#J-600 10/22/82

Memorandum 82-108

Subject: Study J-600 - Dismissal of Civil Actions (Problems Caused by Referral to Arbitration)

A civil action may be submitted to judicial (as opposed to contractual) arbitration pursuant to Code of Civil Procedure Sections 1141.10-1141.32. If a pending action is sumitted to arbitration, how does this affect the rule that the action must be brought to trial within five years? Section 1141.17 deals with this point expressly:

> 1141.17. Submission of an action to arbitration pursuant to this chapter shall not toll the running of the time periods contained in Section 583 as to actions filed on or after the operative date of this chapter. Submission to arbitration pursuant to a court order within six months of the expiration of the statutory period shall toll the running of such period until the filing of the arbitration award.

Under the rule of Section 1141.17 the case must be "submitted to arbitration" before expiration of the five-year period. Roozen v. Ramstead, 124 Cal. App.3d 332, 177 Cal. Rptr. 276 (1981). Despite the plain language of Section 1141.17, a case submitted to arbitration more than six months before the end of the five year period tolls the period if the arbitration remains pending at any time during the last six months of the five year period. Cal. Rules of Court 1601(d); Crawford v. Hoffman, 132 Cal. App.3d 1015, ___ Cal. Rptr. ___ (1982); Apollo Plating v. Superior Court, 135 Cal. App.3d 1019, ___ C.R. ___ (1982). But see Castorena v. Superior Court, 135 Cal. App.3d 1014, ___ C.R. ___ (1982) (ignoring this rule).

After the arbitration award is filed, if either party seeks a trial de novo the action must be brought to trial within the original five-year period, as extended by any tolling of the period. The plaintiff is also entitled to a further reasonable period necessary to enable the plaintiff, acting diligently, to bring the case to trial. Moran v. Superior Court, 135 Cal. App.3d 986, ___ Cal. Rptr. ___ (1982); Fluor Drilling Service v. Superior Court, 135 Cal.3d 1009, ___ Cal. Rptr. ___ (1982); Castorena v. Superior Court, 135 Cal. App.3d 1014, ___ Cal. Rptr. ___ (1982).

The cases applying the rule that the plaintiff must act diligently after the defendant demands a trial de novo seem fairly harsh. In Moran v. Superior Court the plaintiff received notice of the defendant's demand for trial 21 days before the expiration of the five-year period (adjusted to allow tolling for the period of arbitration); the plaintiff's lawyer had three telephone conversations with court officials seeking to have the case set for trial, but the case was not set; four months later defendant moved to dismiss for lack of prosecution; the trial court denied the motion but the Court of Appeal reversed and ordered the case dimissed--the plaintiff should have moved for a trial setting when court officials failed to act promptly. In Fluor Drilling Service v. Superior Court the arbitration award was filed two months before the end of the five year period (after allowing for tolling); defendant demanded a trial de novo and a trial setting conference was held one month later, at which trial was set for a date six months later; after the date set for trial and before the case was assigned to a trial department the defendant moved to dismiss for lack of prosecution; the trial court denied the motion and set a new trial date but the Court of Appeal ordered the case dismissed--plaintiff did not point out the expiration of the five-year period to the trial court and made no showing of a special effort to bring the case to trial earlier. In Castorena v. Superior Court the arbitration award was filed one month after expiration of the five-year period (for some reason the court did not allow tolling during pendency of arbitration); defendant demanded trial de novo, notice of trial setting conference was mailed within one month and the conference was held a month and a half later; trial was set for a date five and a half months later, but shortly before that date defendant moved to dismiss for lack of prosecution; the trial court denied the motion and reset the case for trial but the Court of Appeal ordered the case dismissed--plaintiff did not alert the trial court to the fact that the five year period had run and made no showing of a reasonable effort to bring the case to trial earlier.

A copy of the Moran case is attached as Exhibit 2. Moran and its companion cases provoked a strong dissent by Justice Roth, who pointed out that, apart from the question whether the four to eight month delays involved in these cases are reasonable periods and whether plaintiffs in

fact failed to act diligently, after judicial arbitration the case is in an entirely different posture and the strict five year statute appears inappropriate:

> Here, while plaintiff's case was not literally "brought to trial", it was, of course, adjudicated, albeit in arbitration, sufficiently to suggest to me the propriety of an extended limitation akin to that found in Code of Civil Procedure Section 583(c). [Action must again be brought to trial within three years after new trial ordered on motion or appeal.]

As an alternative, Justice Roth suggests that the law at least be revised to take better account of the situation where the defendant requests a trial after arbitration. Presumably he is referring to codification of the rule that submission to judicial arbitration at any time tolls the five-year period, and possibly also to permitting the plaintiff some additional time where the five year period ends shortly after the arbitration award is filed.

Our consultant on dismissal for lack of prosecution, Garrett Elmore, has written to us also concerning the problems created by these cases. See Exhibit 1. He points out that under these cases the careful attorney for plaintiff will endeavor to obtain orders shortening time and make a motion to advance or to set, to try to bring the case to trial within the five-year period. This in turn places a burden upon the judicial resources and incurs time and expense for counsel on both sides and in some cases the parties themselves. It is well known that finding suitable trial dates particularly where lawyers are heavily engaged in trials is difficult. It puts a strain upon personnel concerned with the master calendar to attempt to accomodate a court-directed request for a trial date within the five-year period, where action is on a "deadline" basis.

Mr. Elmore notes that the judicial arbitration cases highlight a problem that can occur in other contexts as well. Where an action cannot be brought to trial because of an excuse such as arbitration that tolls the statutory period, and where the excuse continues within six months before expiration of the statutory period, Mr. Elmore suggests that upon termination of the excuse the plaintiff should have at least 120 days to bring the action to trial. A copy of Mr. Elmore's proposed draft to achieve this result is attached to his letter.

While the staff does not believe Mr. Elmore's drafting is completely satisfactory, Mr. Elmore's proposal does illustrate one approach to solving the problems involved in the judicial arbitration cases. This approach is to leave the basic dismissal statutes undisturbed, but for purposes of simplification of administration of justice and easing the burden on court and parties to give the plaintiff a "safe harbor" in which to obtain a trial date.

Other possible approaches include revising the dismissal statutes to provide a fixed period to bring a case to trial following tolling (in the interest of certainty), drawing specific provisions to deal with the arbitration problem (as suggested by Justice Roth), and leaving the matter to court development (including watching developments, if any, on Moran in the Supreme Court). The Commission should decide what approach to take in this area.

In any case, Section 1141.17 must be amended to reflect the change in section numbers made by our recommendation:

> 1141.17. Submission of an action to arbitration pursuant to this chapter shall not toll the running of the time periods contained in ~~Section 583~~ Article 3 (commencing with Section 583.310) of Chapter 1.5 of Title 8 of Part 2 as to actions filed on or after the operative date of this chapter. Submission to arbitration pursuant to a court order within six months of the expiration of the statutory period shall toll the running of such period until the filing of an arbitration award.

