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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

VINCENT DILLARD, Plaintiff and Appellant, v. 21ST CENTURY INSURANCE, Defendant and Respondent.	B289002 (Los Angeles County Super. Ct. No. BS142996)

APPEAL from an order of the Superior Court of Los Angeles County, Benny Osorio, Judge. Affirmed.

Law Offices of Benjamin P. Wasserman and Benjamin P. Wasserman, for Plaintiff and Appellant.

Hartsuyker, Stratman & Williams-Abrego, Stanley Edward Germany; Veatch Carlson, Serena L. Nervez, for Defendant and Respondent.

Claimant and appellant Vincent Dillard appeals from an order dismissing his uninsured motorist claim against respondent 21st Century Insurance (21st Century). Dillard contends the court lacked subject matter jurisdiction to determine whether his claim was barred under statutes requiring arbitration to be completed within five years. (Ins. Code, § 11580.2, subd. (i)(2)(A); Code Civ. Proc., § 583.130).)[1] Even if the court had jurisdiction to decide the matter, Dillard contends the court committed prejudicial error in rejecting his argument that the five-year period was tolled because of impossibility, impracticability, or futility. (§ 11580.2, subd. (i)(3); Code Civ. Proc., § 583.340, subd. (c).) Dillard claims the five-year period was tolled because 21st Century asserted that his injuries were pre-existing conditions, necessitating additional discovery into his past medical records. 21st Century contends the trial court had jurisdiction to enforce the five-year deadline, and that the dismissal order was not an abuse of discretion. We conclude the trial court had jurisdiction to decide 21st Century's motion, and it correctly decided the five-year period was not tolled while the parties conducted discovery about whether Dillard's injuries were pre-existing medical conditions.

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[1] All subsequent statutory references are to the Insurance Code unless otherwise indicated.

FACTUAL AND PROCEDURAL HISTORY

Dillard was involved in a car accident on February 10, 2011. Acting through his attorney, Dillard made a demand for arbitration of uninsured motorist coverage under 21st Century's insurance policy on August 25, 2011. Dillard filed a separate lawsuit against the uninsured motorist on February 11, 2013. Dillard's suit against the uninsured motorist was dismissed on April 29, 2016.

In the interim, Dillard and 21st Century proceeded towards arbitration. The trial court's case summary shows that 21st Century filed a motion to compel discovery responses on May 16, 2016. Between January 9, 2017, and March 24, 2017, both parties corresponded about selecting an arbitrator, but no arbitration was scheduled, due in part to the unavailability of two possible arbitrators. On March 29, 2017, 21st Century proposed a new set of three potential arbitrators. Dillard did not respond to 21st Century's March 29, 2017 letter, or to follow-up letters dated April 19, 2017, June 30, 2017, August 9, 2017, and October 17, 2017. An October 25, 2017 declaration by 21st Century's counsel stated "I have worked diligently to bring this matter to resolution, but have received no contact from [Dillard's] attorney since March of this year. Because it has been more than six years since [Dillard] demanded arbitration, this matter should be dismissed." On November 1, 2017, Dillard proposed a new list of three arbitrators.

On November 7, 2017, 21st Century filed a motion to dismiss Dillard's uninsured motorist claim under either Insurance Code section 11580.2, subdivision (i)(2), or Code of Civil Procedure section 583.110 et seq. The opposition and reply briefs were both filed on January 10, 2018. After a hearing on January 19, 2018, the court granted 21st Century's motion to dismiss. On January 23, 2018, 21st Century filed and served a notice of ruling. Dillard appealed the dismissal order on March 23, 2018.[2]

DISCUSSION

Trial court's jurisdiction to hear and decide 21st Century's motion to dismiss

Dillard argues that issues related to his uninsured motorist claim, including enforcement of the five-year deadline, are subject to arbitration, and therefore the trial court lacked subject matter jurisdiction to determine whether his claim was barred under the five-year statutory

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[2] Dillard did not appeal from a final judgment, but the dismissal order is appealable here. (*City of Los Angeles v. City of Los Angeles Employee Relations Bd.* (2016) 7 Cal.App.5th 150, 156–157, fn. 3 [dismissal order signed by the court and filed in an action is appealable]; *Cohen v. Hughes Markets, Inc.* (1995) 36 Cal.App.4th 1693, 1697 [construing notice of appeal from minute order as appealing the formal dismissal order].)

period. Based upon the particular circumstances undisputedly present here—(1) the parties had not yet even selected an arbitrator by the time 21st Century moved to dismiss the action; (2) the motion to dismiss came more than five years after Dillard made his demand for arbitration; (3) there is no evidence of a contractual provision expanding the issues subject to arbitration; and (4) Dillard's contentions for extending the five-year period rest on matters the Insurance Code provides are for the "court" to determine—the trial court had jurisdiction to rule on the motion.[3]

The Uninsured Motorist Act requires California auto liability insurance to include uninsured motorist coverage for bodily injury or wrongful death caused by an uninsured driver. (§§ 11580.2–11580.5; see Cal. Uninsured Motorist Practice (Cont.Ed.Bar 2d ed. 2019) Uninsured Motorist Act, § 1.2, p. 1-4.) Once an insured has made a claim under his or her uninsured motorist coverage, the insured and the insurance company must determine "whether the insured shall be legally entitled to recover damages, and if so entitled, the amount thereof." (§ 11580.2, subd. (f).) If they cannot agree, the statute requires the determination to be made by arbitration. (*Ibid.*) Absent tolling or some exception, the arbitration must be concluded within five years. (*Id.* at subd. (i)(2).).)

