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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ROSLYN LACHER,

Plaintiff and Appellant,

v.

CLIENT SECURITY FUND
COMMISSION FOR THE
STATE BAR OF CALIFORNIA,

Defendant and
Respondent;

SUSAN CARTER et al.,

Real Parties in Interest.

B276490

(Los Angeles County
Super. Ct. No. BS141215)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert H. O'Brien, Judge. Affirmed.

Law Offices of Pamela G. Lacher and Pamela G. Lacher for Plaintiff and Appellant.

Office of General Counsel, State Bar of California,
Vanessa L. Holton, Robert G. Retana, Paul A. Bernardino and
Sean T. Strauss for Defendant and Respondent.

No appearance for Real Parties in Interest.

Roslyn Lacher appeals from the trial court's denial of her petition for a writ of administrative mandamus to set aside the final decision of the Client Security Fund Commission for the State Bar of California (Commission) denying Lacher's application for reimbursement. The trial court denied Lacher's petition after she failed to file her opening brief and lodge the administrative record by the court-ordered deadline despite the court's grant of five continuances over the prior three years. Lacher contends the trial court abused its discretion by rendering a decision without consideration of the administrative record. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Lacher's Application to the Commission*

In September 2009 Lacher filed an application with the State Bar of California seeking reimbursement from the Client Security Fund¹ for sums she paid to attorneys Susan Carter and

¹ "The Client Security Fund was created by the state Legislature in 1971 with the enactment of Business and Professions Code section 6140.5 for the purpose of relieving or mitigating 'pecuniary losses caused by the dishonest conduct of

Jack Kaufman in 1993 and 1994 for their representation of her in connection with litigation over the trust of Lacher's father. Lacher claimed Carter and Kaufman overbilled her for their services. The Commission rendered a tentative decision denying reimbursement on December 3, 2010. After granting Lacher "a number of continuances of the matter so that she could submit additional materials," the Commission rendered its final decision denying reimbursement on November 1, 2012. The Commission found, among other things, Lacher's application was time-barred because it was not filed within four years of her discovery of the losses.

B. *Lacher's Petition for Writ of Mandate*

On January 29, 2013 Lacher filed a petition for writ of mandate in superior court pursuant to Code of Civil Procedure section 1094.5,² seeking to have the Commission's final decision set aside.³ On May 8, 2013 the trial court⁴ held a trial setting

the active members of the State Bar.'" (*Johnson v. State Bar* (1993) 12 Cal.App.4th 1561, 1563, fn. 1.)

² All further undesignated statutory references are to the Code of Civil Procedure.

³ On our own motion, we augment the record to include Lacher's January 29, 2013 petition for writ of mandate, September 9, 2013 amended petition for writ of mandate, and April 27, 2016 ex parte application for continuance and supporting declaration, as well as the trial court's minute orders of May 8, 2013, September 9, 2013, November 13, 2013, March 14, 2014, October 31, 2014, and May 11, 2016. (Cal. Rules of Court, rule 8.155(a)(1)(A).)

⁴ Judge Joanne B. O'Donnell presided over this proceeding from May 8, 2013 through March 1, 2016, except for Judge

conference, at which it set a briefing schedule and January 24, 2014 trial date on the petition. On July 31, 2013 the Commission served Lacher's attorney, Pamela G. Lacher (P. Lacher),⁵ with the administrative record. On September 9, 2013 Lacher filed an amended petition.

Pursuant to the parties' stipulations, on November 13, 2013, March 14, 2014, and October 31, 2014 the trial court continued the hearing and briefing schedule. On April 3, 2015 the trial court granted Lacher's ex parte application for a further continuance of the trial to November 18, 2015 and set deadlines of September 8, 2015 for the filing of Lacher's opening brief and November 6, 2015 for the lodging of the administrative record.

On September 8, 2015 the trial granted a further continuance of the trial, by stipulation of the parties, to May 11, 2016. The court ordered Lacher to file her opening brief by January 12, 2016. The order did not alter the November 6, 2015 deadline for the lodging of the administrative record. In its order, the trial stated, "No further stipulations to continue will be honored."

The administrative record was not lodged on November 6, 2015, nor did Lacher file her opening brief by the January 12, 2016 deadline. Instead, on March 1, 2016 Lacher filed an ex parte application for a further continuance of the trial and other deadlines. The trial court denied Lacher's application, finding Lacher "show[ed] no good cause for a sixth continuance of the

Robert H. O'Brien's approval of an October 31, 2014 stipulation. Judge O'Brien presided over the April 27, 2016 and May 11, 2016 hearings, the latter of which is at issue in this appeal.

