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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CAROLINA MENDEZ,

Plaintiff and Appellant,

v.

FRESCO MARKET,

Defendant and
Respondent.

B272296

(Los Angeles County
Super. Ct. No. BD502958)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephanie M. Bowick, Kevin C. Brazile, and Roy Paul, Judges. Reversed and remanded with directions.

Ashton R. Watkins for Plaintiff and Appellant.

Hansen & Rutherford, James M. Hansen, and Thomas M. Rutherford for Defendant and Respondent.

Plaintiff Carolina Mendez appeals from a judgment entered after the trial court granted defendant JSC & Tech, Inc, dba Fresco Market's (Fresco) motion for nonsuit in this slip and fall case. Mendez challenges the trial court's denial of her multiple requests for a trial continuance, the exclusion of her expert witnesses after they failed to appear for deposition, and the ruling on the motion for nonsuit. For the reasons set forth below, we find the trial court abused its discretion in refusing to continue the trial, and we reverse and remand the matter.

BACKGROUND

On October 26, 2012, Mendez slipped and fell while shopping at Fresco. On March 15, 2013, acting in propria persona, she filed this action against Fresco, asserting causes of action for premises liability and negligence.

Attorney Robert Tafoya Substitutes in as Mendez's Counsel

On March 22, 2013, one week after Mendez filed her complaint, Robert Tafoya of Harbor Bay Law Firm, APC substituted in as counsel for Mendez and filed a first amended complaint on her behalf, asserting the same two causes of action against Fresco.

In the first amended complaint, Mendez alleged: "As [she] walked near the fruit and vegetable section of Fresco market, she suddenly slipped and fell on liquid and/or water on the floor, such that her body went forward and hit the ground with her knees and then fell backwards. Immediately after the fall, [she] felt great pain in her right knee and lower back, among other body parts. [She] noticed a liquid and/or water on the floor, which made the floor slippery. Defendant Fresco's management was notified of the liquid and/or water." Mendez further alleged as a

result of the fall, she “experienced difficulty walking, numbness and weakness in her legs, especially her right, limping, and other problems carrying weight, causing [her] great stress and pain. She was diagnosed with three herniated disc[s] and a meniscus tear of the right knee, among other injuries.” She sought medical treatment for her injuries.

On Mendez’s behalf, Tafoya served written discovery on Fresco and responded to Fresco’s requests for discovery.

Attorney Michael Gulden Substitutes in as Mendez’s Counsel

On December 10, 2013, Michael Gulden of Gulden & Associates substituted in as Mendez’s counsel, replacing Tafoya. On Mendez’s behalf, Gulden served written discovery, participated in depositions, responded to Fresco’s discovery, and filed discovery motions.

Trial was originally set in this matter for September 2014, but the date was vacated when the case was transferred. On December 23, 2014, after multiple reassignments, the matter was assigned to Judge Stephanie Bowick for all purposes.

On April 9, 2015, Judge Bowick held a trial setting conference and set the final status conference for January 22, 2016 and the trial for February 2, 2016.

Tafoya Substitutes Back in as Mendez’s Counsel

On September 18, 2015, Tafoya, now with Tafoya & Garcia, LLP, substituted back in as Mendez’s counsel. The parties proceeded with discovery and preparation for trial.

On December 9, 2015, Tafoya served on behalf of Mendez a designation of expert witnesses and a declaration stating the experts would be prepared to testify at deposition. On December 14, 2015, Fresco served its designation of expert witnesses.

On December 15, 2015, Fresco served notices of deposition of Mendez's four designated expert witnesses, setting the depositions for January 5, 6, 8, and 12, 2016. Although not included in the record before us, apparently Mendez filed objections to the deposition notices on the ground Fresco did not contact Mendez to arrange the dates for the depositions.

On December 18, 2015, Tafoya served on behalf of Mendez a notice of deposition of Marbella Cordero, one of Fresco's employees who was working in the market at the time of the incident. The deposition was set for January 4, 2016.

