Filed 10/23/14 Dowling v. Farmers Ins. Exchange CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

RHONDA DOWLING et al., Plaintiffs and Appellants, v. FARMERS INSURANCE EXCHANGE, Defendant and Respondent.	B248946 (Los Angeles County Super. Ct. No. BC297437)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anthony J. Mohr, Judge. Reversed.

Roxborough, Pomerance, Nye & Adreani, Drew E. Pomerance, Burton Falk; Goshgarian & Marshall, Mark Goshgarian and Merak Eskigian for Plaintiffs and Appellants.

Barger & Wolen, Kent R. Keller, Marina M. Karvelas and Peter Sindhuphak for Defendant and Respondent.

Rhonda Dowling, individually and on behalf of others similarly situated, appeals a judgment of dismissal after the granting of a motion to dismiss for failure to bring the case to trial within five years (Code Civ. Proc., § 583.310), as extended by certain events. Plaintiffs contend (1) the trial court erred by failing to find that it was impracticable or futile to bring this case to trial while an appellate proceeding was pending in a related case; (2) the trial court misconstrued our directions in an opinion from a prior appeal in this case concerning the scope of issues to consider on remand; and (3) a stipulation extending the time to bring the related case to trial also extended the time to bring this case to trial by virtue of a prior stipulation in this case.

We conclude that the trial court misconstrued our directions and erroneously failed to interpret the prior stipulation in this case in light of the extrinsic evidence presented. Finding no conflict in the extrinsic evidence and interpreting the stipulation de novo, we conclude that the parties agreed that any extension of time to bring the related case to trial would also extend the time to bring this case to trial. Accordingly, the stipulation extending the time to bring the related case to trial until June 20, 2011, also extended the time to bring this case to trial until the same date. We therefore conclude that the court erred by dismissing this action based on plaintiffs' failure to bring this case to trial by June 17, 2010, and reverse the judgment of dismissal.[1]

---

[1] We need not decide the current deadline to bring this case to trial.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Complaint and Other Early Proceedings*

Plaintiffs commenced the present action by filing a class action complaint against Farmers Insurance Exchange (Farmers) in June 2003 alleging a single count for violation of the unfair competition law (Bus. & Prof. Code, § 17200 et seq.) based on a violation of Insurance Code section 1861.02. Plaintiffs alleged that Farmers violated section 1861.02 by failing to offer a "Good Driver Discount" to eligible drivers who had a lapse in prior automobile insurance coverage.

The trial court determined that this action was related to another class action in which the plaintiffs challenged an insurer's rating practices under Insurance Code section 1861.02, *Poss v. 21st Century Ins. Co.* (L.A. Sup. Ct. No. BC297438). The court transferred both cases to the same judge. *Poss* later became known as *MacKay v. 21st Century Ins. Co.* after the complaint was amended to substitute a new class representative. We will refer to that action as the *MacKay* action. The plaintiffs in the *MacKay* action alleged that 21st Century Insurance Company (21st Century) violated section 1861.02, and therefore violated the unfair competition law, by using two permissible rating factors, the applicant's "driving safety record" (Ins. Code, § 1861.02, subd. (a)(1)) and "persistency" (Cal. Code Regs., tit. 10, § 2632.5(d)(11)), as proxies for an impermissible rating factor, the absence of prior automobile insurance coverage. Plaintiffs' counsel in this action also represented the plaintiffs in the *MacKay* action, and Farmers's counsel in this action also represented 21st Century in the *MacKay* action.

California voters passed Proposition 64 in November 2004, restricting a plaintiff's standing under the unfair competition law. The trial court granted Farmers's motion for judgment on the pleadings in May 2005 based on the new standing requirements, but granted plaintiffs leave to amend the complaint to allege a count for violation of Insurance Code section 1861.02. Farmers challenged that ruling by petitioning this court for a writ of mandate. The trial court stayed this action in June 2005 pending our decision in the writ proceeding. We granted the writ petition and issued an opinion holding that there is no private right of action for a violation of Insurance Code section 1861.02. (*Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 853-859 (*Farmers*).)

The trial court then granted Farmers's motion for judgment on the pleadings and dismissed the action in its entirety. The trial court determined that our opinion in *Farmers*, *supra*, 137 Cal.App.4th 842, disposed of the entire action. Plaintiffs filed a petition for writ of mandate. We filed an order pursuant to *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171 in November 2006 stating that we were considering the issuance of a peremptory writ of mandate in the first instance directing the trial court to vacate its order. We stated that our opinion in *Farmers* did not address the question whether plaintiffs could amend their complaint. We also stated that the California Supreme Court in *Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, filed after our opinion in *Farmers*, held that Proposition 64 did not necessarily preclude amending a complaint to substitute a new class representative who

had suffered an injury in fact. The trial court responded with an order in December 2006 vacating its order granting judgment on the pleadings.