⁵ Lacher was represented by her daughter.

trial date within the meaning of [California Rules of Court, rule] 3.1332. [P. Lacher]’s proffered reasons for requesting the continuance are vague and nonspecific. [P. Lacher]’s explanations, including the illness of her dog since the last stipulation to continue the trial in September and her related inability to concentrate, do not demonstrate the need for a further continuance and also suggest that, if a further continuance is granted, [P. Lacher] will continue to find excuses for her failure to prepare for trial.”

On April 27, 2016 Lacher filed another ex parte application for a continuance. P. Lacher argued the administrative record was “a mind-boggling mess,” but she did not meet with the Commission’s attorney, Tracey McCormick, to finalize the record until February 12, 2015. Further, on March 3, 2015 McCormick e-mailed P. Lacher an “almost finished product” based on their meeting, but P. Lacher “had some personal issues that caused [her] to be less than attentive to this case (including [her] sick dog, who was a 24 . . . hour job and who recently died).”

At the hearing on the ex parte application, P. Lacher argued the delay resulted from “the fault of the [Commission] who actually started with a record that was unbearable.” She added, “[I]t wasn’t until a year ago March that the parties actually sat down and came up with what was about 90 percent of a record,” and her brief could not “be filed till we have a record.” P. Lacher explained that since March 2015 she “had a really sick old dog, almost like hospice care to keep alive,” which prevented her from timely filing her opening brief. P. Lacher represented, “If the [c]ourt were [to] rule today that . . . the trial could be continued and the briefing could happen, the record would be prepared tomorrow.” She confirmed that, at the request

of P. Lacher, on “March 3rd, 2015, [McCormick] revised the record, reordered it, and sent it to [P. Lacher] in four separate emails requesting her approval.” McCormick added, “Since that time [P. Lacher] took no steps to respond to me to say whether that was a good record that she agreed with that I could then have [it] Bates stamped again and provided” In its minute order denying Lacher’s application, the trial court noted it was Lacher’s seventh request for a continuance, and the court “adopt[ed] the reasoning contained in the minute order of March 1, 2016 by reference.”

On May 5, 2016, less than a week before the trial was to begin, Lacher filed a motion to augment the record and lodged a proposed administrative record. On May 11, 2016 the trial court held a hearing on Lacher’s petition. The trial court observed at the beginning of the hearing, “We don’t have any briefs.” P. Lacher responded she had attached a memorandum of points and authorities to her amended petition. McCormick noted the multiple stipulations entered by the court envisioned a briefing schedule under which Lacher would file a brief with citations to the administrative record.⁶ The court stated it had “grave doubts of whether [Lacher] [was] going to be proceeding in the case without following that September 9th, 2015 [m]inute [o]rder,” which required Lacher to file her opening brief by January 12, 2016.

P. Lacher again blamed the Commission for her failure to file her opening brief, arguing she could not proceed without an adequate record, which the Commission was required to prepare.

⁶ The memorandum attached to the amended petition contains citations to the record served by the Commission on P. Lacher in 2013, but the record was never lodged in the court.

McCormick reminded the court she had served the certified record on P. Lacher on July 31, 2013. McCormick acknowledged the certified record was voluminous because it included all documents Lacher provided to the Commission during the administrative proceeding, including many duplicate documents. However, in response to P. Lacher's concerns, McCormick worked with her to create a revised record, which McCormick provided to P. Lacher for her approval on March 3, 2015. According to McCormick, P. Lacher did not respond. McCormick followed up five or six months later to remind P. Lacher the "ball was in her court" and to request P. Lacher's confirmation the proposed record was acceptable to her.

P. Lacher acknowledged in response, "[T]hat's true, a year ago she sent me the record. I had some personal issues. I thought the record was done after our last meeting which resulted in that . . . March 3rd email to me. . . . I didn't even open it because I thought it was done. And, my bad, I came at the briefing schedule, and it looked like that wasn't true, there was still some minor things that needed to be adjusted. That's when I asked for the stipulation. That last six months I had a sick dog"

The trial court denied Lacher's motion to augment the record and took her petition under submission. On May 11, 2016 the court denied Lacher's petition. The court noted Lacher failed to file and serve an opening brief as required by the September 8, 2015 order and relied instead on her amended petition, which had citations to a nonexistent record.⁷ The court concluded it

⁷ The trial court also incorrectly noted Lacher never obtained approval for filing an amended petition. The court's trial setting

“[had] nothing to decide before it” because of Lacher’s “conduct and lack of action in preparation of a proper record and proper briefs.”