On December 28, 2015, Tafoya sent Fresco's counsel a meet and confer letter regarding 11 motions in limine Mendez planned to file.

Tafoya Seeks to Continue Trial

On December 31, 2015, Tafoya filed on behalf of Mendez an ex parte application, seeking to continue the February 2, 2016 trial date for 60 days. The application set forth the following reasons for the request: "Plaintiff's counsel [Tafoya] is caught in an irresolvable calendaring conflict. Plaintiff's counsel was scheduled to go to trial on December 8, 2015 in the matter of *Jeffrey Dunbar v. State of California, et al.* . . . However, due to [Tafoya's] knee surgery to repair a severe torn meniscus the trial was continued to February 2, 2016. The Dunbar case was filed on March 1, 2013, the trial has been continued twice and it is expected to go forward; (2) Plaintiff's counsel also has a high profile trial beginning on January 4, 2016 in the matter of *Bodden v. Bikram Choudhury, et al.* . . ., which is expected to last through January 25, 2016.

"Plaintiff's counsel's consequent inability to participate in expert discovery, in the preparations of pre-trial documents, such

as witness and exhibit lists, jury instructions, special instruction, voir dire, trial briefs, motions *in limine* and trial unfairly prejudices his client, Carolina Mendez. All of this is to Ms. Mendez's prejudice, as she suffers the adverse consequences of circumstances not of her making. Should this trial date not be continued, counsel will not have adequate time within which properly [to] prepare for trial.

"Additionally, Mr. Tafoya has only a single partner who is overburdened by his own caseload, and between them work with 3 associates who work only part-time, it is literally impossible as well as financially prohibitive for any other lawyer at Plaintiff's counsel's firm to prepare to try the case in Mr. Tafoya's place, and there is no one available at Tafoya & Garcia with the amount of trial experience as Mr. Tafoya."

The same day, Fresco filed an opposition, arguing Tafoya was dilatory in seeking a continuance in that the trial date in the present action was set nearly eight months before counsel filed the application and Tafoya knew about the scheduling issue for months but remained silent rather than filing a noticed motion before Fresco expended time and expense preparing for trial. In an accompanying declaration, defense counsel represented: "When [the] Court set the February 2, 2016 trial date, the Court specifically admonished the parties that there would be no continuances allowed. At the April 9, 2015 Trial Setting Conference, counsel for the defendant and counsel for plaintiff both agreed that they would be ready to proceed to trial on February 2, 2016."¹

¹ The record on appeal does not include a reporter's transcript from the April 9, 2015 trial setting conference, and the minute order from that proceeding does not reflect the trial

The department where the matter was assigned for all purposes was dark on December 31, 2015, so a different judge (Judge Kevin Brazile) heard Mendez's ex parte application and denied it. Gulden appeared at the hearing for Mendez, although Tafoya was counsel of record.

Six days later, on January 5, 2016, Tafoya filed on behalf of Mendez a nearly identical ex parte application in the department where the matter was assigned. Fresco filed an opposition, arguing the second application was an improper motion for reconsideration "to have the same matter re-heard by a different judge." Fresco also asserted Tafoya created the scheduling conflicts of which he complained because he was aware of the trial date in the present action when he sought trial continuances in the Bodden matter in both September and December 2015, and when he associated in as co-counsel with Gulden in the Dunbar matter in October 2015. On December 3, 2015, at a court hearing Gulden (but not Tafoya) attended, the Dunbar matter was continued to February 2, 2016, the same date as the trial in the present action. Fresco submitted documents from these other matters supporting these assertions in its opposition.

On January 5, 2016, the trial court (Judge Stephanie Bowick) heard oral argument on Mendez's ex parte application and denied it.² As reflected in the minute order, Gulden appeared for Mendez, although Tafoya was counsel of record.

court's alleged admonishment that it would not allow a continuance of the trial date.

² Judge Bowick handled all further proceedings in this matter until the case was assigned to another department for trial on February 2, 2016.