2. *First Amended Complaint and April 2008 Stipulation*

Plaintiffs filed a first amended class action complaint in January 2007 alleging a single count for violation of the unfair competition law. Counsel filed a joint stipulation in the present action on April 29, 2008, stating:

"IT IS HEREBY STIPULATED, by and between the parties, through their counsel as follows:

"1. Whereas the class action lawsuit originally entitled Douglas Ryan, an individual, and on behalf of the general public, Plaintiff v. Farmers Insurance Company, and Does 1 through 100, inclusive, Defendants, LASC No. BC297437 was filed on June 13, 2003 ('Farmers action');

"2. Whereas the class action lawsuit originally entitled Dana Poss, an individual, and on behalf of the general public, Plaintiff v. 21st Century Insurance Company, and Does 1 through 100, inclusive, LASC No. BC297438 was filed on June 13, 2003 ('21st Century action');

"3. Whereas on October 3, 2003, the Superior Court deemed the Farmers action and the 21st Century action, and several other actions, related and stayed all of these actions pending a final decision by the Court of Appeal in Donabedian v. Mercury Ins. Co.

"4. Whereas after that opinion was filed on March 11, 2004 in Donabedian v. Mercury Ins. Co. (2004) 116 Cal.App.4th 968, the Superior Court continued the stay

pending a final decision by the Court of Appeal in Poirer v. State Farm Mut. Auto Ins. Co. (B165389).

"5. Whereas on October 15, 2004, the nonpublished opinion by the Court of Appeal in Poirer v. State Farm Mut. Auto Ins. (B165389) was issued;

"6. Whereas after a petition for writ of mandate was filed in the Court of Appeal in the Farmers action, the Superior Court issued a stay of the Farmers action and the 21st Century action on June 30, 2005, which remained in effect until June 22, 2006 when the Court of Appeal issued a remittitur, remanding the Farmers action back to the Superior Court;

"7. Whereas the jurisdiction of the Superior Court to try the Farmers action was suspended while the cases were stayed from October 3, 2003 to October 15, 2004 (i.e., one year and 12 days) and June 30, 2005 to June 22, 2006 (i.e., 11 months and 22 days);

"8. Whereas Code of Civil Procedure § 583.310 requires an action to be brought to trial within five years after the action is commenced;

"9. Whereas in computing the five year time period within which an action must be brought to trial pursuant to Code of Civil Procedure § 583.310, Code of Civil Procedure § 583.340 excludes from the computation the time during which the jurisdiction of the Superior Court to try the action was suspended;

"10. Whereas the jurisdiction of the Superior Court to try the Farmers action was suspended while the cases were stayed as described above; and

"11. Whereas the parties have agreed to identify the five year time period required to bring an action to trial under Code of Civil Procedure § 583.310.

"IT IS HEREBY STIPULUATED TO AND BETWEEN THE PARTIES AS FOLLOWS:

"Absent any further periods wherein the Superior Court's jurisdiction to try the Farmers action is suspended under Civil Code [*sic*] § 583.340 and/or any further Court orders or party stipulations extending or tolling the time period to bring either action to trial, the five year time period to bring the Farmers action to trial under Code of Civil Procedure § 583.310 does not expire until June 17, 2010.

"IT IS SO STIPULATED."

The trial court entered an order on the stipulation on April 29, 2008. The parties to the *MacKay* action, represented by the same counsel as the parties to this action, entered into a virtually identical stipulation, and the trial court in the *MacKay* action entered an order on that stipulation on the same date.[2]

3. *May 2009 Stipulation in the MacKay Action*

Counsel in the *MacKay* action filed a joint stipulation on May 19, 2009, extending the time to bring that action to trial until June 20, 2011. The trial court in the *MacKay* action entered an order on the stipulation on the same date.

---

[2] We judicially notice the stipulation filed on April 29, 2008, in the *MacKay* action. (Evid. Code, § 452, subd. (d).)

