S215990

IN THE
SUPREME COURT OF CALIFORNIA

FANNIE MARIE GAINES,

Plaintiff/Appellant and Petitioner,

vs.

JOSHUA TORNBERG, et. al.

Defendants/Respondents.

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
CASE NO. B244961
Superior Court, Los Angeles County
Case No. BC361 768
The Honorable Rolf M. Treu, Judge

APPELLANT'S REPLY BRIEF

IVIE, McNEILL & WYATT
W. Keith Wyatt, Esq.* (Bar No. 80859)
wkwyatt@imwlaw.com
Antonio K. Kizzie, Esq. (Bar No. 279719)
AKizzie@imwlaw.com
444 South Flower Street, Suite 1800
Los Angeles, CA 90071
Telephone: (213) 489-0028
Facsimile: (213) 489-0552

Attorneys for Plaintiff/Appellant and Petitioner
FANNIE MARIE GAINES

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444 South Flower Street, Suite 1800
Los Angeles, CA 90071
Telephone: (213) 489-0028
Facsimile: (213) 489-0552

Attorneys for Plaintiff/Appellant and Petitioner
FANNIE MARIE GAINES

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APPELLANT'S REPLY BRIEF

Appellant Fannie Marie Gaines ("Appellant"), submits this Reply Brief ("Reply") in response to Defendants/Respondents, Aurora Loan Services, LLC ("Aurora") and Lehman Brothers Holdings, Inc. ("LBHI"), collectively referred to as "Respondents", Answering Merits Brief ("AMB").

I. INTRODUCTION

Characteristic of their involvement from the outset, respondents Aurora and LBHI have presented confusing contentions of fact and law which are in clear conflict with the actual facts and law in the record. As tracked in the timeline presented below, it has been difficult to determine whether respondents mean what they say at the various times they have made representations, either verbally or in writing, throughout this litigation.

Aurora began its participation in or about March 2008. Aurora's counsel, Scott Drosdick, wrote in a letter dated March 18, 2008 in response to Aurora being served in this action that Aurora possessed an $865,000 interest in the subject property. Drosdick wanted a stay of the litigation in order to retain counsel and discuss possible resolution of various issues related to the litigation. Present counsel now represents that Drosdick did not want a stay and that Aurora never possessed an interest in the property.

Aurora/LBHI contend that the Gaineses are elderly, wily, freeloading scam artists taking advantage of the Tornberg defendants and the financial institution defendants to obtain over $1.0 million in benefits they did not deserve. Then, in the same breath, they contend that the Gaineses would have been foreclosed on and living in the street if it had not been for this lawsuit.

The latter claim may be correct. If it were not for appellant's efforts throughout this litigation, she would have lost her equity, and she would have lost title to her home. She may have been evicted from her property by the Tornberg defendants who were ultimately willing to let the house be sold in foreclosure. If Mrs. Gaines had not paid over $30,000 to keep the property from being sold by defendant GMAC Mortgage in June 2007, less than one year after Tornberg fraudulently obtained title, the house would have been sold by foreclosure sale. Appellant would likely have been evicted by whoever bought the property in the foreclosure sale.

Aurora now claims it never had an interest in the property. However, Aurora apparently did not realize that until August 2009 when the matter was prepared to proceed to trial. Aurora previously claimed under penalty of perjury that LBHI possessed the interest that Aurora initially claimed to possess in Drosdick's letter of March 18, 2008.

Aurora/LBHI contend appellant was unreasonable to insist on proof by a legal instrument that would establish LBHI's interest. Despite the obvious

problems which LBHI had experienced with its own "leap before you look" investment strategies, it apparently believes appellant was unreasonable for not accepting Aurora's representations without proof that Aurora was right this time.

LBHI contends appellant should have spent her scarce resources to obtain relief from the LBHI bankruptcy stay before she knew for sure that Aurora was right this time about who the title holder was. LBHI had money to burn, it thought, until it was bankrupt. The Gaineses were reasonably concerned about losing the money they had left before accepting Aurora's representations without confirmation of their accuracy.

The *facts* are that the only instrument *ever* presented in this action which establishes LBHI's interest in the property is the assignment instrument *dated December 10, 2010.* (II, AA 355). LBHI had no interest in the property, prior to December 10, 2010. Aurora/LBHI made misrepresentations regarding which entity held the $865,000 interest in the property for almost 30 months - from Drosdick's letter dated March 18, 2008 until the assignment instrument dated December 10, 2010.

It was impracticable to take this matter to trial without involving the holder of the $865,000 interest in the property. It was impossible to proceed against LBHI from the time it was determined LBHI held an interest in the

property because LBHI was in bankruptcy. The timeline provided below illustrates the undisputed evidence in the record.

November 13, 2006	Original complaint filed. (I, AA 1-57).
March 18, 2008	Aurora's Drosdick proposes"stay": Intended to preserve the status quo; Stay discovery; Avoid filing answer by Aurora; Mediate the issues with all parties; Confirm with stay order from court. (II, AA 264-265).
March 31, 2008	Appellant agrees to stay and obtains agreement from all other parties/claimants. (II, AA 267-269).
April 3, 2008	Appellant submits unopposed ex-parte application for court ordered stay as agreed w/ all counsel. (II, AA 250-276).
April 3, 2008	Court orders stay per agreement of counsel. (II, AA 278-281).
April 3, 2008 to November 13, 2008	Stay lasts 217 days before it is lifted by court order. (II, AA 286-289; 303-306).
January 16, 2009	Aurora admits ownership in verified Answer to 4th Amended Complaint ("AC"). (II, AA 293-301).
August 24-26, 2009	Trial date of 8/29/09 is continued based on settlement between Countrywide and because Aurora disclaims interest in subject property. (II, AA 236-240).
November 6, 2009	Aurora files motion for leave to file amended answer to 4th AC. (II, AA 236-243; AAA 869-885).