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[3] Our review of this issue is de novo. (*Dial 800 v. Fesbinder* (2004) 118 Cal.App.4th 32, 42 ["Where the evidence is not in dispute, a determination of subject matter jurisdiction is a legal question subject to de novo review"].)

Dillard acknowledges that there is no case directly examining whether an arbitrator or the trial court has jurisdiction to decide a motion to dismiss based on the five-year limitations period. Instead, relying upon various cases that emphasize the broad scope of authority given to an arbitrator in contractual arbitrations, he argues that the question can only be decided by an arbitrator. For example, his opening brief quotes from *Orpustan v. State Farm Mut. Auto. Ins. Co.* (1972) 7 Cal.3d 988, 991 (*Orpustan*), arguing that "all disputes arising under the uninsured motorist coverage should be subject to decision by the arbitrator." However, several subsequent decisions by the California Supreme Court expressly and significantly limited the breadth of the quoted language from *Orpustan.* Most recently, the California Supreme Court, in *Bouton v. USAA Casualty Ins. Co.* (2008) 43 Cal.4th 1190, 1193 (*Bouton)*, explained that the range of substantive matters subject to arbitration between an insured and his insurance company in the context of an uninsured motorist claim is narrow, specifically "whether the insured is legally entitled to recover damages from an uninsured motorist and the amount of such damages." (See also § 11580.2, subd. (f); *Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 Cal.3d 473, 485 (*Freeman*).) In *Freeman*, the Supreme Court held that the issue of whether the right to compel arbitration for uninsured motorist claims has been waived for non-compliance with the one-year limitation for initiating arbitration is an issue for the court to decide. (*Freeman*,

supra, 14 Cal.3d at p. 485.) In reaching its decision in *Freeman*, the Supreme Court acknowledged that its holding in *Orpustan* "was stated in language whose breadth was an invitation to misinterpretation." (*Ibid.*) The *Bouton* court referred approvingly to the reasoning in *Freeman* that "acknowledged the strong public policy favoring arbitration, but stated that 'there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate and which no statute has made arbitrable.' ([*Freeman*,] at p. 481.)" (*Bouton*, 43 Cal.4th at p. 1199.) The *Bouton* court also explained that the scope of arbitrable issues could be expanded by agreement of the parties. (*Id.* at pp. 1197, 1201.)

Dillard's argument in the trial court and on appeal is that completion of the arbitration within the five-year period was impossible, impracticable, and futile within the meaning of section 11580.2, subdivision (i)(3), and that the arbitrator, not the court, should have decided that disputed issue. The statutory language provides: "The doctrines of estoppel, waiver, impossibility, impracticality, and futility apply to excuse a party's noncompliance with the statutory timeframe, *as determined by the court*." (§ 11580.2, subd. (i)(3), italics added.) Neither party disputes that five years had passed before 21st Century moved to dismiss, or that in those five years, no arbitrator had yet been selected. Because the insurance agreement is not part of the record on appeal, there is also no evidence that Dillard and 21st Century agreed to expand the scope of arbitrable issues

beyond the language of the Insurance Code. These facts, considered together with the express statutory reference to a determination "by the court," (§ 11580.2, subd. (i)(3)), lead us to conclude there was no error in the trial court's assertion of jurisdiction to decide the issue of impossibility, impracticality, and futility raised by Dillard.

Dillard's reliance on *Briggs v. Resolution Remedies* (2008) 168 Cal.App.4th 1395 (*Briggs*) does not change our analysis. In *Briggs,* an arbitrator stayed the arbitration until the claimant filed a worker's compensation claim. (*Id.* at p. 1398.) The facts and procedural posture of *Briggs* make it distinguishable from the case before us. In *Briggs*, the parties had already selected an arbitrator, who stayed the arbitration until the insured pursued workers' compensation benefits, and the insured sought a writ of mandate from the trial court. (*Id.* at pp. 1398–1399.) The appellate court concluded the trial court lacked subject matter jurisdiction to review the arbitrator's stay order, reasoning that the trial court lacked statutory authority to review an arbitrator's interlocutory decision. (*Id.* at p. 1401.) Here, in contrast, the parties had yet to select an arbitrator, and section 11580.2, subdivision (i)(3), gives the trial court express authority to decide whether noncompliance with the five-year period is excused by "[t]he doctrines of estoppel, waiver, impossibility, impracticality, [or] futility." We find this case to be more analogous to *Miranda v. 21st Century Ins. Co.* (2004) 117 Cal.App.4th 913. In that case, the appellate court engaged in an extensive analysis of the trial court's subject

matter jurisdiction over discovery disputes arising in uninsured motorist arbitrations. Relying on the statutory language of section 11580.2, subdivision (f), it concluded the trial court—not the arbitrator—possessed jurisdiction to both decide discovery disputes and to dismiss the entire action as a sanction if one side refused to comply with discovery orders. (*Id.* at pp. 920–926.)