4. *Writ Petitions and Stay in the MacKay Action*

Both parties to the *MacKay* action petitioned this court for a writ of mandate challenging the trial court's rulings on 21st Century's motions for summary adjudication in that action. The plaintiffs filed their writ petition on November 24, 2009, and 21st Century later filed its own writ petition. The plaintiffs challenged the trial court's ruling that they could obtain judicial review of a rate approved by the Department of Insurance only by pursuing an administrative remedy and then filing a petition for writ of administrative mandate. 21st Century challenged the trial court's ruling that there was a triable issue of fact as to whether the Department of Insurance had approved its use of a particular rating factor known as accident verification. We issued orders to show cause and stayed all trial court proceedings in both the *MacKay* action and another action, *Karnan v. Safeco Ins. Co.* (L.A. Sup. Ct. No. BC266219).

We filed an opinion ruling on the writ petitions in October 2010 (*MacKay v. Superior Court* (2010) 188 Cal.App.4th 1427). We held that the trial court properly concluded that an administrative procedure, followed by judicial review through a petition for writ of administrative mandate, provided the exclusive means to challenge a rate approved by the Department of Insurance. (*Id.* at p. 1432.) We also concluded that the Department of Insurance had approved 21st Century's use of the accident verification rating factor and that there was no triable issue of fact in this regard. (*Id.* at p. 1439.) We therefore denied the plaintiffs' writ petition, granted 21st Century's petition, and directed the trial court to enter judgment in favor of 21st Century. (*Id.* at p. 1451.)

5. *Proposed May 2010 Stipulation in the Present Action*

Plaintiffs' counsel proposed a stipulation extending the time to bring this case to trial until June 20, 2011. Plaintiffs' counsel stated in an e-mail to Farmers's counsel dated May 10, 2010:

"We do not have an updated Stipulation in the Farmers case regarding the Expiration of the 5 year Rule. The Stipulation in the 21st Century case states that the 5 year period runs on June 20, 2011. The facts in the two cases are identical with respect to the 5 year rule. Thus, attached please find an updated Stipulation Re Expiration of the 5 year rule in the *Farmers* case. We would greatly appreciate it if you would send us your signature on this Stipulation, and we will arrange for filing. If you have any questions or comments, please let me know. Thank you."

Farmers's counsel declined to sign the proposed stipulation and instead filed a motion to dismiss the class action allegations.

6. *Dismissal Motion*

Farmers filed a motion to dismiss the class action allegations in this action on May 13, 2010, arguing that the April 2008 stipulation (quoted above) established a deadline of June 17, 2010, to bring this case to trial pursuant to Code of Civil Procedure section 583.310. Farmers argued that plaintiffs had failed to diligently prosecute this action, could not possibly obtain class certification by June 17, 2010, and that the class action allegations therefore should be dismissed.

Plaintiffs argued in opposition that the five-year period to bring this case to trial should be tolled based on several events. They also argued that it was impracticable or

futile to bring this case to trial during the time that the writ proceedings in the *MacKay* action were pending before this court. Plaintiffs did not argue at that time that the five-year period should be extended based on the May 2009 stipulation in the *MacKay* action.

The trial court stated at the hearing on the dismissal motion that it would have stayed this action pending the writ proceedings in the *MacKay* action "if you all asked me to." The court also stated that, despite the common legal issues, it would not consider the writ proceedings in the *MacKay* action then pending before this court in determining whether it was impracticable or futile to bring this action to trial because Farmers was not a party to those writ proceedings. After receiving supplemental briefing and taking the matter under submission, the court filed an order on August 9, 2010, rejecting plaintiffs' arguments. The court concluded that the five-year deadline had passed, so plaintiffs could not obtain class certification, and therefore granted the motion to dismiss the class action allegations of the complaint.

7. *Judgment and Appeal*

The parties stipulated to dismiss the entire action based on the trial court's ruling, without prejudice to plaintiffs' right to challenge that ruling on appeal. The trial court dismissed the entire action based on that stipulation. Plaintiffs appealed the judgment of dismissal.

Plaintiffs argued in their opening brief on appeal, among other arguments, that the five-year period to bring this action to trial should be tolled based on several events and that it was impracticable or futile to bring this action to trial while the writ

proceedings in the *MacKay* action were pending. They also argued that the April 2008 stipulation in this case should be interpreted to mean that any stay of trial court proceedings in the *MacKay* action would have the effect of extending the time to bring this action to trial. Farmers argued in its respondent's brief that plaintiffs had waived this last argument by failing to assert it in the trial court.