August 19, 2010	Aurora files verified Answer to 5th AC, repudiates its interest, and alleges the interest belongs to LBHI instead. (II, AA 344-353).
August 20, 2010	Aurora counsel (who later becomes counsel for LBHI) announces/confirms he had agreed to attempt to obtain voluntary relief from the bankruptcy stay, but LBHI ultimately refused to agree to voluntary relief. (II, AA 382-387)
December 10, 2010	Interest in subject property is "Assigned" to LBHI by Mortgage Electronic Registration Systems ("MERS"). (I, AA 178-182; II, AA 355).
December 13, 2010	Aurora's counsel presents assignment instrument dated 12/10/10 which is the only document ever produced which establishes LBHI's acquisition of an interest in the property. (I, AA 178-182; II, AA 355).
October 12, 2011	Appellant and LBHI stipulate to relief from bankruptcy stay. (II, AA 360-364).
October 25, 2011	U.S. Bankruptcy Court in New York orders relief from bankruptcy stay (II, AA 360-364).
January 3, 2012	LBHI files Answer to 5th Amended Complaint. (AAA 887-894).
May 16, 2012	LBHI files motion for leave to file cross-complaint against appellant and Tornberg. (AAA 896-994).

May 18, 2012	Fidelity/Rybicki file motion to dismiss for failure to bring case to trial within five years (LBHI/Aurora do not join in motion). (AAA 995-1012)

One of the primary exceptions to the five-year statute of limitations has been that when a party is unable, from causes beyond his control, to bring the case to trial because of a total lack of jurisdiction by a trial court, or because proceeding with the trial would be both impracticable and futile, such time should be excluded from calculation of the five year limitations period. *Christin v. Superior Court (1937) 9 Cal.2d 526, 529-533.* The mandatory language of the statute should not be applied in cases where it is impossible, impracticable, or futile to bring an action to trial when the five year period due to causes beyond the parties control. *Moran v. Superior Court (1983) 35 Cal.3d 229, 237-239.*

The impracticability period does not have to be the "but for" cause for failing to meet the five-year deadline. *Tamburina v. Combined Ins. Co. of America (2007) 147 Cal.App.4th 323,333-334; New West Fed. Savings & Loan Assn. v. Superior Court (1990) 223 Cal.App.3d 1145, 1151-1153; Sierra Nevada Memorial-Miners Hospital, Inc. v. Superior Court (1990) 217 Cal.App.3d 464, 469-471.* The Law Revision Commission rejected cases that required a "but for" causal connection and recognized that the time within which an action must be brought to trial is tolled during a period of

impracticability regardless of whether a reasonable time remained at the end of the period of the excuse to bring the action to trial. *New West, supra, at pp. 1153-1155.*

In resolving the issues in this appeal, this Court should look at the *undisputed facts in the record* and independently review the undisputed facts to resolve the legal questions regarding the applicability of CCP §583.340 (b) and (c). *Tamburina, supra 328; Brown & Bryant, Inc. v. Hartford Accident & Indemnity Co. (1994) 24 Cal.App.4th 247, 251-252.*

As a preliminary matter, respondents' AMB does not dispute appellant's contention that a vast majority, if not all, of the facts in the record and in appellant's OMB are undisputed. Therefore, the general deferential policy that a trial court is better suited with factual knowledge to decide a case than this Court or an appellate court does not apply. Further, issues of law are always subject to independent appellate court determination. *Stermer v. Board of Dental Examiners (2002) 95 Cal.App.4th 128, 132–133.* Respondent also does not argue that any defendant would suffer any prejudice by trial on the merits.

Further, respondents' arguments/defenses under CCP § 1775 were *never* previously presented by respondents in the trial court, Court of Appeal, or in opposition to Ms. Gaines Petition for Review to this Court. [I AA 158-191; II AA 400-413;; IV AA 732-745, 756-768.] Therefore, such argument should be

disregarded as untimely, improper, and inapplicable,-as admitted in respondent Aurora's AMB.

To the extent respondent Lehman argues for dismissal or reconsideration of the Appellate Court's decision on Lehman without having formally appealed any decisions in conformance with civil procedure, such argument should also be disregarded as improper and untimely.

Respondents' AMB repeatedly argues that despite spending their last years in poor health and fighting to remain in their home, this Court should rule against appellant because appellant has been "compensated enough." Respondents also argue that Mrs. Gaines, at almost 70 years of age and suffering from cancer, was a "savvy plaintiff." However, if Aurora was mistaken in asserting an ownership interest in the subject property in verified pleadings, it is reasonable that appellant was also confused.

Respondents' AMB urges this Court to go backwards and support the trial court's rigid, mechanical application of CCP §§ 583.310 and 583.340 with no regard for the clear overarching policy concerns and statutory/decisional authority against such an application. Respondents' AMB also mischaracterizes the complete/partial stay as routine "time spent mediating a case," which the record does not support. A routine mediation does not necessitate a court order staying discovery or litigation.

Respondents' AMB improperly twists out of context *dicta* in one opinion decided over one-hundred years (100) ago and prior to the statutes/policies/exceptions relevant to this action, *Bailey v. Taffe (1866) 29 Cal.422*, to incorrectly contend that an appellant has the impossible burden to establish the already amorphous "abuse of discretion" beyond a reasonable doubt.

An appellant must establish an abuse of discretion. *Denham v. Superior Ct. (1970) 2 Cal.3d 557, 566.* The language "beyond a reasonable doubt" is not an operative part of the standard. No current authority supports such a characterization of appellant's burden absent reiterating the dicta in *Bailey*. The standard of review is determined by the nature of the challenged trial court action and the issues raised, "not by what counsel argues about that action." *El Dorado Meat Co. v. Yosemite Meat & Locker Service, Inc. (2007) 150 Cal.App.4th 612, 617.* Therefore, this Court should disregard such argument. Notwithstanding, even if such were the standard appellant contends that the undisputed facts in the record fulfill said burden.