The trial court did not abuse its discretion in finding Dillard's claim barred by the five-year statutory period

Regardless of whether the matter is considered under provisions to prevent stale claims under section 11580.2, subdivision (i), or Code of Civil Procedure, section 583.340, subdivision (c),[4] it is undisputed that the five-year clock started ticking on August 25, 2011, when Dillard made a formal demand for arbitration. (*Santangelo v. Allstate Ins. Co.* (1998) 65 Cal.App.4th 804, 811–812 [claimant's written demand for arbitration was a formal institution of arbitration pursuant to § 11580.2, subd. (i)].) Therefore, absent any extension or tolling, the five-year period under

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[4] Dillard acknowledges in his opening brief that the provisions to prevent stale claims under section 11580.2, subdivision (i), and Code of Civil Procedure section 583.340, subdivision (c), are very similar, particularly because both statutes "contain exceptions to the draconian consequences of the strict application of the five-year statute to bring an arbitration to completion or to bring a case to trial."

either statute would expire on August 25, 2016. Under both statutes, the running of the five-year period is tolled upon a finding that it was impossible, impractical, or futile to bring the matter to trial or arbitration. (§ 11580.2, subd. (i)(3) ["The doctrines of estoppel, waiver, impossibility, impracticality, and futility apply to excuse a party's noncompliance with the statutory timeframe, as determined by the court"]; Code Civ. Proc., § 583.340, subd. (c) ["[b]ringing the action to trial . . . was impossible, impracticable, or futile"].)

We apply the abuse of discretion standard of review to the trial court's decision to dismiss Dillard's claim. "'The question of impossibility, impracticability, or futility is best resolved by the trial court, which "is in the most advantageous position to evaluate these diverse factual matters in the first instance." [Citation.] The plaintiff bears the burden of proving that the circumstances warrant application of the . . . exception. [Citation.] . . . The trial court has discretion to determine whether that exception applies, and its decision will be upheld unless the plaintiff has proved that the trial court abused its discretion. [Citations.]' [Citation.] Under that standard, '[t]he trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.' [Citation.]" *Gaines v. Fidelity National Title Ins. Co.* (2016) 62 Cal.4th 1081, 1100, fn. omitted (*Gaines*).)

In determining whether a plaintiff has shown impossibility, impracticability, or futility, "courts have focused on the extent to which the conditions interfered with the plaintiff's ability to 'mov[e] the case to trial' during the relevant period. [Citations.]" (*Gaines*, *supra*, 62 Cal.4th at p. 1101.) "A plaintiff has an obligation to monitor the case in the trial court, to keep track of relevant dates, and to determine whether any filing, scheduling, or calendaring errors have occurred. This obligation of diligence increases as the five-year deadline approaches." (*Jordan v. Superstar Sandcars* (2010) 182 Cal.App.4th 1416, 1422; see also *De Santiago v. D & G Plumbing, Inc.* (2007) 155 Cal.App.4th 365, 371 [impracticability exception "makes allowance for circumstances beyond the plaintiff's control, in which moving the case to trial is impracticable for all practical purposes"].) The reasonable diligence requirements apply to uninsured motorist arbitrations, and the duty is arguably even higher, considering that arbitration is "'intended to be more expeditious than litigation.' [Citation.]" (*Santangelo*, *supra*, 65 Cal.App.4th at p. 816.)

The trial court did not abuse its discretion in granting 21st Century's motion to dismiss because Dillard did not provide evidence of any effort to ensure that the arbitration was completed before the five-year period expired in August 2016. He argues that 21st Century waited until November 2013 to raise an argument that his injuries were pre-existing conditions, but then claims—without any supporting evidence—that it took 22 months to locate past medical

records and undergo additional medical tests. Even accepting that the additional discovery took two years to complete, there is no evidence that he made any effort between November 2015 and August 2016 to ensure the arbitration would conclude before the five-year deadline.

Under these circumstances, we conclude the trial court did not abuse its discretion in granting 21st Century's motion based on the finding that plaintiff failed to establish that bringing the action to trial was "impossible, impracticable, or futile." (§ 583.340, subd. (c); *Jordan v. Superstar Sandcars*, *supra*, 182 Cal.App.4th at p. 1422.)

DISPOSITION

The dismissal order is affirmed. Costs on appeal are awarded to respondent 21st Century Insurance.

MOOR, J.

We concur:

RUBIN, P. J.

BAKER, J.