Farmers also argued that the words "either action" were included in the April 2008 stipulation by mistake and that the stipulation as a whole and its drafting history showed that the parties did not intend that any stay in the *MacKay* action would extend the time to bring the present action to trial. Farmers filed a motion to augment the appellate record with correspondence and prior drafts of the stipulation that were exchanged between counsel before the stipulation was finalized and executed on April 22, 2008.

Plaintiffs for the first time in their reply brief identified the May 2009 stipulation in the *MacKay* action and argued that it extended the time to bring the present action to trial, pursuant to the April 2008 stipulation.

We sent a letter to counsel before oral argument requesting supplemental briefs answering the question whether, pursuant to the April 2008 stipulation filed in this action, the May 2009 stipulation in the *MacKay* action had the effect of extending the time to bring the present action to trial.

Farmers argued in a supplemental brief that the April 2008 stipulation and its drafting history showed that the parties never intended that an extension of the five-year period in the *MacKay* action would automatically extend the five-year period in this

action. Farmers cited correspondence and prior drafts of the stipulation attached to its prior motion to augment. Farmers also filed a supplemental motion to augment the appellate record with the e-mail dated May 10, 2010, from plaintiffs' counsel proposing a separate stipulation extending the time to bring this case to trial commensurate with the May 2009 stipulation in the *MacKay* action, and related correspondence. Farmers argued that the correspondence showed plaintiffs' counsel's understanding that the April 2008 stipulation did not make future stipulated extensions in the *MacKay* action automatically applicable to the present action.[3]

We concluded in an opinion filed in August 2012 that the April 2008 stipulation precluded the possibility of additional tolling periods prior to the date of the stipulation. We stated in this regard that the trial court properly interpreted the term "further" in the stipulation to mean "future" rather than "additional." (*Dowling v. Farmers Ins. Exchange* (2012) 208 Cal.App.4th 685, 695-696 (*Dowling*).) We also concluded that the court erroneously failed to consider the potential impact of the writ proceedings in the *MacKay* action in determining whether it was impracticable or futile to bring the present action to trial. We stated, "the trial court must exercise its discretion by deciding whether the particular circumstances of this case, common legal questions and practical realities made it impracticable or futile to bring this case to trial while the writ

---

[3] We judicially notice the appellants' opening brief filed on December 9, 2011, respondent's brief filed on March 15, 2012, motion to augment filed on March 15, 2012, appellants' reply brief filed on May 4, 2012, our letter to counsel dated June 29, 2012, and the supplemental motion to augment filed on July 11, 2012, in *Dowling v. Farmers Ins. Exchange*, No. B228899. (Evid. Code, § 452, subd. (d).)

proceedings in the *MacKay* action were pending, rather than decide as a matter of law that it could not be so." (*Dowling*, *supra*, at p. 699.)

We declined to consider plaintiffs' argument asserted for the first time on appeal that the five-year period in this action should be extended based on the April 2008 stipulation in this action and the May 2009 stipulation in the *MacKay* action. We stated:

"We generally will not consider an argument asserted for the first time on appeal. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847 [60 Cal.Rtpr.2d 780].) Although we have the discretion to consider for the first time on appeal an issue of law based on undisputed facts, we will not consider a new issue where the failure to raise the issue in the trial court deprived an opposing party of the opportunity to present relevant evidence that, if considered by the trial court, might have affected its ruling. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 772 [336 P.2d 534]; *Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 879 [242 Cal.Rptr. 184].) Supplemental briefing filed by Farmers in response to our request shows that extrinsic evidence of the parties' intention in entering into the April 2008 stipulation would have been presented for consideration by the trial court if the new issues now asserted by plaintiffs regarding interpretation of the stipulation had been raised below. We therefore will not consider those new issues in this appeal." (*Dowling*, *supra*, 208 Cal.App.4th at pp. 696-697.)

We therefore reversed the judgment with directions to vacate the orders dismissing the class action allegations and the entire action and "reconsider the motion

to dismiss in light of the views expressed in this opinion." (*Dowling, supra*, 208 Cal.App.4th at p. 700.)

8. *Motions After Remand*

Plaintiffs filed a motion in October 2012 to extend the five-year period. They argued that (1) it was impracticable or futile to bring the case to trial while the writ proceedings in the *MacKay* action were pending; (2) the May 2009 stipulation in the *MacKay* action extending the time to bring that action to trial also extended the time to bring the present action to trial pursuant to the April 2008 stipulation in this action; and (3) our opinion in *Dowling*, *supra*, 208 Cal.App.4th 685, did not preclude the trial court from considering the latter argument on remand.

