successfully moved this case out of court, cannot complain that plaintiffs failed to prosecute it in court. (See *Brock*, *supra*, 10 Cal.App.4th at p. 1797.) The trial court therefore properly denied defendants' motion to dismiss the action.

II. The Arbitrator Did Not Exceed Her Powers

An arbitration award may be vacated where the arbitrators "exceeded their powers" and the award "cannot be corrected without affecting the merits" of the decision. (§ 1286.2, subd. (a)(4).) An arbitrator exceeds his or her powers by issuing "an award that violates a well-defined public policy [citation], [or] issues an award that violates a statutory right." (*Jordan v. California Dept. of Motor Vehicles* (2002) 100 Cal.App.4th 431, 443.)

Defendants contend the arbitrator exceeded her powers by denying their repeated requests to dismiss the arbitration pursuant to section 583.310. We disagree.

An arbitrator need not comply with section 583.310. (*Burgess v. Kaiser Foundation Hospitals* (1993) 16 Cal.App.4th 1077, 1081 [section 583.310 "does not directly apply to arbitration"]; *Titan/Value Equities Group, Inc. v. Superior Court* (1994) 29 Cal.App.4th 482, 488-489 [the arbitrator sets the time and place of the hearing and establishes procedures for resolution of claims].) If a matter is not brought to arbitration within five years, the arbitrator has discretion to dismiss the matter for failure to proceed with reasonable diligence (*Brock*, *supra*, 10 Cal.App.4th at p. 1808; *Young v. Ross-Loos Medical Group, Inc., supra,* 135 Cal.App.3d at p. 673), but is not required to do so (*Burgess v. Kaiser Foundation Hospitals*, *supra*, at p. 1081).

Even if the arbitrator was required to comply with section 583.310, failure to follow the law is not grounds to vacate an arbitration award. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 33.)

DISPOSITION

The judgment is affirmed. Respondents are to recover costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.