The court found “[n]o good cause shown” for the continuance request.³

Mendez’s designated experts did not appear for their depositions scheduled for January 5, 6, 8, and 12, 2016. At Fresco’s request, the court reporter prepared affidavits of nonappearance.

Gulden Substitutes Back in as Mendez’s Counsel

On January 12, 2016, Gulden substituted back in as counsel for Mendez in this action.

The following day, on January 13, 2016, Fresco’s counsel sent a letter to Gulden, informing him Fresco intended to file a motion to exclude Mendez’s designated experts for failure to appear at deposition. Gulden responded by email the same day, stating: “It is my understanding that Plaintiff’s prior counsel simply objected to your expert deposition notices on the basis that neither counsel nor expert were available for depositions on the date noticed. [¶] It is also my understanding that plaintiff never refused to make the experts available for depositions. If you have a letter or email stating otherwise please send it to me. [¶] Please provide me dates you are available for deposition and I will inquire of the witnesses. Unless I get dates from you, I will assume you are not interested in deposing Plaintiff’s retained expert witnesses.”

On January 15, 2016, Fresco’s counsel responded by letter, stating: “Plaintiff’s objections to the expert depositions asserted . . . that the defendant had not contacted the plaintiff’s counsel to arrange for the depositions. We are not aware of any case or

³ The record on appeal does not include a reporter’s transcript of the ex parte hearings on December 31, 2015 or January 5, 2016.

statute that requires such. In fact, the Code specifically requires that the party designating the expert produce the expert for deposition. Accordingly, given the short time frames for expert discovery, we noticed the depositions and never received a single call saying the experts would not be appearing for their depositions. We then appeared for each deposition, along with the court reporter, and an affidavit of non-appearance documenting the experts' failure to appear for their deposition was taken. If you are aware of any authority supporting your apparent position that the plaintiff was not obligated to produce her experts as noticed, or that the objection somehow relieved the plaintiff of her obligation to produce her experts for deposition, please send it to us forthwith."

On January 19, 2016, Gulden filed and served on behalf of Mendez a proposed joint witness list and statement of the case.

Gulden Seeks a Trial Continuance

On January 21, 2016, Gulden filed on behalf of Mendez an ex parte application for a trial continuance, asserting "[d]ue to trial preparations in the Dunbar case, Plaintiff's counsel is unable to participate in expert discovery and trial."

Fresco filed an opposition, arguing, in part: "The only reasonable conclusion based on recent conduct is that the substitution of attorney was filed as part of a scheme to create a basis for making this third ex parte application for a trial continuance. It is undeniable that Mr. Tafoya and Mr. Gulden have been involved in plaintiff's representation since the beginning. For example, Mr. Tafoya was the initial lawyer plaintiff contacted and then 14 months later Mr. Gulden took over. Then, in September 2015, Mr. Tafoya resumed representing plaintiff. And now Mr. Gulden has filed a

substitution of attorney. Throughout all of this, Mr. Gulden and Mr. Tafoya have worked closely together on cases, Mr. Gulden has made appearances in the [present] case on Mr. Tafoya's behalf and both have shared the same paralegal. Not only would defendant be substantially prejudiced by a continuance, plaintiff's conduct is improper and does not justify a continuance."

On January 21, 2016, the trial court denied Mendez's third ex parte application without a hearing.

Fresco Files an Objection to Mendez's Experts Testifying at Trial

On January 21, 2016, not having received a response to the January 15, 2016 letter regarding expert depositions, Fresco's counsel sent Gulden a letter, stating Fresco would agree to depose Mendez's experts on January 25, 26, and 27 and refrain from filing a motion to exclude, if Mendez agreed to pay the court reporter fees for the nonappearances and to expedite the transcripts. Gulden did not respond.

On January 22, 2016, Fresco filed its trial brief. Therein, Fresco objected to Mendez's experts testifying at trial based on their failure to appear for deposition.