Farmers opposed the motion to extend and filed a motion to dismiss for failure to bring the case to trial by the stipulated deadline of June 17, 2010. Farmers argued that *Dowling*, *supra*, 208 Cal.App.4th 685, expressly limited the proceedings on remand to the determination of a single issue. Farmers identified that issue as whether the pendency of the writ proceedings in the *MacKay* action made it impracticable or futile to prosecute this action. Farmers argued that plaintiffs failed to diligently prosecute this action and that the writ proceedings in the *MacKay* action were not the cause of or the reason for that failure.

Farmers also briefly addressed plaintiffs' argument that the May 2009 stipulation extending the time to bring the *MacKay* action to trial also extended the time to bring the present action to trial pursuant to the April 2008 stipulation in this action. Farmers argued that plaintiffs' interpretation of the April 2008 stipulation was incorrect and that,

in any event, the trial court had no jurisdiction to consider this new argument. Farmers requested leave to file a separate brief addressing the issue in the event that the court decided to consider the issue. Alternatively, Farmers requested that the court consider its supplemental brief and exhibits previously filed in the Court of Appeal on this issue. Farmers filed those documents in the trial court attached to its counsel's declaration in opposition to the motion to extend.

The trial court granted Farmers's dismissal motion and denied plaintiffs' motion to extend. The court stated that its jurisdiction on remand was limited by the directions in our opinion. It noted the heading "*The Trial Court Properly Interpreted the Stipulation*" in our opinion (*Dowling*, *supra*, 208 Cal.App.4th at p. 694) and the absence of any language expressly directing the trial court to "reinterpret" the April 2008 stipulation. The trial court concluded, "When the Court of Appeal directed this court to reconsider the motion to dismiss 'in light of the views expressed in this opinion,' this court believes that the justices had in mind section 4 of their 'Discussion,' to the effect that this court erred by not considering the potential impact of the writ proceedings in *MacKay*." The court therefore limited its ruling to deciding whether it was impracticable or futile to bring this case to trial while the writ proceedings in the *MacKay* action were pending.

The trial court concluded that plaintiffs failed to show "that *MacKay* addressed substantive issues that justified the failure of the *Dowling* plaintiffs to move their case, especially with respect to propounding discovery and seeking class certification." It stated, "Nothing prevented the Dowling plaintiffs from seeking class certification earlier

than later. They should have done so. Prompt and early determination of a class is essential in order to permit class members to elect whether to proceed as members of the class, to intervene with their own counsel, or to be excluded from a class action. [Citation.]"

The trial court stated further that it appeared that plaintiffs had planned to prosecute this case regardless of the outcome in *MacKay*. The court stated that, therefore, it was not impracticable or futile for plaintiffs to propound discovery on an issue not presented in the *MacKay* action—whether Farmers's rates were properly approved by the Department of Insurance. The court concluded that there was no "causal connection" between the writ proceedings in the *MacKay* action and plaintiffs' failure to propound discovery and move for class certification in this case, and that common legal questions and practical realities did not make it impracticable or futile to bring this case to trial while the writ proceedings in the *MacKay* action were pending. The court therefore granted the dismissal motion and entered a judgment of dismissal.

Plaintiffs timely appealed the judgment.

CONTENTIONS

Plaintiffs contend (1) the trial court erred by failing to find that it was impracticable or futile to bring this case to trial while the writ proceedings were pending in the *MacKay* action; (2) the trial court misconstrued our directions in *Dowling*, *supra*, 208 Cal.App.4th 685, concerning the scope of issues to consider on remand; and (3) the May 2009 stipulation in the *MacKay* action extended the time to bring this case to trial by virtue of the April 2008 stipulation in this case.

DISCUSSION

1. *Statutory Framework*

"Code of Civil Procedure section 583.310 states, 'An action shall be brought to trial within five years after the action is commenced against the defendant.' The five-year period may be extended by written stipulation or oral agreement made in open court. (*Id.*, § 583.330.)

"Code of Civil Procedure section 583.340 states that the time during which any of the following conditions existed is excluded from the five-year period:

'(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.'