As recognized in the dissenting Appellate Court opinion by Justice Rubin, the complicated factual circumstances coupled with the undisputed facts of Mrs. Gaines' *reasonable* diligence in prosecuting this action against several major financial institutions while challenging the fraudulent, illegal conduct of the Tornberg defendants and abetting entities, militate that this matter be

allowed to proceed to trial on the merits. *Gaines v. Fidelity National Titile Insurance Company (2013) 165 Cal.Rptr.3d 544, 573.*

Respondent Aurora's AMB with its colorful language is mostly silent on the policy considerations asserted in Appellants OMB, e.g. trial on the merits, preventing elder/real estate fraud. Respondents' repeated and similar attempts to mischaracterize the request for a stay as *a request by appellant only* as opposed to *a request by all parties* reflect respondents' recognition of the manifest injustice which would result from allowing any of the parties to include the period of the stay in the computation of the five-year limitations period for bringing this matter to trial.

ARGUMENT

II. THIS COURT SHOULD DISREGARD ANY ALLEGED FACTS PRESENTED BY RESPONDENTS WHICH SERVE ONLY TO ARGUE THAT THE APPELLANT WAS "COMPENSATED ENOUGH" OR WAS A "SAVVY PLAINTIFF" AS IRRELEVANT TO THE ISSUES PRESENTED

Taking the arguments in order as presented in respondents' AMB, it should be noted, as a preliminary matter, the Gaineses disagree with the Aurora/LBHI arguments that Ms. Gaines has been "compensated enough already". Respondents Aurora and Lehman apparently make this argument to make it easier for this Court to support a procedural dismissal over trial on the

merits. Respondents cited no case authority, statutes, or facts which supported their "compensated enough already" arguments.

Further, the fact that Mrs. Gaines worked in antique resale for thirty (30) and achieved a master's degree in the 1950s hardly makes Mrs. Gaines in her elder years and poor health "savvy" to complicated real estate schemes in the 2000s. Appellant does not characterize Mrs. Gaines as an "inexperienced simpleton." [Aurora AMB, pg. 7.] Appellant presents facts that at the time of this action Mrs. Gaines was elderly, had limited financial means, was in poor health, and was vulnerable to the respondents' schemes and trickery.

Respondent repeatedly reiterates that the "Gaines were on the verge of losing their home." [Aurora's AMB, pg. 22.] Respondents' point in repeating this contention and the others begs the question, "So?"

Mrs. Gaines did not deserve to be scammed out of ownership of her home during the last years of her life. The Gaineses were not done a favor by being victims of defendants' actions.

III. RESPONDENTS DO NOT CHALLENGE APPELLANTS' CONTENTION THAT RESPONDENTS SHOULD BE ESTOPPED UNDER THE DOCTRINE OF EQUITABLE ESTOPPEL

Respondent Aurora's AMB provides no argument to rebut appellants' contention that the doctrine of equitable estoppel applies when parties

enter an agreement and one party uses the other party's reliance on the language of that agreement to their detriment regarding dismissal motions based on limitations periods. *Waley v. Turkus (1958) 51 Cal.2d 402, 439-40* ("We perceive no logical reason why the doctrine of estoppel should be so restricted. Stipulations in open court are not only the words or conduct which reasonably and commonly induce reliance by counsel. When...plaintiff's reliance is reasonable, an estoppel is essential to prevent defendant from profiting from his own deception."); *See also Tresway Aero, Inc. v. Superior Court (1971) 5 Cal.3d 431, 436* (Enunciated the rule that equitable estoppel is available to a plaintiff who has failed to comply with the statutory requirements in reasonable reliance upon the words or conduct of the defendant.)

The record establishes that respondents willingly entered into the agreement along with all the other parties. The order granting the ex parte application induced reasonable reliance on the agreement by all parties for at least the 120 day time period that the parties all agreed to. Respondents' failure to rebut should constitute a concession to the merits of this contention.

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IV. RESPONDENT LBHI'S INFORMAL REQUEST FOR APPEAL SHOULD BE DISREGARDED AND DENIED AS UNTIMELY AND NOT IN CONFORMANCE WITH APPELLATE PROCEDURES

The Court of Appeal held that the trial court erred in dismissing LBHI under the five-year statute. *Gaines v. Fidelity (2013) 165 Cal.Rptr.3d 544, 561.* Respondent LBHI at no time moved for formal reconsideration or appeal of the Court of Appeal's decision despite opportunities to do so. Now, for the first time in its AMB, respondent LBHI in a footnote on pg. 8 improperly encourages this Court to consider reinstating the "trial court ruling in its entirety" despite established procedures formally appeal. [AMB, pg. 8, footnote 16.]

V. EVEN IF NOT A COMPLETE STAY, THE PERIOD OF THE STAY SHOULD BE EXCLUDED UNDER CCP § 583.340(C) BECAUSE IT WAS IMPRACTICABLE TO PROSECUTE THIS LITIGATION IN GOOD FAITH DURING THE STAY; APPELLANT WAS REASONABLY DILIGENT BEFORE, DURING, AND AFTER THE STAY; AND APPELLANT HAS DEMONSTRATED IN THE RECORD THAT THERE WAS A CAUSAL CONNECTION BETWEEN SAID IMPRACTICABILITY AND THE ABILITY TO BRING THE MATTER TO TRIAL WITHIN THE FIVE-YEAR STATUTE

Respondents do not appear to dispute the principle that what is deemed impossible, impracticable, or futile is determined by the Court *in light of all the circumstances of a particular case, including the conduct of the parties* and the nature of the proceedings. *Brown, supra* at 251.

Appellants do not dispute that a party claiming impracticality must establish: 1) a circumstance of impracticability; 2) a causal connection between that circumstance and the inability to meet the five-year deadline; and 3) *reasonable* diligence. *Tamburina, supra* at 328.

The parties disagree whether appellant has presented facts to support the three aforementioned factors. "[I]mpracticability and futility" involve determining "excessive and unreasonable difficulty or expense *in light of all the circumstances of a particular case.*" [Emphasis added.] *Bruns (2011) 51 Cal.4th, supra at 730-731; see also Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal.4th 424, 438*; *Tamburina, supra* at *328*.

Appellant contends that under the facts and circumstances of this case all of the elements have been met. *At no time* have respondents introduced any arguments or evidence of prejudice in the record.