Later, on February 2, 2016, Fresco's counsel filed a declaration in support of Fresco's previously-asserted objection to Mendez's experts testifying at trial based on their failure to appear for deposition. Counsel stated, in pertinent part: "Neither plaintiff nor plaintiff's counsel appeared for any of the four depositions. At no time did Plaintiff's counsel ever state that the experts were not available for the dates noticed. Plaintiff's counsel never offered alternative dates and never called to re-schedule. Further, plaintiff's counsel never sought a protective

order to change the date of the depositions despite filing multiple ex partes on other matters. In fact, plaintiff's counsel was present in court with defense counsel on several days for multiple ex partes and plaintiff's Motion to Strike and yet plaintiff's counsel never said anything about the experts not appearing for their depositions. Accordingly defense counsel appeared at the depositions of each expert as noticed and the court reporter prepared an affidavit of non-appearance."

Gulden Again Seeks to Continue the Trial and Then to Be Relieved as Counsel

On January 22, 2016, the trial court held the final status conference. As reflected in the court's minute order,⁴ Mendez "announce[d] not ready for trial." Gulden moved for a continuance. The minute order states, in pertinent part: "Plaintiff's oral fourth motion for trial continuance is heard, argued and DENIED. This is a 2013 case. No good cause is shown. Plaintiff's counsel Michael Gulden has been aware of the current trial date since April 2015. [¶] . . . [¶] This matter . . . will be sent to a trial court on February 2, 2016. No continuances will be granted. [¶] Parties are ordered to appear . . . ready for trial on February 2, 2016. Sanctions will be considered if plaintiff fails to comply."

On January 28, 2016, Gulden filed an ex parte application to shorten time on a motion to be relieved as counsel for Mendez. In an accompanying declaration, Gulden stated he was "scheduled to start trial on February 2, 2016 in [another department] and [could not] be at two trials at the same time."

⁴ The record on appeal does not include a reporter's transcript of the January 22, 2016 final status conference.

Fresco opposed the ex parte application, arguing it was “a disguised attempt to obtain a trial continuance.” Fresco also asserted, “Mr. Gulden accepted representation of Ms. Mendez on January 12, 2016 with full knowledge of what was required. [Citation.] If he did not want to be counsel for the plaintiff, he should not have signed the substitution.”

On January 28, 2016, after hearing oral argument, the trial court denied the ex parte application, stating in its minute order: “This Court has previously denied five [*sic*] previous requests by Plaintiff to continue the trial date in this case.^[5] The requests for continuance have been vigorously opposed by the Defendant. The Court set February 2, 2016 as the trial date for this case on April 9, 2015. On October 22, 2015 [*sic*], the Plaintiff and Defendant in the Dunbar v. State of California case stipulated to set the date of February 2, 2016 as the new trial date in that case, the same trial date as this case.^[6] Mr. Gulden was counsel for Plaintiff Jeffrey Dunbar at that time. Mr. Gulden has been aware of the trial date in this case since April 2015, as he attended the Case Management hearing in this case as Plaintiff’s counsel, and he should have alerted the court in the Dunbar case of the conflict on October 22nd [*sic*], and should have requested a continuance from the judge handling that matter. In addition, Mr. Gulden officially substituted back in on this case on January 12, 2016 (after having substituted Robert Tafoya, Esq. as counsel on September 18, 2015), and again was aware of this case having a February 2, 2016 trial date. Allowing Mr. Gulden to now be

⁵ At this point, Mendez had made four previous requests for a trial continuance.

⁶ On December 3, 2015, the Dunbar case was continued to February 2, 2016.

relieved as counsel in this case so that he can handle the trial in the Dunbar matter is prejudicial to both the Defendant in this case and Plaintiff Mendez, Mr. Gulden's client (as a continuance would be needed for any new lawyer stepping in). In addition, Robert Tafoya, Esq. has not been substituted out or relieved as Plaintiff's counsel in the Dunbar case. It is unclear to this Court why Mr. Tafoya cannot handle the Dunbar trial on February 2, 2016 and Mr. Gulden handle this matter. [¶] The Court will not consider any further requests for a continuance in this matter. [¶] The trial date of February 2, 2016 stands."