On June 7, 2016 the court entered judgment in favor of the Commission. The judgment stated, “Following the hearing, after taking the matter under submission, the Court issued the following Orders: [¶] 1. The motion to augment the record is denied. [¶] 2. The petition for a writ of mandate is denied. [¶] 3. Judgment is entered in favor of Respondent . . . and against Petitioner” The Commission’s counsel served notice of the entry of the judgment by mail on June 15. Lacher timely appealed.

DISCUSSION

A. *Standard of Review*

A plaintiff must proceed with reasonable diligence in prosecuting a civil action (§ 583.130), and a trial court has discretion to dismiss an action for delay in prosecution under specified conditions. (§ 583.410, subd. (a) [“The court may in its discretion dismiss an action for delay in prosecution pursuant to this article on its own motion or on motion of the defendant if to do so appears to the court appropriate under the circumstances of the case.”].) Under section 583.420, subdivision (a)(2)(A), the trial court may dismiss an action if “[t]he action is not brought to trial within . . . [¶] [t]hree years after the action is commenced

minute order of March 8, 2013 provided an amended petition was to be filed and served by September 9, 2013.

against the defendant,” except in specified circumstances not applicable here.⁸

“When reviewing a discretionary dismissal, we must presume the decision of the trial court is correct, unless the party challenging the decision shows the trial court abused its discretion.” (*ZL Technologies, Inc. v. Does 1-7* (2017) 13 Cal.App.5th 603, 609; accord, *Corrinet v. Bardy* (2019) 35 Cal.App.5th 69, 72 [“On appeal, we review the trial court’s ruling for abuse of discretion. [Citations.] We will not substitute our opinion for that of the trial court absent a clear abuse of discretion and a miscarriage of justice.”]; *Van Keulen v. Cathay Pacific Airways, Ltd.* (2008) 162 Cal.App.4th 122, 131 [“A reviewing court may not reverse a trial court’s order granting dismissal for dilatory prosecution unless the plaintiff meets the burden of establishing manifest abuse of discretion resulting in a miscarriage of justice.”].)

⁸ Lacher contends the denial of her petition for a writ of administrative mandamus without first considering the record was “essentially a defacto dismissal” and an abuse of discretion. The dismissal statutes applied to Lacher’s administrative mandamus proceeding. (*Oskooi v. Fountain Valley Regional Hospital* (1996) 42 Cal.App.4th 233, 239 [“section 583.110 et seq. applies to mandamus proceedings”]; *Binyon v. State of California* (1993) 17 Cal.App.4th 952, 955 [“there is no bar preventing the court from applying the dismissal statutes to administrative mandamus proceedings unless, as the statute states, such application would be inconsistent with the character of that proceeding or the statute governing it”].) We therefore treat the trial court’s denial of Lacher’s petition without consideration of the merits as a discretionary dismissal with prejudice.

B. *The Trial Court Did Not Abuse Its Discretion in Denying Lacher's Petition in Light of Her Failure To File an Opening Brief and To Facilitate Lodging of the Administrative Record*

Lacher contends the trial court abused its discretion in denying her petition without considering the merits despite her failure to bring her case to trial within three years of its commencement because she was reasonably diligent in prosecuting the proceeding. She was not.

Lacher assigns blame for the delay in prosecution to the Commission, which she argues failed to provide the administrative record.⁹ But it is undisputed the Commission served P. Lacher with the certified administrative record in July 2013. After the parties conferred over the state of the record, the Commission generated a condensed version of the record, which it sent to P. Lacher by e-mail on March 3, 2015 for her approval. P. Lacher had this proposed version of the record for over a

⁹ Without citation, Lacher asserts “the trial court ordered [the Commission] not [Lacher] to pay for . . . and to serve and file [the administrative record].” The appellate record does not contain such an order. “Generally, [i]n a section 1094.5 proceeding, it is the responsibility of the petitioner to produce a sufficient record of the administrative proceedings; “. . . otherwise the presumption of regularity will prevail”” (*Weinberg v. Cedars-Sinai Medical Center* (2004) 119 Cal.App.4th 1098, 1107; accord, *Elizabeth D. v. Zolin* (1993) 21 Cal.App.4th 347, 355 [“A petitioner has the burden to provide a partial record that will allow sufficient and effective review by the court.”].) As discussed below, even if the court had ordered the Commission to prepare the administrative record (which the Commission did), it was Lacher’s conduct that delayed lodging of the record.

month before she filed her ex parte application on April 3, 2015 for a fourth continuance. In the 12 months that followed, P. Lacher failed to respond or take any steps to complete the record designation process. P. Lacher admitted she “didn’t even open” the revised record for six months “because [she] thought it was done,” and she failed to take action over the subsequent six months because of the illness of her dog.