Comment. Section 1141.17 is amended to correct a section reference.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

GARRETT H. ELMORE
*Attorney At Law*
340 Lorton Avenue
Burlingame, California 94010
(415) 347-5665

October 25, 1982

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, Ca. 94306

Re: Study J-600, Dismissal For Lack Of Prosecution

Dear Members, Mr. DeMoully and Mr. Sterling:

A series of recent appellate decisions, principally in District Two, Division Two, involve the effect of a case being on the judicial arbitration list. They point up a potential problem with the current text where it covers "exclusion" periodd. (Sec. 583.350-computation of time)

Briefly, a "condition" resulting in an "exclusion" may terminate near the end of the 5 year period (or 3 year period). The proposed Act makes no express allowance for a "reasonable period" to get the action to trial thereafter. The majority opinion in Moran v. Superior Court (September 21, 1982) declares that once the judicial arbitration results in an award (defined as the end of the "exclusion" in the Judicial Arbitration Law (CCP 1141.17-applicable to certain submissions)), plaintiff must do all he can to get the case to trial within the five year period;plaintiff must take all procedural steps reasonably available to set the case for trial before the end of the five year period.Further, the opinion states that even allowing a "reasonable period" to bring the case to trial, plaintiff's motion to advance came too late after expiration of the five year period, as extended. Factually, plaintiff had relied upon statutory and rule provisions that direct that, if after arbitration award, a party requests a court trial de novo, the case shall be restored to former place on the calendar or given priority setting (CCP 1141.20) and upon assurances of court personnel the case would be set as a priority case. Due to misfiling by the clerk's office, this was not done. A strong dissenting opinion by Roth, P. J., holds that the plaintiff had exercised reasonable diligence, and that, on the facts, the action should not be ordered dismissed (contrary to the trial judges' rulings). The arbitrator had awarded plaintiff some $12,000.The request for trial de novo was made by a co-defendant who was held

not liable by the arbitrator. Plaintiff did not request a trial de novo. Justice Roth's dissent adds his belief that the statute relating to judicially imposed arbitration have shortcomings as illustrated by the case;that bringing a case to arbitration hearing and award should be the euivalent of bringing the case to trial or alternatively, that the statute should be revised to take better account of the situation disclosed by the case.

Assuming that the Moran case is not granted a rehearing, or a hearing in the Supreme Court, it points up an unsettled area both in procedure and substantive approach.

If the majority opinion is to be followed, the careful attorney for plaintiff will endeavor to obtain orders shortening time and make a motion to advance or to set, to try to bring the case to trial within the five year period. This in turn places a burden upon the judicial resources and incurs time and expense for counsel on both sides and in some cases the parties themselves,

It is well known that finding suitable trial dates particularly where lawyers are heavily engaged in trials is difficult. It puts a strain upon personnel concerned with the master calendar to attempt to accomodate a(court-directed) request for a trial date within the five year period, where action is on a "deadline" basis.

In dealing with the problem revealed by the Moran case (in its present posture),several alternatives present themselves.

First, the matter can be left to judicial resolution. The writer does not favor this alternative, except in the limited sense that action might be deferred to see if a Supreme Court hearing is granted.

Second, amendments of the Judicial Arbitration act could be sponsored, dealing with the arbitration "exclusion" problem alone.

Third,the Act now being proposed could be amended to eliminate problems caused by "exclusions" that continue into, or arise, in the last six months of the time to bring the action to trial. The suggested principle may be described: If the exclusion arises or continues in the last six months,then, subject to court order otherwise, bringing the action to trial within a period of 120 days after expiration of the time otherwise applicable or after termination of the "exclusion" is a sufficient compliance. No motion to advance or for special setting would be necessary. The Arbitration statutes would be amended to conform.

Enclosed is a draft of a new section (Sec. 583.355) to accomplish the principle in "Third." It is the writer"s belief this concept should be included in the Final Recommendation.

Respectfully submitted,

Garrett H. Elmore

Garrett H. Elmore , Consultant

See letter of Garrett H. Elmore dated Octobrt 25, 1982. Alternative Third on page 2.

Draft of new section based on Alternative Third.

§ 583.355. Statutory Extension In Certain Cases.

§583.355. If one or more of the conditions described in section 583.350 arises, or continues to exist, within 180 days of the expiration of the time allowed to bring the action to trial, determined without regard to section 583.350, it is a sufficient compliance with the requirements of this article that the action be assigned a trial date and brought brought to trial within the later of the following periods: (a) 120 days after such expiration date, and (b) 120 days after the latest date on which the condition ceased to exist. No motion to advance or to set specially for trial is necessary. This section shall be construed as a statutory extension of time for certain cases and is not the exclusive method for bringing an action to trial.

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NOTE: Amendments should take into account the provisions of the Judicial Arbitration Law (that may or may not expire). Minor changes in that law and the "policy" of the first sentence of CCP 1141.20 (no tolling as to actions filed on or after July 1, 1979) should be considered. The second sentence is subject o criticism because it does not allow time to get the action to trial in some cases, making necessary the "reasonable period" assumption of the Moran majority opinion.

EXHIBIT 2



[Civ. No. 63693. Second Dist., Div. Two. Sept. 21, 1982.]

JAMES MORAN, Petitioner, v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
BARBARA RICCARDO, Real Party in Interest.

[Civ. No. 63694. Second Dist., Div. Two. Sept. 21, 1982.]

LUTHERAN HOSPITAL SOCIETY OF SOUTHERN CALIFORNIA, Petitioner, v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
BARBARA RICCARDO, Real Party in Interest.

[Civ. No. 63734. Second Dist., Div. Two. Sept. 21, 1982.]

KARL STORZ, Petitioner, v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
BARBARA RICCARDO, Real Party in Interest.

SUMMARY

The Court of Appeal ordered the issuance of a writ directing the trial court to dismiss an action for failure to bring the matter to trial within the five-year period for doing so set forth in Code Civ. Proc., § 583, subd. (b), or within a reasonable period of time thereafter. The court held that plaintiff made no showing of impossibility or impracticability of trying the case or setting it for trial during the three-month period between the date of expiration of the five-year period, as tolled pursuant to Code Civ. Proc., § 1141.17 during arbitration of the case, and the date of defendants' motion, since counsel merely phoned the court clerks and informed them of the necessity of setting an immediate trial date in the week following one defendant's demand for trial de novo and failed thereafter to inquire as to the status of the case or to move to

specially set the case for trial under Cal. Rules of Court, rule 225. The court held that under Cal. Rules of Court, rule 1616(b), which provides that upon a demand of trial de novo a case will be restored to the civil active list for prompt disposition, the clerk of the court does not automatically set a trial date. The court also held that the representation of the trial judge, at the time of ordering the case to arbitration, that in the event of trial de novo after arbitration the matter would be returned to its place on the trial calendar did not exempt plaintiff from the operation of Code Civ. Proc., § 583, subd. (b). (Opinion by Beach, J., with Compton, J., concurring. Separate dissenting opinion by Roth, P. J.)

## HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Dismissal and Nonsuit § 35—Involuntary Dismissal—Delay in Bringing Action to Trial (Code Civ. Proc., § 583)—Five-year Limitation—Excuses, Exclusions, and Extensions—Impracticability or Impossibility—Failure to Bring Motion to Specially Set Case for Trial.**—The trial court erred in denying defendants' motion to dismiss an action for failure to bring the action to trial within the five-year period for doing so set forth in Code Civ. Proc., § 583, subd. (b), since plaintiff made no showing of impossibility or impracticability of trying the case or setting it for trial during the three-month period between the date of expiration of the five-year period, as tolled pursuant to Code Civ. Proc., § 1141.17, during arbitration of the case, and the date of defendants' motion. Plaintiff's counsel did not do all that was reasonable to help bring the case to trial during the statutory period merely by phoning the court clerks and informing them of the necessity of setting an immediate trial date in the week following one defendant's demand for trial de novo, and failing thereafter to inquire as to the status of the case or to move to specially set the case for trial under Cal. Rules of Court, rule 225. Under Cal. Rules of Court, rule 1616(b), which provides that upon a demand of trial de novo a case will be restored to the civil active list for prompt disposition, the clerk of the court does not automatically set a trial date. Further, the representation of the trial judge, at the time of ordering the case to arbitration, that in the event of trial de novo after arbitration the matter would be returned to its place on the trial calendar, did not

exempt plaintiff from the operation of Code Civ. Proc., § 583, subd. (b), since the judge's representation was no more than a correct statement of the law embodied in Code Civ. Proc., § 1141.17, and Cal. Rules of Court, rule 1616(b).

[See **Cal.Jur.3d,** Actions, § 253; **Am.Jur.2d,** Dismissal, Discontinuance, and Nonsuit, § 53 et seq.]

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COUNSEL

Patterson, Ritner, Lockwood, Zanghi & Gartner, Rushfeldt, Shelley & McCurdy, Horvitz & Greines, Irving H. Greines, Barry R. Levy, Billips & Desimone and Salvatore Desimone for Petitioners.

No appearance for Respondent.

Iverson, Yoakum, Papiano & Hatch and John A. Slezak for Real Party in Interest.

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OPINION

**BEACH, J.**—Petitions by three codefendants for writs of mandate or prohibition. The question presented is whether plaintiff presented sufficient evidence of impossibility, impracticability or futility of prosecuting her case so as to prevent dismissal thereof pursuant to Code of Civil Procedure section 583, subdivision (b)[1] for failure to bring the case to trial within five years. We hold that she did not and that the trial court erred in failing to grant the motion of petitioners (defendants below).

BACKGROUND:

On March 6, 1975, plaintiff filed her action. On January 25, 1980, with about forty-one days of the five-year period remaining, the matter was ordered and submitted to judicial arbitration (CCP § 1141.10). An arbitration award was filed on March 17, 1981. On that date there still remained the approximate forty-one days before the five-year period ex-

[1]All references to code sections, unless otherwise indicated, are to Code of Civil Procedure and indicated thus: CCP § —.

pired, the time during which the case was in arbitration having been statutorily tolled from the five-year period. (CCP § 1141.17.) One of the defendants demanded trial de novo. In the week following the demand for trial de novo, plaintiff's lawyer had three telephone conversations with clerks of the arbitration and master calendar departments. Thereafter, plaintiff's counsel did nothing to bring the matter to trial. On August 12, 1981, almost five months after the arbitration award was filed, one of the defendants moved to dismiss the action for plaintiff's failure to bring it to trial within the five years under CCP § 583, subdivision (b). The other two defendants joined in the dismissal motion.

Although plaintiff opposed the dismissal, it was not until September 2 that plaintiff made her motion to specially set the case for trial. After hearing, the trial court denied defendant's motion to dismiss. In doing so, the trial court found plaintiff's attorney had made the telephonic inquiry to the court clerks. The trial court found that "under the circumstances . . . it was impracticable to take the matter to trial before May 3rd" [1981]. This date was the end of the five-year period as extended by the time the case was in arbitration. But the trial court made no finding concerning the additional time up to August 12, the date of defendant's motion to dismiss. The trial court expressly stated it did not know when the five-year period expired in this particular case.

DISCUSSION:

(1) The evidence and the court's findings were insufficient to support the ruling of the trial court.

CCP § 583, subdivision (b) provides that an "action . . . shall be dismissed by the court . . . unless such action is brought to trial within five years after the plaintiff has filed his action . . . ." Although seemingly clear, unambiguous and mandatory, this statute has had judicially created exceptions grafted thereon. The issue to be determined in this case is when the five-year period expired so as to require dismissal under the statute as so engrafted.

Decisional law creating the exceptions have applied the exceptions similarly whether discussing the three-year period of CCP § 581a or the five-year period of § 583, subdivision (b). The five-year mandatory dismissal requirement has been held not to apply if it is established that it was impossible, impracticable or futile for a plaintiff to bring the mat-

ter to trial within the five-year period. (*Hocharian* v. *Superior Court* (1981) 28 Cal.3d 714, 722 [170 Cal.Rptr. 790, 621 P.2d 829]; *Wyoming Pacific Oil Co.* v. *Preston* (1958) 50 Cal.2d 736, 741 [329 P.2d 489].) These decisional exceptions are in addition to any statutory tolling such as the tolling during arbitration provision of CCP § 1141.17 applicable here. There is no problem with the matter of tolling. The question at bench concerns only the problem of what should be done and by whom after the tolling period has ended and subsequent passage of time invokes applicability of the dismissal statute.

CCP § 1141.17 provides for tolling or suspension of the running of the five-year time period of CCP § 583 only until the filing of the arbitration award. Here the trial court found that the arbitration award was filed on March 17, 1981. The statute thus became operative and barred plaintiff from trial, if not brought before the expiration of the five years, presumably forty-one days after March 17, 1981. Accordingly, long after the forty-one days after which the five-year period had passed, giving allowance for the tolling during arbitration, defendants moved for dismissal because the action was not brought to trial.

The argument asserted by plaintiff's lawyer against the operation of the statute was as follows: (1) rule 1616(b) California Rules of Court returned the case to the civil active list; (2) the clerk would automatically set the action for trial; (3) plaintiff's lawyer had a right to assume "that official duty would be done," however, the case was not set for trial by the clerk nor the court as was their duty. In support of these contentions plaintiff's lawyer filed his declaration and that of one of his partners.

The declaration by one of plaintiff's counsel (Slezak) states: "In reliance upon Rule 1616, I apprised the respective clerks to whom I spoke that it was my understanding that it was the Court's duty to restore the case for immediate disposition in the same position it would have been had there been no arbitration. I further informed them that since a trial date had been assigned prior to the case being ordered to arbitration, the Court was obligated to set an immediate trial date. I added that plaintiff was desirous of a quick conclusion to the case. [¶] The response of the clerks in the Master Calendar and Arbitration Offices was that the matter would have to be forwarded to Santa Monica, but that it would immediately be set for trial in accordance with its priority position on the trial calendar. At that time I assumed that the Court

clerks and officers would perform their official duty to reset the case for trial as if the arbitration had never been ordered, in which case the five-year rule would not bar a new trial since trial had been scheduled to commence within the five-year period when the matter was ordered to arbitration. [¶] Subsequently, during the period from late April through mid-August, 1981, I was extremely busy with other legal matters. During this period of time I presumed, in reliance upon Judge Feinerman's statements in chambers, California Rule of Court §1616, and my discussions with the Court's clerks, that the case would be restored to its rightful position and the five-year rule would not bar the action during the period of time it took the Court to fulfill its official duty of restoring the matter to the trial calendar."