On February 2, 2016, the case was assigned to Judge Roy Paul for trial. The following day, on February 3, 2016, Gulden filed a declaration in support of Mendez's fifth request for a continuance. The basis of the request was that the Dunbar matter was scheduled for trial on February 8, 2016. Gulden stated in his declaration: "After four trial continuances, and several final status conferences, the Dunbar parties appeared ready for trial on February 2, 2016 before the Honorable Marc Marmaro. At that time, I informed Judge Marmaro of the trial conflict in the [present] case, as I had done on 3 prior occasions in January 2016. Judge Marmaro made it clear that the Dunbar case was an older case, that he had continued the trial four times, and that the State of California and its witnesses were ready for trial given the last continuance. . . ."

On February 3, 2016, the trial court (Judge Paul) heard oral argument on Mendez's request for a continuance. Gulden represented that Tafoya was no longer working on the Dunbar matter. In a lengthy ruling, the court denied the continuance after considering the factors set forth in California Rules of Court, rule 3.1332, and finding no good cause.

The Trial Court Excludes Mendez's Experts

The same day, the trial court also heard oral argument on Fresco's motion to exclude Mendez's designated expert witnesses for failure to appear at deposition and granted the motion. The court's minute order states: "The Court has heard oral argument and researched the subject matter case law and finds unreasonable failure by Plaintiff's counsel and that said failure is not excused by anything this court has heard. [¶] To admit these experts at this late date without prior deposition would be a tremendous prejudice to the defense. [¶] The Court recognizes the prejudice it would create for the Plaintiff to exclude [her] expert witnesses but the court must follow the law."

The Trial Court Grants Fresco's Motion for Nonsuit

Trial proceeded. On February 5, 2016, after Mendez rested, Fresco made a motion for nonsuit on the ground Mendez could not establish causation. Fresco's counsel argued: "The only evidence about the fall that's been presented has been from Mrs. Mendez herself. . . . In that part of her testimony, she testified that she did not know how long the water had been there, [and] she did not know what the source of the water [was]. She testified that she had entered the store just two or three minutes prior to the time when she fell."⁷

In opposition to the motion for nonsuit, Gulden made a reference to Fresco's discovery responses, and the trial court stopped him, commenting that the discovery responses were not

⁷ Mendez's trial testimony is not included in the record before us. She did not request a reporter's transcript from February 4, 2016, the date she testified. The trial testimony in the appellate record is all from medical professionals, relating to damages, not causation.

evidence at trial. Gulden also represented that Mendez had “been trying to” subpoena Fresco’s owner, and requested additional time to effect service. The trial court denied the request.

The trial court granted the motion for nonsuit, concluding “there’s no evidence to support a verdict for the plaintiff” because she did not show Fresco had actual or constructive notice of the water on the floor before Mendez slipped and fell.

On March 16, 2016, the trial court entered judgment in favor of Fresco and awarded it “costs and expenses” in the amount of \$68,546.24.

DISCUSSION

Mendez contends the trial court abused its discretion in denying her “repeated requests for continuance.” We agree.

“A motion for continuance is addressed to the sound discretion of the trial court.” (*Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389.) “Although continuances of trials are disfavored, each request for a continuance must be considered on its own merits. The court may grant a continuance only on an affirmative showing of good cause requiring the continuance.” (Cal. Rules of Court, rule 3.1332(c).)

“In ruling on a motion or application for continuance, the court must consider all the facts and circumstances that are relevant to the determination. These may include:

- “(1) The proximity of the trial date;
- “(2) Whether there was any previous continuance, extension of time, or delay of trial due to any party;
- “(3) The length of the continuance requested;

“(4) The availability of alternative means to address the problem that gave rise to the motion or application for a continuance;

“(5) The prejudice that parties or witnesses will suffer as a result of the continuance;

“(6) If the case is entitled to a preferential trial setting, the reasons for that status and whether the need for a continuance outweighs the need to avoid delay;

“(7) The court’s calendar and the impact of granting a continuance on other pending trials;

“(8) Whether trial counsel is engaged in another trial;

“(9) Whether all parties have stipulated to a continuance;

“(10) Whether the interests of justice are best served by a continuance, by the trial of the matter, or by imposing conditions on the continuance; and

“(11) Any other fact or circumstance relevant to the fair determination of the motion or application.” (Cal. Rules of Court, rule 3.1332(d).)