Lacher’s reasons for her attorney’s inaction over the 12 months prior to the trial date do not provide a reasonable excuse for the delay. Lacher’s dilatory conduct is underscored by her failure to seek a continuance of the briefing schedule and trial date until March 1, 2016, when she filed an ex parte application for a continuance, over two months after the court’s January 12, 2016 deadline for filing her opening brief.

Under these circumstances, Lacher has not shown reasonable diligence, and the trial court did not abuse its discretion in denying Lacher’s petition without consideration of the merits. *Black Historical Society v. City of San Diego* (2005) 134 Cal.App.4th 670 is instructive. There the petitioner failed to file its opening brief in the trial court, then argued on appeal it was prevented from doing so because the respondent “held the administrative record hostage and refused to release it without advance payment.” (*Id.* at p. 677.) The Court of Appeal rejected this argument, noting the petitioner had a statutory and court-ordered responsibility to pay for the costs of record preparation. The court reasoned, “[A]lthough [petitioner] had requested [respondent] prepare the administrative record, it then failed to take any further necessary steps to obtain the record, that is, to pay the costs of preparation as ordered by the court or to seek modification of the court’s order to permit a waiver of costs or

delayed payment.” (*Id.* at p. 678.) The court concluded that under the circumstances, dismissal for failure to prosecute was not an abuse of discretion. (*Ibid.*)

Lacher’s reliance on *Elizabeth D. v. Zolin* (1993) 21 Cal.App.4th 347 (*Elizabeth D.*) for the proposition a trial court cannot resolve an administrative mandamus proceeding without a review of the administrative record is misplaced. There, the petitioner challenged the Department of Motor Vehicles’ decision to suspend her driving privileges for medical reasons. (*Id.* at p. 350.) The trial court granted a peremptory writ of administrative mandamus despite the petitioner producing an incomplete administrative record, which omitted the transcript of the administrative hearing and relevant reports on her medical condition. (*Id.* at p. 355.) The Court of Appeal reversed, reasoning the record did not accurately represent the administrative proceedings and therefore “fail[ed] to establish administrative abuse of discretion.” (*Ibid.*; see *Hothem v. City and County of San Francisco* (1986) 186 Cal.App.3d 702, 705 (*Hothem*) [reversing issuance of writ of mandate where petitioner provided trial court with incomplete record and court made no finding whether the full administrative record was reasonably available to petitioner].)

Elizabeth D. and *Hothem* stand for the proposition the trial court cannot grant a writ of mandate where the petitioner fails to provide an adequate administrative record. But here the trial court properly *denied* the petition because Lacher failed in a timely manner to provide an adequate record and file an opening brief. Further, given Lacher’s dilatory conduct, the trial court did not abuse its discretion in denying Lacher’s 11th-hour attempt to augment the record less than a week before the hearing. The

trial court similarly acted within its discretion in refusing to consider Lacher's amended petition as her opening brief because it lacked citations to the condensed administrative record, and Lacher's belated request denied the Commission an opportunity to file a responsive brief.¹⁰

Finally, Lacher argues public policy favors trial on the merits. "However, it is now well established that the policy [of preferring to dispose litigation on the merits] only comes into play when a plaintiff makes a showing of some excusable delay." (*Van Keulen v. Cathay Pacific Airways, Ltd.*, *supra*, 162 Cal.App.4th at p. 131; accord, *Salas v. Sears, Roebuck & Co.* (1986) 42 Cal.3d 342, 347 ["although the interests of justice weigh heavily against disposing of litigation on procedural grounds—a policy we reaffirm—that policy will necessarily prevail only if a plaintiff makes some showing of excusable delay"].) As discussed, Lacher has not shown her delay was excusable.

¹⁰ *Woodard v. Personnel Commission* (1979) 89 Cal.App.3d 552, also relied on by Lacher, is likewise inapposite. The court in *Woodard* reversed the trial court's denial of a petition for writ of mandate based on an incomplete record, concluding the trial court must "order a transcript of the administrative proceeding . . . when the petitioner is indigent and cannot pay the cost of such a transcript and the administrative agency takes the position that review of its decision is impossible without it." (*Id.* at p. 558.) Given the Commission's preparation of the initial record and a condensed record, Lacher's ability to pay for an administrative record is not at issue.

DISPOSITION

The judgment is affirmed. The Commission is to recover its costs on appeal.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

STONE, J.*

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