A. THE RECORD REFLECTS THAT APPELLANT DEMONSTRATED *REASONABLE* DILIGENCE BEFORE, DURING, AND AFTER THE STAY

Respondent contends that Mrs. Gaines did "scant little before her death other than to meet the challenges of defendants to the pleadings." [AMB pg. 9.] Again, respondents' contentions lack any support from the record.

Mrs. Gaines was forced to amend the pleadings several times to incorporate subsequently discovered entity defendants, as is not uncommon in real estate fraud litigation. Mrs. Gaines was sufficiently diligent during the litigation to successfully oppose Countrywide's motion for summary judgment, settle with Countrywide, and announce ready for trial in August 2009. [II AA 236-243].

Determining whether the CCP 583.340 (c) exception applies requires a *fact-sensitive inquiry* and depends "*on the obstacles faced by the plaintiff in prosecuting the action and the plaintiff's exercise of reasonable diligence in overcoming those obstacles.*" *Bruns (2011) 51 Cal.4th, supra at 731.* Respondents' AMB takes the hindsight position of perfect diligence, which is not the standard.

Respondents' claim that over "29 months" Mrs. Gaines was not diligent about bringing the matter to trial is not true nor supported by the record as respondents' footnote 19 to support said claim only cites to a portion of the record wherein Mrs. Gaines' counsel timely prepared and filed Final Status Conference documents, motions in limine, and announced ready for trial. [II AA 238:17-20.]

Aurora had previously filed a verified answer to appellant's Fourth Amended Complaint on January 21, 2009 in which it admitted it held a $865,000 interest in the property. [II, AA236-243;292-301;343-355]. On or

about November 6, 2009, Aurora moved for leave to file an amended answer in which it asserted, *for the first time*, that it did not hold an interest in the property and that LBHI, which was in bankruptcy, was the owner of the loan encumbering the property. [AAA, 869-886]. Although counsel for Aurora represented to the court that counsel would provide proof of LBHI's interest, it was not until after December 2010 that Aurora provided any proof to appellant that LBHI had been assigned its interest. Proof of ownership came in an "Assignment of Deed of Trust and Request for Special Notice" dated December 10, 2010. (II, AA 355.).

Contrary to respondents' contentions, the *facts and record* indicate that the Gaineses proceeded with extraordinary diligence in the prosecution of their action despite their elderly status, limited financial means, poor health, lack of sophistication in real estate/financing transactions, opposition and multiple misrepresentations from real estate professionals and major institutions. Impracticability to the Gaineses was far different than it was to Countrywide, Aurora, Fidelity, or Lehman Brothers. Appellant requests that this Court reasonably consider all of the circumstances and find that appellants have been reasonably diligent not only during the stay, but during the prosecution of this case.

B. PETITIONER WAS REASONABLE AND DILIGENT TO REJECT AURORA'S REPRESENTATIONS THAT LEHMAN BROTHERS HAD TITLE TO THE SUBJECT PROPERTY ABSENT DOCUMENTED PROOF OF OWNERSHIP

Respondent Aurora's AMB contends that in May 2009 "plaintiff's counsel had been informed of Lehman's interest." [Aurora's AMB, pg. 9.] However, appellant's counsel had also been "informed" of Aurora's interest in a verified answer to appellant's Fourth Amended Complaint just four months earlier in July 2009. (II AA 293-301, at ¶ 9).

When Appellant announced ready for trial in August 2009, Countrywide settled and required time to make a good-faith settlement. It was only at that point defendant Aurora, *for the first time*, indicated that Lehman Brothers, in bankruptcy, held title to the property. One year later, in an August 20, 2010 status conference, counsel for defendant Aurora, represented *that Aurora had been trying unsuccessfully* to get voluntary relief from stay pass-through. It was reasonable for appellant to expect Aurora/LBHI to do what they said they would do.

August 20, 2010 Status Conference Dept. 19 Hon. Rex Heeseman

The Court: So where are we with the bankruptcy issue and all that?

Mr. Garcia: Lehman Brothers continues to be in bankruptcy in the Southern District of New York. *I have been working trying to, as we represented we would, trying to get a voluntary relief from any stay pass-through.* There are issues behind the scenes happening with Lehman Brothers

that make it so that they're not willing to do that." [III AA 648 ln. 26-28; 649 ln. 1-5.]

The trial date was continued several times during the Lehman "bankruptcy issue" because defendant Aurora failed to provide sufficient proof of Lehman's interest and expected Ms. Gaines to accept Aurora's statement as accurate based on a proposed declaration. It would have been unreasonable for appellant to invest time and money in obtaining relief from Lehman's bankruptcy stay if Lehman did not hold an interest in the property. It would have been unreasonable for appellant to accept the representations of Aurora regarding the holders of interest in the property without documented proof after Aurora had already proved to be an unreliable source for information regarding the identity of people and/or entities that held an interest in the property. Aurora had previously mistakenly submitted a verified answer dated January 16, 2009 in which it claimed an $865,000 interest in the property. (II AA 293-301, at ¶ 9).

Aurora/Lehman finally produced a written instrument which established Lehman's interest in the property, entitled "Assignment of Deed of Trust and Request for Special Notice" dated December 10, 2010. (II AA 355). No other document establishing Lehman's interest in the property has ever been produced in these proceedings. The undisputed record on appeal is that Lehman's interest in the property commenced on December 10, 2010.

Respondent contends there was "no basis for counsel to be confused" [Aurora AMB pg. 10.].

Respondents have not explained why Aurora was confused about whether it held an interest when it apparently never did. Respondents have not explained why the only instrument presented which establishes LBHI's interest in the property is an assignment dated December 10, 2010 when Aurora was claiming LBHI was the interest holder since August 2009.

There were no bases for appellant to attempt to obtain relief from the automatic bankruptcy stay prior to December 10, 2010 when Aurora/Lehman finally produced the assignment instrument which established that Lehman held an interest in the property. Appellant was not in a financial position to expend money attempting to obtain relief from the bankruptcy stay of defendant Lehman, only to find out that Aurora was *again* mistaken about the actual title holder's identity. Appellant reasonably required documented proof from Aurora.