A trial “court must look beyond the limited facts which cause a litigant to request a last-minute continuance and consider the degree of diligence in his or her efforts to bring the case to trial, including participating in earlier court hearings, conducting discovery, and preparing for trial.” (*Oliveros v. County of Los Angeles, supra*, 120 Cal.App.4th at p. 1396.) “ ‘ “While it is true that a trial judge must have control of the courtroom and its calendar and must have discretion to deny a request for a continuance when there is no good cause for granting one, it is equally true that, absent [a lack of diligence or other abusive] circumstances which are not present in this case, a

request for a continuance supported by a showing of good cause usually ought to be granted.” ’ ’ (*Ibid.*)

As Fresco acknowledged in its respondent’s brief, up to the time Tafoya made the first request for a trial continuance, Mendez had “aggressively” (i.e., diligently) litigated this case. The trial court had entertained no prior request for a continuance. Fresco asserts the trial court admonished the parties at the April 9, 2015 trial setting conference that it would not allow any continuance of the February 2, 2016 trial date. The minute order from the trial setting conference does not reflect such admonishment.

Mendez showed good cause for a continuance. Both of the attorneys who represented her in this action were preparing for trial in the Dunbar matter, an older case in which the court had already granted a number of continuances. Neither the court in the Dunbar matter nor the trial court in the present action would budge on the trial date, even after both were aware of the conflict. As a result, Mendez’s attorneys did not display the same diligence they had employed for the prior two and a half years in this case. “[W]hatever counsel’s shortcomings in managing [their] schedule, it is the rights of the client, not the lawyer, which are at stake here” (*Oliveros v. County of Los Angeles*, *supra*, 120 Cal.App.4th at p. 1400.)

The record indicates Mendez was harmed by the denial of the continuance. Counsel informed the trial court Mendez would not be able to comply with expert discovery absent a continuance. Mendez’s experts did not appear for their depositions and were excluded from trial. One of these experts was designated to testify about causation—the element on which the court granted the motion for nonsuit. Moreover, Mendez informed the court she

had been unable to serve Fresco's owner with a trial subpoena. He too was projected to testify regarding causation—"how often employees inspected the store for possible hazards."

Below, Fresco did not make any specific claims of prejudice that would result from a 60-day continuance (e.g., witness or counsel unavailability). Fresco's claim during appellate oral argument that it would have been prejudiced by a continuance because it was having difficulty keeping track of its witnesses over the three-year life of the case is not reflected in the record before us, and was not a claim made to the trial court in its written oppositions to the continuance requests.

The trial court did not state that a continuance would impact the calendaring of other pending trials. (Cal. Rules of Court, rule 3.1332(d)(7) [in ruling on a request for a trial continuance, a trial court may consider the "court's calendar and the impact of granting a continuance on other pending trials"].)

We recognize that counsel on both sides could have avoided the circumstances giving rise to this appeal by civilly working out an expert discovery schedule and addressing conflicting trial schedules. The musical chairs of Mendez's trial counsel made it that much more difficult to arrive at courteous accommodation to counsels' mutual concerns. It is also understandable that this lack of civility frustrated the trial court. Nonetheless, for the reasons set forth above, it was an abuse of discretion for the trial court to refuse Mendez one continuance. Here, "the interests of justice [were] best served by a continuance." (Cal. Rules of Court, rule 3.1332(d)(10).)

DISPOSITION

The judgment is reversed and the matter remanded. The trial court is ordered, upon remand, to set a new trial date and a schedule for expert witness depositions. Each side is to bear its own costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.