Slezak's declaration explained that Judge Feinerman in ordering the matter to arbitration had privately in settlement conference with plaintiff's counsel alone, assured plaintiff's lawyers that in the event of demand for trial de novo after arbitration the matter would be returned to its place on the calendar. The declaration by Slezak's partner related only to the same representation by Judge Feinerman.

The fact Judge Feinerman made such representation does not demonstrate any reason to exempt plaintiff from the operation of the provisions of CCP § 583, subdivision (b). The judge did, and could do, nothing more than make a correct statement of the law. That law is embodied in CCP § 1141.17 and California Rules of Court, rule 1616(b). CCP § 1141.17 in pertinent part provides in cases such as at bench that submission to arbitration pursuant to court order "... shall toll the running of such period until the filing of an arbitration award." California Rules of Court, rule 1616(b) simply provides that where trial de novo is demanded the case "... shall be restored to the civil active list for prompt disposition, in the same position on the list it would have had if there had been no arbitration in the case...." The problem is that this statute and this rule are not self-executing. Someone has to do something. Plaintiff's position is that the someone is the clerk or the court and the something is to set the case for trial immediately or on a date before the five-year period and that plaintiff and her lawyer need not do anything. This is unacceptable and we expressly reject such "no-duty-upon-me-to-help" attitude on the part of counsel.

Established law requires one in plaintiff's position to do all that is reasonable to help bring her case to trial. The record before the trial court upon the motion to dismiss presented no evidence of plaintiff's

counsel doing, or even trying to do, what established law requires. There was no showing of plaintiff qualifying under an exception to mandatory dismissal of her case. "In applying any of these exceptions to a given factual situation, the critical question is whether a *plaintiff used reasonable diligence* in prosecuting his or her case. The particular factual context or cause of the noncompliance should not be determinative, rather the primary concern must be *the nature of the plaintiff's conduct.*" (*Hocharian* v. *Superior Court, supra,* 28 Cal.3d 714, 722; italics added.)

Examination of plaintiff's conduct at bench through her lawyer's action or inaction fails to establish or demonstrate any good reason why she failed to bring the action to trial before the expiration of the five-year period, even allowing exclusion of the arbitration period and a reasonable time thereafter.

The "official-duty-will-be-done" claim and reliance thereon is unavailing. The declaration of Attorney Slezak emphasizes that he informed the clerks that he assumed they would set the matter back on the calendar and that he assumed that official duty would be done. In this court too plaintiff's lawyers rely primarily on that same assumption as a defense against dismissal. Such defense is ineffective. Where a party awaiting a trial de novo has been confronted with a time limitation, the assumption that official duty will be done to get the matter on calendar has been expressly rejected as a defense such as relied upon by plaintiff here. (*County of Alameda* v. *Superior Court* (1960) 187 Cal. App.2d 502 [10 Cal.Rptr. 84]; *Sanford* v. *Superior Court* (1952) 111 Cal.App.2d 311 [244 P.2d 463]; see also *Lewis* v. *Greenspun* (1958) 160 Cal.App.2d 711 [325 P.2d 551]; *Swartzman* v. *Superior Court* (1964) 231 Cal.App.2d 195 [41 Cal.Rptr. 721].)

At bench the evidence before the trial court consisted solely of the two declarations of plaintiff's counsel in addition to the file itself. Those declarations demonstrated that plaintiff's lawyer telephoned and talked to the clerks. But there is no direct or inferential evidence of a demand for and a receipt of a specific trial date before the 41 days remaining had expired. Nor is there shown directly or inferentially any promise or any representation from any clerk that a special date would be obtained or that anyone said that plaintiff's lawyer need not do anything further. No evidence before the trial court demonstrated that it was impossible, impracticable or futile or in any way beyond plaintiff's control to get the matter to trial or to try and do all reasonably possible to set the

case for trial before August 12. To the contrary, other than the three telephone calls, which were of ambiguous consequence, plaintiff's lawyer did nothing for almost five months after the award was filed. Even allowing for the fact that counsel would not know of the need to set the case for trial until the request for trial de novo was made, still nothing else was done by plaintiff's counsel for nearly four months. While the findings and decisions of a trial court based on evidence before it are entitled to great weight and respect, at bench the trial court gave no reason nor stated what the specific facts or circumstances were that made it "impracticable" or impossible for plaintiff to proceed to trial or prosecute her case to that end at least within the five months.

That it was one of defendants and not plaintiff who requested trial de novo is irrelevant. The fact that a defendant requests a trial de novo after judicial arbitration cannot be used to deny or limit other procedural rights available to him. Nor can added burden be cast on him on that account. To do so would penalize a person for exercising the constitutional right to trial by jury. It follows here that defendant having lawfully and within the statutory time allowed exercised his right to demand trial de novo his action is irrelevant in determining when the five-year period expired. That notice thereof was received by plaintiffs nearly 20 days after the award, is a circumstance to consider, but is not the focus of the inquiry. Rather the focus is plaintiff's conduct in the light of all of these circumstances and whether that conduct was reasonable. (*Hocharian* v. *Superior Court, supra*, 28 Cal.3d 714, 722.)

Plaintiff's counsel were confronted with the prospect of the expiration of the statutory period and the dilemma of only a short time left within which to bring the action to trial. But counsel were not without a means to try to help plaintiff in such situation. Plaintiff's counsel were at all times free to bring a motion to specially set the case for trial. Reasonable, professional competence of a lawyer requires that under such circumstances counsel should at least file a motion to advance or specially set the case for trial. "... [I]t is common knowledge in the profession that the courts in our metropolitan areas are congested. It is also common knowledge that in such circumstances, attorneys faced with the expiration of the five-year provision take protective action by moving to advance for trial under rule 225. It is a plaintiff's responsibility to see that an action is brought to trial within the five-year period or the three-year period as the case may be.... When it became apparent in the remaining [time] that the case was not going to receive a trial date reasonable precautions dictated that plaintiff should have moved

under rule 225, advising the court of the urgency of a prompt trial so as to avert dismissal." (*Crown Coach Corp.* v. *Superior Court* (1972) 8 Cal.3d 540, 549-550 [105 Cal.Rptr. 339, 503 P.2d 1347] [disapproved on another point in *Hocharian* v. *Superior Court, supra*, 28 Cal.3d 714].) California Rules of Court, rule 225 specifically provides the means by which to accomplish this, yet plaintiff's lawyers totally neglected to try to do so until long after defendants moved to dismiss.