Respondents do not explain why such proof took so long to procure or why the only "proof" provided was dated December 10, 2010, indicating when Lehman's interest in the property began. Petitioner reasonably waited until the proof was provided before spending the time, money, and effort to obtain relief from the bankruptcy stay in New York.

VI. THE STAY AT ISSUE WAS A *COMPLETE* STAY BASED ON THE UNDISPUTED FACTS IN THE RECORD AND THIS COURT MAY EXERCISE ITS INDEPENDENT JUDGMENT ON THIS QUESTION OF LAW SINCE THE FACTS ARE NOT IN DISPUTE

Respondents' AMB states that "the Drosdick letter" did not call for a stay of litigation, and respondents assert that the legislature views mediation as part of prosecution (in circumstances under CCP § 1775 et. seq. which are not reflective of this case), and simple "early mediation" does not toll the statute. Respondents' AMB cites no evidence in the record to support their conclusion that any outstanding discovery existed or was ever responded to during the stay. The record supports a finding that all parties ceased litigating this action during the period of the stay as they all agreed to do.

Because the facts in the record are undisputed, this Court should review those facts independently and determine the nature of the stay under the circumstances of this case. *Tamburina, supra at 327-328; Brown, supra at 251-252.*

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A. THE RECORD OF CORRESPONDENCE BETWEEN COUNSEL, THE EX PARTE APPLICATION, AND THE LANGUAGE AND SPIRIT OF THE STAY ORDER REFLECT THE UNDERSTANDING THAT THE STAY WOULD FUNCTION AS A *COMPLETE* STAY WHICH ENCOMPASSED ALL PROCEEDINGS IN THE ACTION AND PROSECUTION WAS NOT CLEARLY CONTEMPLATED BY THE PARTIES NOR FACILITATED BY THE MEDIATION

Respondents' AMB admits that Attorney Scott Drosdick's, counsel for Aurora, letter "became the foundation for the partial stay." [AMB 15.] A plain reading of the language of the letter from counsel for defendant Aurora, Scott E. Drosdick, dated March 18, 2008 supports Appellant's position that the spirit and understanding between all counsel was that the stay would function as a *complete* stay to all litigation. [II,AA264-265]

"This confirms our recent telephone conversations and emails over the course of February and March 2008... *and the agreements reached therein*...In light of the foregoing, it is agreed by and between games and Aurora loan... That:

> 1) Aurora *Loan shall not be required to enter an appearance, and/or answer, move or otherwise respond to*, Gaines' Fourth Amended Complaint for 120 days from the date of this letter ("Stay");
>
> 2) Gaines *shall not file a request for default judgment*... against Aurora Loan during the stay;
>
> 4) Aurora loan *agrees to toll* as of February 26, 2008 the "running" of the three-month period provided for in Civil Code section 2924(a)(2)..." [II,AA 264-265]

The March 31, 2008 confirmation letter sent by Attorney Randall Kennon, appellant's counsel, to all counsel also memorialized the agreement and indicated the spirit and purpose of the stay was to *halt litigation* for the reasons *defendant Aurora* initially expressed, and that prosecution during the stay was not contemplated by the parties nor facilitated by the mediation. [II,AA, 267-269]. The letter stated:

> "1. The court *strike the current September 22, 2008 Trial Date*, set this case for a Trial Setting Conference on or after July 16, 2008 and enter its order that except for the matters set forth below, *all other litigation efforts in this case be stayed* until *on or after* the Future Trial Setting Conference.
>
> 2. All previously served and outstanding written discovery shall be responded to... *each serving party's 45 day period to move to compel further responses to that discovery shall commence on the date of the future Trial Setting Conference.*
>
> 3. *No other discovery shall be commenced until after the future Trial Setting Conference.*"

The record does not establish that any outstanding discovery was responded to. The language was merely precautionary. Further, Respondent Aurora's own AMB contends that stipulations to extend time for performing certain tasks do not extend the five year period "unless it appears that the parties so intended." [Aurora's AMB, pg. 16.]

Evidence of such intention further exists as the ex parte application made *on the same grounds and understanding* was

unopposed by any defendant. [II,AA,283-284]. It was not *until respondents filed their reply to plaintiff's opposition* to the motion to dismiss that respondent Fidelity and Rybicki presented an affirmative argument, with no evidence, that the period of the stay should not be excluded.

The trial court abused its discretion by making findings of fact based on arguments in respondents' reply unsupported by any evidence in the record. *Save Sunset Strip Coalition v. City of W. Hollywood (2001) 87 Cal.App.4th 1172, 1181 n.3* (Absent justification for failing to present an argument earlier, the court will disregard an issue raised for the first time in a reply brief.); *Reichardt v. Hoffman (1997) 52 Cal.App.4th 754, 764.*

Notwithstanding, it is undisputed *in the record* that even if, hypothetically, there was any outstanding discovery, no party could have engaged in any litigation to compel responses as it was agreed that the 45 day period to do so would not begin after the stay was lifted and no party could propound any discovery during the stay. [II, AA267-269] Therefore, such precautionary language when considered under the totality of the circumstances should not be determinative.

////

B. THE RECORD SUPPORTS APPELLANT'S POSITION THAT IT WAS IMPRACTICABLE, IF NOT IMPOSSIBLE, TO BRING THE MATTER TO TRIAL DURING THE TIME OF THE STAY

Based on the agreed upon and court ordered stay of all litigation, it was impracticable and impossible to bring this matter to trial during the stay (complete or partial) from April 13, 2008 until November 6, 2008 because such actions would have violated the court order of the previously assigned judge who was no longer available and the language and spirit of the agreement reached by all the parties to stay. [II, AA 226-431].

No new judge was assigned, and no trial setting conference was conducted to lift the stay until November 6, 2008. It was impossible and impracticable to bring this matter to trial during the original 120 days of the stay and during the 97 day additional period while no judge or courtroom was assigned to lift the court ordered stay. [II, AA 226-431]. Respondents present no facts or evidence in the record to support their contention that the stay was within Mrs. Gaines' control without a courtroom or judge to hear the matter until November 6, 2008. [II,AA236-243, 302-306.]

