Sotomayor Law
Rande S. Sotomayor, Esq.
Mediation, Arbitration and Business Dispute Services

Stipulated "Mediation Stay" Does Not Toll the Five-Year Mandatory Dismissal Period

February 28, 2016

California litigators know that cases must be brought to trial within five years or face mandatory dismissal. (C.C.P. Section 583.310). Time periods when "prosecution or trial of the action was stayed" or when bringing the action to trial was "impossible, impracticable, or futile" are excluded from the five-year calculation under C.C.P. Section 583.340.

In another decision throwing parties' efforts to mediate under the wheels of the five-year rule, the California Supreme Court decided that a trial court order striking a trial date and staying the action following the plaintiff's agreement to the defendants' request to engage in mediation and complete outstanding discovery did not operate to toll the running of the five-year period. According to the majority, the "mediation stay" did not amount to a sufficiently complete stay or render the prosecution of the case impossible, impracticable, or futile to effect tolling. *Gaines v. Fidelity National Title Insurance Company, et al.*, S215990 (filed 2/25/16)

As Justice Kruger points out in her dissent, joined by Justice Liu, the plaintiff's "decision to accommodate an opposing party does not reflect a lack of reasonable diligence. It reflects a willingness to cooperate. To fault Gaines for agreeing to seek the stay — or for failing to seek to lift the stay before its expiration — simply creates unfortunate incentives for the conduct of pretrial litigation . . ." (Dissent, p. 14)

The dissent also struggles with the majority's view that mediation "represents the continued prosecution of the action because 'it is a means by which the parties may reach a settlement of the suit.'" (Dissent, p. 9) The majority equated termination of the action by voluntary settlement in mediation to "steps in the action" that can similarly result in termination before trial, such as discovery, a demurrer, or a summary judgment. (Maj. Op., p. 15)

California lawyers really have to be careful about that pesky five-year rule. Just last month, in *Castillo v. DHL Express (USA)* (Ct. of Appeal Case No. B258432, filed 12/15/15; part. pub. order 1/14/16), the California Court of Appeal held that participation in private mediation – as opposed to a mediation program administered by the court – does not toll the five-year period under C.C.P. Section 1775.7. Footnote 5 in that opinion offered a solution: "Nothing in this opinion should be construed to impact the parties' ability to stipulate to a stay in the proceedings while they engage in mediation. (See § 583.330.)" But under *Gaines*, that stipulation had better expressly toll the running of the five-year period. (Majority Op., p. 10) (See the blog discussion about *Castillo* at http://www.sotomayorlaw.com/danger-zone-in-california-civil-trial-courts-private-mediation-does-not-toll-the-five-year-period-for-bringing-a-case-to-trial/)

Isn't mediation one of many *alternatives* to prosecuting an action? I think that the California statutory scheme should be reworked to support, and even require, parties' efforts to avoid litigation through mediation, both pre-filing and pre-trial. What do you think?

Sotomayor Law
Rande S. Sotomayor, Esq.
466 Foothill Blvd., #162 | La Cañada, CA 91011
Phone: 626-791-5519 | Fax: 626-794-3789 | Mobile: 626-616-5843
E-mail: Rande@SotomayorLaw.com | Website: www.SotomayorLaw.com