A request for trial de novo following arbitration simply restores the case to the civil active list.[2] This, however, does not set the case for trial. As indicated earlier, CCP § 1141.20 (of the arbitration statute) provides that such trial shall be calendared insofar as possible so that the trial shall be given the same place on the active list as it had prior to arbitration or shall receive civil priority on the next setting calendar. But neither the statutes nor the rules require the court to automatically set a trial date for a time prior to the expiration of the five-year statute. Nor do they provide how the court would do so automatically. To the contrary, the rules provide only that the case shall be restored to the civil active list for prompt disposition. Thus the case is simply restored to a list of civil cases that are "at issue but not yet set for trial." (Cal. Rules of Court, rule 207(a).) It is a plaintiff's duty, not the court's, to see that a case on the civil active list is set for trial before expiration of the five-year period or at least take all procedural steps reasonably available to do so. (*Crown Coach Corp.* v. *Superior Court, supra*, 8 Cal.3d 540; *Sanford* v. *Superior Court, supra*, 111 Cal.App.2d 311; *County of Alameda* v. *Superior Court, supra*, 187 Cal.App.2d 502.) The reason for existence of the rule 225 and the court's power to shorten time of notice (CCP § 1005) is for use in this very kind of case. (*Swartzman* v. *Superior Court, supra*, 231 Cal.App.2d 195.) Merely being on the civil active list does not toll the running of the five-year period. As the court in *Crown Coach* stated: "It is settled that the implied exceptions to the five-year period described by section 583 do not contemplate 'that time consumed by the delay caused by ordinary incidents of proceedings like disposition of demurrer, amendment of pleadings *and the normal time of waiting for a place on the court's calendar* or securing a jury trial is to be excluded from a computation of the five-year period.... [T]he duty rests upon a plaintiff at every stage of the proceedings to use due diligence to expedite his case to a final determination.' [Citations.]" (*Id.* at p. 548, italics added.)

[2]In Los Angeles County the civil active list contains approximately 15,000 cases.

At bench it was plaintiff, not the defendants, who had the burden of keeping track of and prosecuting her own case. (*Singelyn* v. *Superior Court* (1976) 62 Cal.App.3d 972 [133 Cal.Rptr. 486].) "It is the duty of a plaintiff to act, and to act with reasonable promptness and diligence, and defendant need make no move until the law requires him to do so 'in response to the movements of plaintiff at the various stages of litigation.'" (*Bonelli* v. *Chandler* (1958) 165 Cal.App.2d 267, 275 [331 P.2d 705]; *Black Bros. Co.* v. *Superior Court* (1968) 265 Cal.App.2d 501 [71 Cal.Rptr. 344]; 4 Witkin, Cal. Procedure (2d ed. 1971) Proceedings Without Trial, § 93, p. 2754.)

At bench plaintiff's counsel well knew that the period of time was running. The tolling had ended. Yet at no time between the time of the filing of the arbitration award and the making of the defense motion for dismissal five months later did plaintiff employ appropriate motion to bring to the court's attention the particular problem. Nor did plaintiff's counsel demonstrate during that time any valid reason why the operation of CCP § 583 should not bar trial after the expiration of the five-year period. If accepted, plaintiff's contentions would have the incongruous effect of creating an open-end five years, i.e., no time limit at all! It would place upon defendants the burden of pursuing plaintiff's own case against themselves. That in effect is the result of the trial court's ruling. It was defendant's motion to dismiss, not any motion to set for trial that first brought the matter to the trial court's attention after arbitration.

Assuming a deputy clerk actually promised or assured plaintiff's lawyer that the deputy himself would set the matter for trial before the 5 years expired, i.e., sometime during whatever time remained of the 41 days, plaintiff's inaction to the end of the 41 days might be considered reasonable. We may even assume further that some reasonable period of time after the 41 days was necessary to process the paperwork and added to an allowable period of the lawyer's inaction. Nonetheless, the lawyer's failure to even inquire about what the clerk had done towards setting the case, as the 41st day approached begins to diminish the reasonableness of such inaction. But to do nothing, neither by inquiry as to the status of the case nor by motion to set for trial, within a few days after the 41st day had passed and for more than three months thereafter was unreasonable.

Cases such as *Brown* v. *Engstrom* (1979) 89 Cal.App.3d 513 [152 Cal.Rptr. 628] and *Nail* v. *Osterholm* (1970) 13 Cal.App.3d 682 [91

Cal.Rptr. 908], relied upon by plaintiff, are distinguishable. In some the plaintiff was unable to extricate the matter from other pending procedures. In others the plaintiff had in fact made some effort by motion to bring the matter to trial. At bench plaintiff waited until after defendants acted. No excuse for inactivity, no impracticability or impossibility was demonstrated.

A question remaining unanswered by the trial court on the motion to dismiss is: "When does the five-year time limit expire in this case? If not by May 3, 1981, when?" We must respect and interpret CCP § 583, subdivision (b) as requiring some definiteness, at least as applied to the facts of this case. We are mindful a fixed rule applicable to *all* cases is a concept that resists comprehensive definition. (*Weeks* v. *Roberts* (1968) 68 Cal.2d 802 [69 Cal.Rptr. 305, 442 P.2d 361].)

As explained above, plaintiff failed to demonstrate any impossibility, inability or impracticability of bringing her case to trial within the five months between the filing of the arbitration award and plaintiff's motions to dismiss. The trial court "found" that it was "impracticable" for plaintiff to bring her case to trial before May 3, 1981. Accepting that finding and decision, there is, however, no finding or conclusion concerning the ability of plaintiff to bring the matter to trial on May 4 or even more practically during any other remaining part of the five months. After the arbitration award is filed, the language of CCP § 1141.17 suggests that whatever part remains of the five years, begins running anew—being used up day by day. Thus, at bench, under CCP § 1141.17, the time would have run out on May 3. On the other hand, some reasonable amount of time must be allowed to plaintiff to enable her to at least move to specially set the matter for trial. Implicitly, the finding of the trial court here is that the mere chronological passing of the 41 days did not afford a reasonable enough period for plaintiff to try her case. We may accept that as a proper exercise of the court's discretion. That aspect of the court's decision is supported in part by the fact that almost 20 of the 41 days expired before plaintiff knew that she would be required to go to trial, leaving only about 21 more days within which to try her case.

On the other hand, the trial court stated no factual reason nor did the court cite any standard, statute, rule or decisional law by which it determined that the remaining 21-day period of time was similarly an impracticable period within which plaintiff could try the case or move to set it for trial. Again, accepting the decision as a proper exercise of the trial court's discretion to support its conclusion relative to the time

to May 3, 1981 (which includes the 21 days after plaintiff was put on notice), we still have no explanation or inkling of what standard was used to make a similar conclusion with reference to the more than 3 *additional* months of available time to August 12, 1982. To avoid an open-ended five-year rule that would say, "the five-year limitation is inapplicable until the defendant makes a move," we must establish the limits beyond which plaintiff should not be entitled to wait before bringing her case to trial.