It would have been an unreasonable waste of resources to conduct this litigation without including the party claiming the largest financial interest in the property. The stay was intended to allow Aurora, and the other parties, an opportunity to assess their various positions and attempt to resolve the litigation

without incurring the time, expense, and effort of litigation involving up to 10 defendants.

C. THE RECORD REFLECTS THAT THE STAY, COMPLETE OR PARTIAL, ESTABISHED A CAUSAL CONNECTION TO MRS. GAINES' INABILITY TO BRING THE MATTER TO TRIAL WITHIN FIVE YEARS

Respondents' AMB does not appear to explicitly claim that appellant failed to establish a "causal connection" between the stay and the impracticability/impossibility to bring the case to trial. However, applicable case law dictates that the "causal connection" required may be established when "an unusually lengthy" circumstance of impracticality deprives the plaintiff of a "substantial portion" of the five-year period for prosecuting the lawsuit even if there is ample time after the period of impracticability in which to go to trial. *Tamburina*, *supra* at 335; *Sierra, supra at 473*; *New West, supra at 1155*; *Sanchez v. City of Los Angeles (2003) 109 Cal.App.4th 1262, 1271–1273.*

In *Tamburina*, the Appellate Court held that *the parties' willing stipulations* to continue trial due to plaintiff's and his counsel's illnesses demonstrated 424-day total period of impracticability as required to support tolling exception under CCP 583.340 (c). Id. 328-333. Further, the Appellate Court held that the trial court improperly utilized only the "but for" principle of a causal connection, and that plaintiff demonstrated the

requisite "causal connection" between those illnesses and his failure to satisfy five-year requirement by applying the principle that an unusually lengthy period of impracticability that deprives the plaintiff and/or his counsel of a substantial portion of the five-year period for moving the case to trial should be excluded. Id. at 333-336.

Similarly, appellant and all defendants agreed to stay the litigation for at least 120 days. An unusually lengthy circumstance of impracticability led to the stay lasting 217 days wherein appellant could not prosecute the action until the court lifted the stay. If the trial court would have considered and excluded *any* portion of the stay (the 120 days of the court order, the 217 days of the actual stay, or the 97 days after the 120 during which no court was available to lift the stay), appellant's action would have been within the five-year statute by at least 15 days, 38 days, or 135 days.

Appellant contends that the stay, whether considered complete or partial, satisfies both the "but for" and "substantial portion" analysis re: "causal connection" as established by evidence and arguments set forth in Appellant's OMB and herein regarding the spirit and understanding of the agreement, the facts and circumstances of the instant case, and was recognized in Justice Rubin's dissenting opinion. *Gaines (2013) 222 Cal.App.4th supra at 57.* (If the trial court had exercised its discretion "in conformity with the spirit of the law" and not to "defeat the ends of substantial justice" and excluded the

120 days of the parties' stipulated stay or the 217 days of actual stay or any significant part of the Aurora/Lehman Brothers time, the five years would not have elapsed.)

D. RESPONDENTS' CONTENTION THAT THE STAY WAS SIMPLY A ROUTINE MEDIATION/PERIOD OF SETTLEMENT DISCUSSIONS OR SHOULD BE GOVERNED BY CCP § 1775 IS NOT SUPPORTED BY THE RECORD OF THE CIRCUMSTANCES OF THIS CASE

Respondents apparently do not dispute that the word "stay" must be looked at in the context *of each individual case. Bruns v. E-Commerce Exchange, Inc. (2011) 51 Cal.4th 717.* However, respondents' AMB fails to objectively review the undisputed facts in the record to evaluate the stay that occurred.

The undisputed factual circumstances indicate the stay was not a routine mediation or settlement discussion. Routine mediations/settlement discussions rarely require a court ordered "stay," rarely preclude litigation or additional discovery, rarely toll the time required for responsive pleadings under "fast track" rules, and rarely toll the time to compel responses to discovery. Respondents' claim that "this was not even a stay at all" is another self-serving example of respondents saying things they do not mean.

Respondents AMB also argues *at length* for the first time that the stay should not be excluded under CCP § 1775 et. seq. However, respondents

admits that CCP § 1775 et. seq. is *not* reflective of the circumstances of *this* case because Title 11.6 of the Code of Civil Procedure applies "*only* to cases that are amenable to judicial arbitration because they fall within its jurisdictional threshold" and that said statutes "therefore are not directly applicable to this case." [Aurora AMB, pg. 17, 18.]

Further, the fact that the Legislature has historic analyses and exceptions for "stays/mediations" at issue herein and discussed in CCP §§ 583.310 and 583.340 establish that there may be recognized exceptions to the rules under the circumstances of each case. Finally, the cases cited in respondents' AMB are factually inapposite, make no holdings under CCP § 1775 et. seq., reference CCP § 1775 only in dicta, do not discuss CCP § 1775 regarding stays or exclusion of time, and do not discuss CCP §§ 583, 583.310 or 583.340 in any capacity. *Foxgate Homeowner's Ass'n, Inc. v. Bramalea California, Inc. (2001) 26 Cal.4th 1* (In a construction defects action, plaintiff homeowners association moved for sanctions against defendant developer and its attorney under Code Civ. Proc., § 128.5, for failing to participate in good faith in court-ordered mediation and comply with an order of the mediator.); *Rojas v. Superior Court (2004) 33 Cal.4th 407* (Mediation privilege for "writings" applied to witnesses' statements, analyses of raw test data, and photographs prepared during mediation.); *In re Marriage of Woolsey (2013) 220*

Cal.App.4th 881 (Mediation confidentiality precluded husband from establishing undue influence based on conduct during mediation.)

No case cited by respondent supports respondents' claim that "the Legislature deems that court-ordered mediation should not impede the running of the five-year period to bring the case to trial under CCP 583.310 unless the case is within six months of the five year expiration date when the order is made." [Aurora AMB, pg. 20.] Respondents arguments under CCP § 1775 et. seq. should be disregarded as irrelevant, a waste of time, and admittedly inapplicable.