"Code of Civil Procedure section 583.130 states that in construing these provisions the policy favoring trial or other resolution on the merits is generally to be preferred over the policy requiring dismissal for failure to prosecute with reasonable diligence.[4] Accordingly, the tolling provisions of Code of Civil Procedure section 583.340 must be liberally construed consistent with the policy favoring trial on

---

[4] " 'It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other disposition. Except as otherwise provided by statute or by rule of court adopted pursuant to statute, the policy favoring the right of parties to make stipulations in their own interests and the policy favoring trial or other disposition of an action on the merits are generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action in construing the provisions of this chapter.' (Code Civ. Proc., § 583.130.)"

the merits. (*Baccus v. Superior Court* (1989) 207 Cal.App.3d 1526, 1532 [255 Cal.Rptr. 781]; see Cal. Law Revision Com. com., 15C West's Ann. Code Civ. Proc. (2011 ed.) foll. § 583.340, p. 457.) Similarly, we believe that the policy favoring trial on the merits must be considered by the court in resolving any ambiguity in a written stipulation extending the time to bring an action to trial pursuant to Code of Civil Procedure section 583.310." (*Dowling*, *supra*, 208 Cal.App.4th at pp. 693-694.)

2. *Standard of Review*

We review the ruling on a motion to dismiss for failure to bring an action to trial within the time provided by Code of Civil Procedure section 583.310 for abuse of discretion to the extent that the ruling is based on the trial court's 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; *Dowling*, *supra*, 208 Cal.App.4th at p. 694.) To the extent that the ruling is based on the interpretation of a written agreement, however, the standard of review applicable to contract interpretation applies (discussed *post*). (*Dowling*, *supra*, at p. 694; cf. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859 ["any determination underlying any order is scrutinized under the test appropriate to such determination"].)

We independently review the trial court's interpretation of our prior opinion. (*Ayyad v. Sprint Spectrum, L.P.* (2012) 210 Cal.App.4th 851, 859; *In re Groundwater Cases* (2007) 154 Cal.App.4th 659, 674.)

3. *The Trial Court Misconstrued Our Prior Opinion*

The trial court concluded that our directions in *Dowling, supra*, 208 Cal.App.4th 685, precluded it from deciding any issue on remand apart from whether it was impracticable or futile to bring this case to trial while the writ proceedings in the *MacKay* action were pending. We disagree. *Dowling* reversed the judgment of dismissal with directions to vacate the dismissal orders and "reconsider the motion to dismiss in light of the views expressed in this opinion." (*Dowling, supra*, at p. 700.) Nowhere in the opinion did we state that the trial court was limited as to the issues that it could consider in ruling on the dismissal motion on remand.

We declined to consider plaintiffs' argument made for the first time on appeal that the May 2009 stipulation extending the time to bring the *MacKay* action to trial also extended the time to bring the present action to trial pursuant to the April 2008 stipulation in this action. We noted that Farmers had submitted to this court extrinsic evidence relating to the interpretation. We stated that Farmers could have submitted such evidence in the trial court if plaintiffs had asserted their new argument in the trial court. We stated that we would not consider plaintiffs' new argument because their failure to assert the argument in the trial court had deprived Farmers of an opportunity to present evidence on the issue in the trial court. We did not state, however, that the trial court on remand could not consider plaintiffs' new argument.

We conclude that absent an express statement or some other strong indication in our opinion that we intended to limit the issues that the trial court could consider in ruling on the dismissal motion, we imposed no such limitation. The parties were free to

present new arguments and evidence relating to the motion. The trial court erred in concluding that it had no jurisdiction to consider such matters and in failing to interpret the April 2008 stipulation in this case in light of the extrinsic evidence presented.

4. *Farmers Is Not Entitled to a Dismissal*

a. *Rules of Contract Interpretation*

We interpret a stipulation in accordance with the ordinary rules of contract interpretation. (*Dowling, supra*, 208 Cal.App.4th at p. 694; *Chacon v. Litke* (2010) 181 Cal.App.4th 1234, 1252.) Our goal is to give effect to the mutual intention of the contracting parties at the time of contract formation. (Civ. Code, § 1636.) We ascertain that intention solely from the written contract if possible, but we also consider the circumstances under which it was made and the matter to which it relates. (*Id.*, §§ 1639, 1647.) We consider the contract as a whole and interpret its language in context giving effect to each provision, rather than interpret contractual language in isolation. (*Id.*, § 1641.) We interpret words in their ordinary and popular sense, unless the words are used in a technical sense or a special meaning is given to them by usage. (*Id.*, § 1644.)