We are not without some guides. Twenty-eight days (*Weeks* v. *Roberts, supra*, 68 Cal.2d 802) and forty-six days (*Vogelsang* v. *Owl Trucking Co.* (1974) 40 Cal.App.3d 1068 [115 Cal.Rptr. 666]) are not too short periods of time to require a court to fix a trial date and provide the means of commencing trial when a plaintiff makes an effort to avoid the five-year rule. The plaintiff, if necessary, may move within that time to at least start the case for trial by putting on one witness. (*Weeks* v. *Roberts, supra*; *Hartman* v. *Santamarina* (1982) 30 Cal.3d 762 [180 Cal.Rptr. 337, 639 P.2d 979].) Six months has been held too long a period to wait. A similar period of time of a little over three months has been deemed an unduly long time to wait before calling the court's attention to the statute of limitations problem. (*State of California* v. *Superior Court* (1979) 98 Cal.App.3d 643 [159 Cal.Rptr. 650].)

If it is reasonable that the periods of time above described are sufficient periods within which plaintiff can move to commence the trial of an action, the delay of plaintiff at bench beyond these periods is presumptively unreasonable. The important feature is not simply the amount of time which passes but what reasonably can be done in that time. If action reasonably can be taken within a given period of time and it is not taken, the burden is on the party obligated to act to clearly demonstrate why he or she so failed. Here, allowing for the 20-day delay for filing of the arbitration award to the demand for trial de novo plaintiff nonetheless waited 130 days without excuse before doing anything to prosecute her case. That amount of time is unreasonable. She is barred from bringing her action by operation of the five-year statute.

Let a writ issue directing the trial court to dismiss the action of plaintiff for failure to bring the matter to trial within the period of time described in CCP § 583, subdivision (b) or within a reasonable period of time thereafter.

Compton, J., concurred.

**ROTH, P. J.**—I dissent.

This writ proceeding deals with admitted facts.

The underlying actions now dismissed under Code of Civil Procedure section 583, subdivision (b) by this court's order had been originally set for trial on February 11, 1980, comfortably within the five-year period prescribed by that section.

At a settlement conference theretofore ordered and held on January 25, 1980, a superior court judge acting pursuant to the provisions of Code of Civil Procedure, chapter 2.5, sections 1141.10-1141.32 (Judicial Arbitration) and specifically Code of Civil Procedure sections 1141.11 and 1411.16, determined that the amount in controversy would not exceed $15,000, vacated the trial date and ordered arbitration.

An arbitration was held. An award was made in favor of plaintiff in the underlying action (RPI in this proceeding) in the sum of $12,000 against Dr. Moran, defendant in the underlying action, petitioner herein. Two other defendants to the arbitration were dismissed. The award was filed on April 17, 1981. Section 1141.17 provides, however, that an arbitration "shall toll the running of such period until the filing of the arbitration award." As a consequence the five-year limitation set up in Code of Civil Procedure section 583, subdivision (b) had been extended 41 days.

Plaintiff accepted the award. Defendant Moran, however, on or about May 3, 1981, the 20th and last day of the period permitted for that purpose (Judicial Arbitration Rules of Court, rule 1616), filed a written request for a trial de novo.[1] Any party to the action or the clerk of the court had 21 days left to calendar the de novo request.

I assume arguendo as the petitioner and the majority appear to do that it was the duty of plaintiff to bring the action to trial within a 41-day period after the expiration of the 5-year period.[2]

[1]In pertinent part, Code of Civil Procedure section 1141.20 provides: "... Such trial shall be calendared, insofar as possible, so that the trial shall be given the same place on the active list as it had prior to arbitration, or shall receive civil priority on the next setting calendar."

[2]Predicated on an objective reading of section 1141.20 excerpted in footnote 1 and the announced construction thereof by the superior court sitting in this county (dis-

Before fleshing out and analyzing the facts stated above, those stated in the majority opinion and other facts before the trial court, it should be noted that the majority proceed on the theory that an exception to the mandatory five-year period fixed by Code of Civil Procedure, section 583, subdivision (b) cannot be granted unless "... it is established that it was *impossible, impracticable* or *futile* for plaintiff to bring the matter to trial within the 5-year period." (Italics added.) Many authorities are cited to support that proposition including *Hocharian* v. *Superior Court* (1981) 28 Cal.3d 714 [170 Cal.Rptr. 790, 621 P.2d 829]. *Hocharian*, however, is better understood, in my view, as articulating the proper rule to be that "The statute sets forth the [five-year] limitation period which must be complied with unless plaintiff shows that the [greater-than-five-year][3] delay was not due to his or her unreasonable conduct," (*id.*, at p. 722) and that while the issue of reasonableness may be addressed in terms of impossibility, impracticality or futility, those concepts are not exclusive on the question (*id.*, at p. 721) or are, at least, not limited in their application to an objective standard (*id.*, at p. 722, fn. 5), such that the correct inquiry is only whether the plaintiff, in fairness, *should have* brought his action to trial within the specified period. That this is so, I think, is buttressed by the further consideration delineated in *Hocharian*, whether a defendant has been prejudiced by delay.

The test announced by *Hocharian* is therefore two pronged: In order to escape the bar of Code of Civil Procedure section 583, subdivision (b), it must be established that (1) the conduct of plaintiff in seeking the commencement of a trial beyond the statutory period has not been *unreasonable* and, if not, that (2) the defendant in the action has not been *prejudiced* by the delay.[4] The opinion of the court makes no refer-

cussed *infra*) it might well be suggested, contrary to the majority's assumption that plaintiff has the burden of setting the case, that, the statute being so far as the parties are concerned self-executing, it is the primary duty of the clerk of the court to set the machinery in motion to fix a date on the calendar which would be within the five-year period as extended and that there was no need for plaintiff to make a motion to set.

[3]*Hocharian*, of course, involved application of Code of Civil Procedure section 581, subdivision (a), but it is clear its rationale encompasses section 583, subdivision (b) as well.

[4]I do not imply by stating the proposition negatively that the burden of proof is at all junctures on the plaintiff. Once that party has rebutted the presumption his delay beyond five years is unreasonable, it is incumbent upon the defendant to establish that even though such is the case he will suffer prejudice if the matter is permitted to proceed. When both showings have been made, the trial court is then obliged to weigh their relative merits and to resolve the issue in the exercise of its sound discretion, in terms of the relative equities and in view of a "strong public policy that litigation be disposed of on the merits wherever possible." (*Hocharian* v. *Superior Court*, *supra*, 28 Cal.3d 714, 724.)

ence to either prong of the *Hocharian* test except in the paragraph immediately preceding the concluding one wherein it is stated: "... the delay of plaintiff ... is presumptively unreasonable ... [A]t bench ... allowing for the 20-day delay for filing ... demand for trial de novo plaintiff ... waited 130 days .... That amount of time is unreasonable." The majority thus concede the first prong of *Hocharian* must be met and satisfies itself with the conclusion that plaintiff had 21 days within which to bring her action to trial, but she waited 109 days and such delay was presumptively too long. It does not suggest even remotely why tested by the totality of all the facts the trial court had denied the lapse of the 109 days was too long, or what might have been a reasonable lapse of time.