As a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal; appealing parties must adhere to the theory (or theories) on which their cases were tried or dismissed. *Greenwich S.F., LLC v. Wong (2010) 190 Cal.App.4th 739, 767*; *Giraldo v. California Dept. of Corrections & Rehabilitation (2008) 168 Cal.App.4th 231, 251.* Further, a defendant cannot assert a new theory of defense for the first time on appeal. *Bardis v. Oates (2004) 119 Cal.App.4th 1, 13*; *Curcio v. Svanevik (1984) 155 Cal.App.3d 955, 960*; *Lucich v. City of Oakland (1993) 19 Cal.App.4th 494, 498.* Therefore, respondents' contentions under CCP § 1775 et. seq. are not only inapplicable, but also untimely.

VII. THE TRIAL COURT AND APPELLANT AGREED THAT IT WAS IMPRACTICABLE TO BIFURCATE THE TRIAL OF A REAL ESTATE MATTER WITHOUT THE TITLE HOLDER OF THE PROPERTY PRESENT IN THE ACTION AND APPELLANT'S DECISION TO NOT FILE A MOTION TO BIFURCATE DOES NOT REFLECT A LACK OF REASONABLE DILIGENCE

Respondents' AMB briefly implies that appellant may have demonstrated a lack of diligence because appellant did not move to bifurcate the trial. However, respondents' AMB fails to acknowledge the impracticality and undue expense of trying the matter twice due to a titleholder's bankruptcy and the plain and straightforward language of the trial court *in the record of two status conferences on August 20, 2010 and November 18, 2010* wherein the court explicitly indicated it would not likely bifurcate the action. [II,AA 384-385, 391-392].

Petitioner reasonably required documented proof that Lehman was the holder of the title to the property before trying to obtain relief from the bankruptcy stay. Further, appellant's position is not inconsistent with *Bruns*. Respondents' reliance on arguments based on *Bruns* are misleading as *Bruns* is factually distinguishable from the instant case. In *Bruns*, the motion to dismiss was brought after almost *seven years* had passed. All the other defendants officially joined the motion *and* served notice to plaintiff. Id. at 722. None of the defendants joined the Fidelity/Rybicki motion to dismiss. *Gaines v.*

Fidelity National Title Insurance Company (Cal. Ct. App. 2013) 165 Cal.Rptr.3d 544, 562.

However, the principles in *Bruns* favor appellant's position because, as the Court held, "Subdivision (c) gives the trial court discretion to excluded additional periods, including periods when partial stays were in place, when the court concludes that bringing the action to trial was "impossible, impracticable, or futile." *Id. at 726.* If there is a partial stay, the Court in *Bruns* stated the measure is "the plaintiff's exercise of reasonable diligence." *Id. at 731.* Defendants Fidelity and Rybicki even indicated in the motion to dismiss they were "willing to admit" it was impracticable to bring the action to trial without defendant Lehman. [III AA 485.]

In light of the option of bifurcation being strongly and reasonably discouraged by the trial court, appellants' decision to not move for bifurcation does not and should not be held to reflect a lack of reasonable diligence as opposed to appellant's counsel merely seeing the "writing on the wall" regarding the court's position and not frivolously wasting each parties' and the court's time and resources to hear such a motion. Therefore, respondents' contentions in the AMB regarding a motion to bifurcate lack merit.

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VIII. THE ABUSE OF DISCRETION STANDARD IS TOO AMORPHOUS AND FATAL TO BE USEFUL AS A GUIDE IN DETERMINING IF A TRIAL JUDGE ABUSED HIS/HER DISCRETION IN THE DISMISSAL OF A FACTUALLY COMPLICATED CASE THAT WAS OBJECTIVELY TOO IMPRACTICABLE TO BE BROUGHT TO TRIAL DESPITE COUNSEL'S REASONABLE DILIGENCE

Respondent mistakenly argues as if Justice Rubin is the only judge who has ever articulated the impractical and unrealistic nature of the abuse of discretion standard as an analytical tool to review trial court decisions. Many courts and respected judges have discussed that the abuse of discretion standard is difficult, if not impossible, to apply in a consistent manner because it is "so amorphous as to mean everything and nothing at the same time and be virtually useless as an analytical tool." *Hurtado v. Statewide Home Loan Co. (1985) 167 Cal.App.3d 1019, 1022*; *People v. Jackson (2005) 128 Cal.App.4th 1009, 1019* ("Abuse of discretion standard is itself much abused.")

Respondent claims that "to follow the path advocated by Justice Ruben...would be to render the abuse of discretion standard meaningless." [Respondent AMB, pg. 39.] Respondent ignores ample authority that the standard is already virtually "meaningless" and even supports said finding. ["[i]sn't that the point?" Respondent Aurora AMB, pg. 34.]

In his dissenting opinion *in Messler v. Bragg Management (1990) 219 Cal.App.3d 983* Justice Johnson discussed the legislative history of CCP §583.130 extensively. He indicated that the statement of the Legislature that

California, as a matter of public policy, favors a trial on that merits over dismissal for failure to prosecute with reasonable diligence *was not a mere platitude.* Justice Johnson indicated the desire to reduce court congestion does not justify the sacrifice of substantial rights of litigants.

Respondent Aurora seeks at all costs to sacrifice the rights of appellant and everyone who has had to suffer a miscarriage of justice under the current standard until it is respondents' turn one day. After an objective review of this record, if the policy of trial on the merits means anything, this Court should not sacrifice appellant's rights to her day of trial under the undisputed facts of reasonable diligence.

Again, the facts of record are not in dispute wherein a trial court would have more knowledge of the facts of a case and more deference. The abuse of discretion standard is concerned with *legal principles*. Deference should depend on whether the trial court's opportunities for observation or other policy reasons require greater deference than would be accorded to the trial court's determination of purely legal questions. Absent such justification for deference, an issue is "largely a question of law subject to plenary appellate scrutiny." *Hurtado, supra, 167 Cal.App.3d at 1025–1027*; *In re Robert L. (1993) 21 Cal.App.4th 1057, 1065* ("Deference makes sense where the issue usually involves primarily factual disputes.")