Extrinsic evidence is admissible to explain the meaning of a written contract provided that the contract is reasonably susceptible of the meaning supported by the extrinsic evidence. (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 343; *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 40.) We must consider the policy favoring trial on the merits in resolving any ambiguity in a written stipulation extending the time to bring an action to trial. (*Dowling, supra*, 208 Cal.App.4th at p. 694.) We must interpret a written contract most strongly against

the drafting party (Civ. Code, § 1654) only if the other rules of interpretation and the extrinsic evidence and do not resolve the ambiguity. (*Steller v. Sears, Roebuck & Co.* (2010) 189 Cal.App.4th 175, 183-184.)

We independently review the trial court's interpretation of a contract unless the interpretation turns on the resolution of a factual dispute concerning the credibility of extrinsic evidence. (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866 (*Parsons*).) Contract interpretation, including the resolution of any ambiguity, is solely a judicial function, and our review is de novo, unless the evidence creates a legitimate dispute as to the truth or falsity of a fact that is both extraneous to the contract and material to its interpretation. (*City of Hope*, *supra*, at p. 395; *Parsons*, *supra*, at pp. 865-866.) If the facts are undisputed but may give rise to conflicting inferences, in contrast, determining which inferences to draw from the undisputed facts for purposes of contract interpretation is a question of law that we review de novo. (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 439; *Parsons*, *supra*, 62 Cal.2d at p. 865, 866, fn. 2;[5] *City of El Cajon v. El Cajon Police Officers' Assn.* (1996) 49 Cal.App.4th 64, 71.) Thus, if the extrinsic evidence is not in conflict, we interpret the contract de novo in light of the extrinsic evidence. (*Parsons*, *supra*, 62 Cal.2d at

---

[5] *Parsons*, *supra*, 62 Cal.2d 861, equated conflicting inferences with conflicting interpretations. (*Id.* at p. 866, fn. 2 [" . . . conflicting inferences, actually conflicting interpretations . . . . "].)

pp. 865-866; *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1127.)

b. *The Parties Agreed to Extend the Time to Bring This Action to Trial Commensurate with any Extension in the MacKay Action*

The April 2008 stipulation begins by identifying this action (defined as the "Farmers action") and the *MacKay* action (defined as the "21st Century action"). It then states that this action and the *MacKay* action were deemed related in October 2003 together with several other, unnamed actions. It then describes a stay in "all of these actions" from October 2003 to October 2004 followed by a second stay in this action and the *MacKay* action from June 2005 to June 2006. After discussing the legal effect of the stays and noting the provisions of Code of Civil Procedure sections 583.310 and 583.340, the stipulation states, "the parties have agreed to identify the five year time period required to bring an action to trial under Code of Civil Procedure § 583.310."

The stipulation then states that the parties agree that "[a]bsent any further periods wherein the Superior Court's jurisdiction to try the Farmers action is suspended under Civil Code [*sic*] § 583.340 and/or any further Court orders or party stipulations extending or tolling the time period to bring *either action* to trial, the five year time period to bring the Farmers action to trial under Code of Civil Procedure § 583.310 does not expire until June 17, 2010." (Italics added.)

We interpret the words "either action" in this context as referring to the present action and the *MacKay* action, which are the two actions most prominently identified and most consistently referenced in the stipulation. The language of the stipulation

suggests that by agreeing that the time to bring this action to trial would not expire until June 17, 2010, "[a]bsent any . . . further Court orders or party stipulations extending or tolling the time period to bring *either action* to trial" (italics added), the parties expressed their mutual intention that such a further extension in the *MacKay* action would have the effect of extending the time to bring the present action to trial as well.

The recitals in the stipulation stating that the present action and the *MacKay* action were stayed for the same time periods on two prior occasions support this interpretation. Such recitals considered together with the later reference to a further extension in "either action" suggest an intention to continue the practice of staying both actions contemporaneously. The fact that the parties in the two actions were represented by the same counsel, who would be aware of and would have to agree to any stipulated extension in either action, is consistent with an agreement that an extension in either action would have the same effect in the other action.

Our consideration of the uncontroverted extrinsic evidence presented by Farmers does not change our view. Plaintiffs' counsel sent a letter to Farmers's counsel dated April 3, 2008, proposing two stipulations, one for the present action and one for the *MacKay* action, extending the time to bring the two cases to trial. The proposed stipulation for the present action was identical to the stipulation filed in the present action on April 29, 2008, except (1) paragraphs 7 and 10 of the recitals referred to the trial court's jurisdiction to try "the Farmers action and the 21st Century action," rather than only "the Farmers action"; and (2) the final paragraph of the stipulation extended

the deadline "to bring the Farmers action and the 21st Century action to trial," rather than only "the Farmers action to trial," to June 21, 2010.