Further the majority does not suggest how defendant Moran who made the motion for the trial de novo would suffer prejudice. In fact Moran concedes by his de novo demand he was and is ready to proceed and by so doing pregnantly admits that he was not prejudiced but also that the full dress rehearsal of plaintiff's case afforded to him at the arbitration has enabled him to supplement and improve his defense.

It is respectfully suggested too that the majority's conclusion that "... tested by the totality of all the facts ... 109 days was too long" is when tested by *Hocharian* factually incorrect and is legally and equitably unjust. None of the cases cited by the majority as the basis for the several judgments at bench or in three other related cases filed this date, except *Apollo Plating, Inc.* v. *Superior Court* (1982) *post*, page 1019 [— Cal.Rptr. —], discuss the problems peculiar to de novo trials delayed beyond the statutory period as a result of awards of a mandated judicial arbitration. All the cases other than *Apollo* upon which the majority rely were decided prior to the enactment of statutes governing judicial arbitration.

Thus none of the authority cited by the majority treat of timeliness questions and/or problems inherent in the statutes embracing judicial arbitration. The working pitfalls of judicial arbitration in the procedure provided by the code sections rules of the Judicial Council, customs developed, what duties arise and where they are placed such as those of the court's clerk when an award is filed and/or a request for a de novo trial is made, have not been judicially clarified or explored by authoritative cases. To illustrate, why is it accepted by the majority as settled law that a satisfied plaintiff winning an award in arbitration continues to have the *sole* burden of setting a case for a retrial he does not want.

None of these factors are treated by any authority cited by the majority because there is none except *Apollo* wherein a situation generated by judicial arbitration was reluctantly recognized by the majority as entitled to consideration.

Inevitably, then, problems, legal and factual, involving timeliness with respect to trials de novo arising in judicial arbitration cases must be embraced within "... the totality of all the facts ... and these factors can and should be, depending on what the evidence shows, of considerable impact upon the conscience of a chancellor sitting as a trial judge or as a justice in appellate review as to whether a plaintiff who seeks relief because of a literal violation of Code of Civil Procedure section 583, subdivision (b) is equitably entitled to the relief sought.

The motions of the three defendants to dismiss and of plaintiff's opposition thereto were consolidated and noticed for hearing on September 18, 1981. The hearing dates were thereafter separated. The motion to dismiss was heard on September 18, 1981, before Judge Choate and denied. Plaintiff's motion to specially set was heard on September 28, 1981, before Judge Rafeedie. It was granted.

The trial court accepted as true: the specific declarations made in the affidavits of the respective counsel representing plaintiff that counsel were told by the trial judge at the mandatory setting conference that if the arbitration did not jell it would be restored to the civil calendar in its former position, that Code of Civil Procedure section 583, subdivision (b) would be tolled and thus plaintiff would be protected by an extension of the time consumed in the arbitration; it was also set out in one of counsel's declarations that immediately after he received notice of defendant Moran's request for a de novo trial he called the clerk of the court and was assured the case would be restored to the calendar; counsel for plaintiff were first alerted to the fact that Code of Civil Procedure section 583, subdivision (b) as extended by the toll thereof had expired when the original motion to dismiss was made on August 12, 1981; the original motion to dismiss was not made by defendant Moran whose request for a de novo trial had been filed on May 3, 1981, but was made by one of the two defendants who had theretofore been dismissed in the arbitration and freed from any liability under the award; defendant Moran, who had insisted upon a new trial and did nothing except file his request to that end, joined in the motion to dismiss, as did the other defendants who also had been dismissed and freed from liability by the award.

The trial court also found as true the declarations filed by one of plaintiff's counsel:

"During the week following my receipt of Defendant Moran's Request for Trial De Novo, I personally placed at least three (3) telephone calls to the Arbitration Office and the Master Calendar Clerk's Office. Prior to making the calls I had reviewed California Rule of Court §1616, entitled 'Trial After Arbitration,' Part B of which states:

"'*The case shall be restored* to the civil active list *for prompt disposition, in the same position on the list it would have had if there had been no arbitration in the case*, unless the court orders otherwise for good cause.' (Italics added.)

"In reliance upon Rule 1616, I apprised the respective clerks to whom I spoke that it was my understanding that it was the Court's duty to restore the case for immediate disposition in the same position it would have been had there been no arbitration. I further informed them that since a trial date had been assigned prior to the case being ordered to arbitration, the Court was obligated to set an immediate trial date. I added that plaintiff was desirous of a quick conclusion to the case.

"The response of the clerks in the Master Calendar and Arbitration Offices was that the matter would have to be forwarded to Santa Monica, but that it would immediately be set for trial in accordance with its priority position on the trial calendar. At that time *I assumed that the Court clerks and officers would perform their official duty to reset the case* for trial as if the arbitration had never been ordered, in which case the five-year rule would not bar a new trial since trial had been scheduled to commence within the five-year period when the matter was ordered to arbitration." (Italics added.)

None of the facts averred in either of the several statements found to be true are contradicted by anything in the record.

Thus it is clear that when plaintiff on August 12, 1981, received a notice of motion to dismiss predicated upon lack of prosecution under Code of Civil Procedure section 583, subdivision (b) he immediately called one of the clerks of the court, asked about the case, and was confronted with the statement that in response to his first call to reset this case to a trial date consistent with its former place on the calendar, it

had instead been mistakenly misfiled in the basement.[5] Irrespective of whether wrongful official conduct is or is not involved or does or does not excuse plaintiff's counsel from a failure to assume a burden to specially set which he didn't think was his, when on August 12, 1981, he received a notice of motion for dismissal from a dismissed defendant's counsel, plaintiff moved immediately to reset such motion and on September 2, 1981, noticed a motion to specially set the case and had all motions consolidated to be heard on September 18, 1981.[6]

At the September 18, 1981 hearing, Judge Choate stated in part:

"THE COURT: Well, if the court has any leaning, the court is inclined to believe that quite probably the error lay largely with the Clerk's Office, and I think that the interpretation of the statute is such that the law should be that—the statute and the case law—the law should be that that issue should be tried and should be tried before a court or a jury if demanded.

"It looks to me as though the motion to dismiss should be denied.

". . . . . .

"MR. COLEMAN: When you say that the clerks have made some error, what specifically—what error is the court refering [*sic*] to?

"THE COURT: As I understand it, there was no notice from the clerk, no indication from the clerk—the court does find that there was inquiry by the plaintiff via telephone. Even though it was not in writing, it was

[5]In an article written by Judge John L. Cole for the Association of Business Trial Lawyers in its August 1982 report, Judge Cole stated:

"The sheer volume of filings on the Eighth Floor of the Central District (in 1981, in excess of 52,000 matters were calendared and more than 37,000 were actually heard), plus the sheer size of the courthouse and numbers of judges and clerks involved, *inevitably leads to 'lost' or 'mislaid' files*. This is not a fact anyone is proud of, but *it is a fact of court life*.

"The files are normally transmitted to the proper department *three or four days ahead of the hearing date*. Checking out the file downstairs just ahead of that time is almost certainly calculated to cause it to be lost, since it will probably not be returned to its *rightful place of rest* in time to be found." (Italics added.)