Where there are no disputed factual issues, the appellate court *independently* reviews the trial court's disqualification determination as a *question of law. People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc. (1999) 20 Cal.4th 1135, 1144*; *City & County of San Francisco v. Cobra Solutions, Inc. (2006) 38 Cal.4th 839, 848.* Further, several appellate courts have stated, "A dismissal for dilatory prosecution must be more closely scrutinized on review than one denying the motion." *Wong v. Davidian (1988) 206 Cal.App.3d 264, 268.*

Pure issues of law are always subject to independent appellate court determination. *Stermer v. Board of Dental Examiners (2002) 95 Cal.App.4th 128, 132–133*; *TG Oceanside, L.P. v. City of Oceanside (2007) 156 Cal.App.4th 1355, 1371.* Even the legal and policy component of discretion was explained long ago in *Bailey, supra, at p.424*, "It is not a mental discretion, to be exercised *ex gratia,* but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice...."

The abuse of discretion standard should not to be exercised to "defeat the ends of substantial justice." The ends of substantial justice require that the ruling of the trial court be reversed. The trial court abused its discretion by failing to consider the "circumstances of the instant case" as stated in *Bruns*

which warrant exclusion of the time for the court ordered stay (complete or otherwise) due to impossibility/impracticability.

The dismissal of this action on procedural grounds which were not factually nor legally supported contradicted overarching state policies of trial on the merits, protection of the elderly and vulnerable against real estate/foreclosure fraud and elder abuse, policy favoring agreements of counsel, equitable estoppel, and alternative resolution of legal disputes.

IX. THE RECORD OF THE PROCEEDINGS REQUESTED FOR JUDICIAL NOTICE IS RELEVANT TO SHOW THE PROTRACTED NATURE OF THE LITIGATION

Respondent does not oppose Appellant's Request for Judicial Notice. Therefore, such lack of opposition should be considered as a concession to the merits of appellant's request.

X. CONCLUSION

Respondents have repeatedly contended that appellant has received $1,060,000 in benefits already. These contentions are misleading as appellant is appealing from an order dismissing her entire action. She would not receive any benefit from the payoff of her $565,000 mortgage if she no longer owns the property.

Appellant would only receive that benefit if appellant is allowed to proceed to trial, wins the trial, and it is determined that the title

obtained by the Tornberg defendants was void. This litigation is intended to have those issues resolved at trial.

Appellant has not been "compensated enough already" as respondents contend. The Tornberg defendants conspired to defraud the Gaineses to steal their equity and the title to their property. The Tornberg defendants could not have succeeded without the assistance of the financial institution defendants who facilitated the elder financial abuse, the violations of HESCA, the forging/alterations of deeds, and the theft of escrow proceeds committed by the Tornberg defendants.

This appeal presents whether the trial court should have excluded the time of the stay agreed to by the parties in calculating whether the five year limitations period to bring this matter to trial had expired. Based upon the undisputed facts in the record, appellant contends this Court should uphold the spirit and history of both the legislative and decisional law in California and determine that appellant is entitled to proceed to trial on the merits against all of the defendants.

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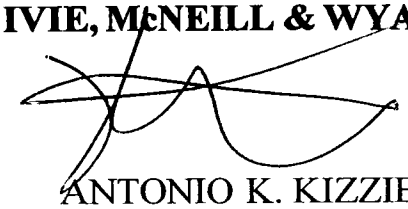
The decision of the trial court dismissing all of the defendants should be reversed and this case should be remanded for trial against all of the defendants.

Respectfully submitted,

IVIE, McNEILL & WYATT



ANTONIO K. KIZZIE
W. KEITH WYATT

Attorneys for Plaintiff and Appellant
FANNIE MARIE GAINES

CERTIFICATE OF COMPLIANCE WITH RULE 8.204(c)(l)

I, the undersigned W. Keith Wyatt, declare that:

I am a member in the law firm of Ivie, McNeill & Wyatt, which represents plaintiff and appellant, Fannie Marie Gaines .

This Certificate of Compliance is submitted under Rule 8.204(c)(l) of the California *Rules of Court.*

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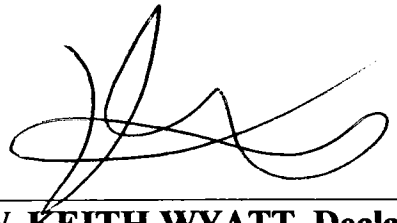

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STATE OF CALIFORNIA)
) ss.:
COUNTY OF LOS ANGELES)

Case Name: Fannie Marie Gaines vs. Joshua Tornberg, et. al.

Case No.: Second Civil B244961

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, State of California, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 444 S. Flower Street, Suite 1800, Los Angeles, CA 90071; that on August 4, 2014, I served on interested parties in said action the within APPELLANT'S REPLY BRIEF in said action or proceeding by depositing a true copy thereof, enclosed in sealed envelopes with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, California Supreme Court
350 McAllister Street
San Francisco, CA 94102-7303
(Via Federal Express, Original and 13 Copies)

Clerk, California Court of Appeal
Second Appellate District, Division Two
300 South Spring Street
Floor Two, North Tower
Los Angeles, CA 90013-1213

Clerk of the Superior Court
111 N. Hill Street
Los Angeles, CA 90012-3014

Kevin Broersma, Esq.
FIDELITY NATIONAL LAW GROUP
915 Wilshire Blvd., Suite 2100
Los Angeles, CA 90017

Substituted in as of 4/23/14
Steven Ray Garcia, Esq.
GARCIA LEGAL
A Professional Corporation
301 N. Lake Avenue, 7th Floor
Pasadena, CA 91101
(626) 577-7500
Steven@GarciaLegal.net

A.J. Roop
3424 E. Turney Avenue
Phoenix, AZ 85018
and
19475 N. Grayhawk #1089
Scottsdale, AZ 85255

Craig Johnson
6410 W. Maya Way
Phoenix, AZ 85083

Craig Johnson
Ray Management Group, Inc.
6410 W. Maya Way
Phoenix, AZ 85083

Joshua Tornberg
26065 N. 68th Drive
Peoria, AZ 85383

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M. CHRISTINA MUNOZ