Plaintiffs' counsel sent an e-mail to Farmers's counsel dated April 22, 2008, stating: "Per our discussion, attached is a revised stipulation as to the Farmers' action. I have deleted reference to 21st Century in the Farmers' stipulation and the order, as well as in paragraphs 7 through 10 of the recitals. [¶] Please sign and return as soon as possible. [¶] Also, as to 21st Century, please confirm within the next 24 hours as to whether 21st Century will agree to the stipulation or not." Farmers's counsel responded by e-mail less than 30 minutes later stating: "We are good to also sign off for 21st Century. Send over a stipulation for 21st as well, or a new stip combining both the farmers and 21st century actions." Counsel signed the stipulation on April 22, 2008.

Farmers argued in the trial court that the language "either action" in the signed stipulation was "a typographical error . . . that is a remnant of [plaintiffs'] counsel's initial draft of the Stipulation." Farmers noted that the final paragraph of the stipulation proposed by plaintiffs' counsel in May 2010 did not include the language "either action," and instead stated, "[a]bsent any . . . further Court orders or party stipulations extending or tolling the time period to bring *the action* to trial . . . . " (italics added). Farmers argued that this and the correspondence described above showed that "the word 'either' did not belong in the [April 2008] stipulation."

In our view, the cited evidence does not show that the words "either action" appeared in the April 2008 stipulation by mistake or failed to express the parties' mutual intention. The fact that counsel agreed to eliminate references to the *MacKay* action in

recitals 7 and 10, while retaining references to the *MacKay* action in recitals 2, 3, and 6, does not suggest that the language "either action" in the stipulation was mistaken and should have stated "this action" or "the *Farmers* action." Instead, the evidence suggests that counsel sought to eliminate from the stipulation provisions that might be binding on the parties to the *MacKay* action. 21st Century had not yet agreed to an extension at the time that the references to the *MacKay* action in recitals 7 and 10 were deleted. Unlike the statements of apparently undisputed facts in recitals 2, 3, and 6, the statements in recitals 7 and 10 were legal conclusions concerning time periods to be excluded from the five-year period pursuant to Code of Civil Procedure section 583.340. The effort to avoid such legal conclusions relating to the *MacKay* action in the stipulation in the present action was not inconsistent with an agreement that a further extension of the time to bring the *MacKay* action to trial would also extend the time to bring the present action to trial.

We note that the language "[a]bsent any . . . further Court orders or party stipulations extending or tolling the time period to bring *either action* to trial . . . . " (italics added) appears not only in the April 2008 stipulation in the present action, but also in both the April 2008 and May 2009 stipulations in the *MacKay* action. This repeated use of the same language tends to undermine Farmers's argument that the use of the words "either action" in the April 2008 stipulation in the present action was unintended.

Farmers also argued in the trial court that the fact that plaintiffs' counsel, in May 2010, proposed a separate stipulation extending the time to bring this action to trial

to June 20, 2011, indicated that plaintiffs' counsel understood that the May 2009 stipulation in the *MacKay* action did not automatically extend the time to bring the present action to trial. In our view, the fact that plaintiffs' counsel proposed a separate stipulation in the present action may suggest such an understanding. But, alternatively, it may suggest that counsel was only being prudent and cautious in proposing a separate stipulation in this action. We must consider the policy favoring trial on the merits in resolving any ambiguity in this regard. (*Dowling*, *supra*, 208 Cal.App.4th at p. 694.)

Considering the language of the April 2008 stipulation, the uncontroverted extrinsic evidence, the rules of contract interpretation, and the policy favoring trial on the merits, we conclude that the parties intended that any extension of time to bring the *MacKay* action to trial would also extend the time to bring the present action to trial. We therefore conclude that the May 2009 stipulation in the *MacKay* action extended the time to bring the present action to trial until June 20, 2011.[6] Accordingly, the trial court erred by dismissing this action based on plaintiffs' failure to bring the case to trial by an earlier date. In light of our conclusion, plaintiffs' contention that it was impracticable or futile to bring this case to trial while the writ proceedings in the *MacKay* action were pending is moot.

---

[6] The current deadline to bring the case to trial in light of other events is a question for the trial court to address in the first instance should the issue arise on remand.

DISPOSITION

The judgment is reversed. Plaintiffs are entitled to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, Acting P. J.

WE CONCUR:

ALDRICH, J.

KUSSMAN, J.*

---

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