[6]Using the time schedule set by the majority and assuming that plaintiff is blameless for the time wasted in the elapsed period between May 3, 1981, the date of the first motion to dismiss filed on August 12, 1981, by a defendant who had been dismissed in the arbitration plaintiff did by strange coincidence notice his motion for a special setting was within the 21 days defendant Moran had generously left him.

an inquiry, which the court adopts his declaration or that portion of his declaration and finds that it was true. And given the time sequence here, the court is inclined to find that it would be unjust to grant the motion to dismiss.

". . . . . .

"THE COURT: Within the time period that he had available, the court does find that it was impracticable for him to do so.

"The court finds that the factual allegations of the moving party's declaration to dismiss in the motion to dismiss under CCP583(b) are accurate.

"The court finds that the award was filed on 3-17; that there was *a request for a new trial* on April 3rd, roughly 30 days before the statute would have run on May 3rd." (Italics added.)

On September 28, 1981, when Judge Rafeedie was hearing plaintiff's motion to specially set, he said in the course thereof:

"THE COURT: This is a motion to specially set this case for trial on September 29. I note that this is a matter that was first ordered to arbitration on January 25, 1980. Following the arbitration award, a trial de novo was requested by one of the defendants: Dr. Moran, is that right?

". . . . . .

"THE COURT: Well, as a matter of fact, *the case should have been set automatically.* If there has been a mandatory arbitration and the matter is returned with a trial de novo, *the case should be set without counsel having to do anything.*

"The question here is that not having gotten set in the remaining time, which was 41 days, how long is counsel entitled to wait before he loses his right to go to trial?

"MR. SLEZAK: On that issue, your Honor—

"THE COURT: Apparently, you hadn't moved until these people filed a motion to dismiss; is that right?

"MR. SLEZAK: Well, that is not completely accurate. Ironically—and this almost sounds suspicious. I hate to even bring it up. The very morning I had—this had been bothering me a long time, why nothing had been done. I asked my secretary on several occasions to call the court, see what was happening. And that very morning before Mr. Desimone's motion, which was the first motion that came in the mail at about 10:45, we had called and ascertained that apparently the file had been misdirected to the basement because of its age; and we asked for a trial setting conference to be set, and they did so, and set it for, *I believe, September 22.* (Italics added.)

". . . . . .

"THE COURT: Well, there is no question that this, on the one hand, is an order by another judge denying a motion to dismiss under 583(b), followed by a motion to specially set, which seems to require the court to set, and the other parties to all pursue any remedies they have against the judge who denied the motion to dismiss. But what you are asking here is to have me, in effect, sit as a Court of Appeal, and reverse what Judge Choate did.

"MR. COLEMAN: No, I don't think that is correct.

". . . . . .

"THE COURT: . . . What I have before me is a motion denying this dismissal made on September 18, 1981, which I assume was made on all the grounds that were raised at that time, which will speak for themselves; and I am not going to go into it. I don't think now it would be proper for me to say, well, your motion is not clear as to whether you meant it on this ground or that, or whether you included this period or that period or both. So I am accepting it on its face value in the motion to dismiss under 583(b) which was denied.

"I am going to set this case for trial, and you gentlemen then will have whatever remedy you have against the granting of that order denying your motion to dismiss.

"Now the question is when is this matter going to be ready for trial. You [plaintiff in the action] are requesting tomorrow; is that right?

". . . . . .

"MR. COLEMAN: Your Honor, plaintiff's counsel has waited five months to be concerned about the five year problem. I think at the very least my client is entitled to 30 days to prepare this case.

"THE COURT: Well, presumably on September 18, Judge Choate ruled he still had a right to have this case set for trial; so this is now September 28, and he is moving and asking the court to set it as soon as practicable. How about October 14?

". . . . . .

"THE COURT: Well, that is as soon as the court can even begin to accomodate [*sic*] this case, if then.

"The matter is set for trial on September [*sic*] 14 at 9:00 a.m. in this department, and without prejudice to the defendants to take whatever action they deem is appropriate.

"THE CLERK: October 14, your Honor?

"THE COURT: Yes."

I conclude the standard of reasonable conduct mandated by *Hocharian* was satisfied by plaintiff and that nothing was shown by Dr. Moran or either of the other defendants which would have required a result different from that reached by the trial court in its refusal to dismiss and in its order setting the case for trial.

When the trial judge denied petitioner's motion to dismiss, he had before him the following uncontradicted facts:

1. Plaintiff had his case set for trial comfortably within the five-year period.

2. The court using the powers of mandatory arbitration vacated it and forced him to arbitrate.

3. The court assured him that if the arbitration did not jell that the time consumed by the arbitration proceeding would be used to extend Code of Civil Procedure section 583, subdivision (b).

4. The court assured him that it would be restored to its former place on the calendar and that it would be set for trial by the clerk.

5. He assumed that the filing of the award and the request by a defendant for a trial de novo triggered the clerk's duty to set and it was a self-executing provision.

6. The trial judge who set the case for trial after defendant's motion had been denied specifically states it was the clerk's duty to reset.

7. Plaintiff's counsel during the time from "late April to August 12 was extremely busy with other legal matters" and properly relied on the clerk to fix a day for trial within the five-year period as extended or had arranged with Moran's counsel for a later date.

8. On August 13, 1981, the clerk informed plaintiff's counsel through his secretary the case had not been reset but had inadvertently been put in the basement.

When the motion to dismiss was filed plaintiff for the first time knew he and his client were in trouble.

I respectfully suggest that if on the above uncontradicted showing of fact (devoid of logical inferences) the trial court had granted the motion to dismiss it would be the duty of this court to reverse. There is before the court, however, an order denying the motion, one which to my thinking ought to be upheld as a valid exercise of the trial court's sound discretion.

Accordingly, I would affirm the judgment.

Having thus tendered my dissent and its rationale, I would in addition point out what I regard as a shortcoming in the statutes and rules having to do with judicially imposed arbitration. While Code of Civil Procedure section 1141.17 is specific in its refusal to toll the application of Code of Civil Procedure section 583 beyond the extension which it grants, and while as pointed out by my colleagues, the settled rule is that the burden of prosecution of any matter is at all stages of the proceedings on the plaintiff, the fact is that in an instance where a defendant seeks and obtains a new trial following traditional litigation, that burden is placed within a revised context respecting the time limits beyond which dismissal of the action may be appropriate (Code Civ.

Proc., § 583, subd. (c)), such that, in recognition of the plaintiff's having once complied with the requirements of Code of Civil Procedure section 583, subdivision (b), he is not again obliged to do so within the period specified by its terms. Here, while plaintiff's case was not literally "brought to trial," it was, of course, adjudicated, albeit in arbitration, sufficiently to suggest to me the propriety of an extended limitation akin to that found in Code of Civil Procedure section 583, subdivision (c). In the absence of such a solution, it would seem that, at the least, revision of Code of Civil Procedure section 1141.20 and rule 1616(b) is called for, so as to take better account of situations like that before us.

[Sept. 1982]