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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SARA LOPEZ, Plaintiff and Appellant, v. ARTURO SUAREZ, et al., Defendants and Respondents.	B188558 (Los Angeles County Super. Ct. No. BC327445)

APPEAL from an order of the Superior Court of Los Angeles County, John Shepard Wiley Jr., Judge. Reversed.

Geoffrey R. Pope for Plaintiff and Appellant.

No appearance for Respondents.

SUMMARY

The trial court dismissed this action for failure to prosecute. Because the plaintiff was not given notice of the court's intention to dismiss her action or an opportunity to be heard in this regard, we reverse the trial court's order of dismissal.

FACTUAL AND PROCEDURAL SYNOPSIS

On January 19, 2005, Sara Lopez filed a complaint for personal injuries against Arturo and Hortencia Suarez.[1] At the initial status, case management and trial setting conference in May, there was no appearance on behalf of Lopez (although her counsel had filed a case management statement) or Arturo Suarez. Hortencia Suarez's attorney informed the court that Arturo Suarez was in state prison as a result of criminal proceedings relating to the facts of this case. He further represented that he had "received information that [Lopez] ha[d] been arrested for murder."

In its case management order, the trial court directed Lopez to file within 10 days a statement indicating whether she would waive jury (as Hortencia Suarez had done) and whether doe defendants could be dismissed. Further, the trial court referred the matter to mediation to be completed by August 10 and ordered the parties to file a joint status report by August 11. A post-mediation status conference was set for August 15.[2] For that same date, the court set an "Order to Show Cause re why this case should not be dismissed for failure to prosecute and Order to Show Cause re why sanctions should not

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[1] According to the complaint, Arturo Suarez shot Lopez in the head while she was a guest in his home. As a result, Lopez lost her left eye, her left eye socket was fractured, her nose was shattered, she had a hole in her right cheek and she lost her senses of taste and smell. Further, Arturo Suarez's mother Hortencia Suarez heard Lopez's pleas for help but refused to help; she prevented Lopez from calling emergency services and told Lopez she would take Lopez to her doctor instead.

[2] Trial was also set for December.

be imposed on [Lopez] for failure to appear at today's hearing." Defense counsel was to give notice.

At the time of the August 15 hearing, Lopez's counsel (Albert Perez, Jr.) appeared along with counsel for Hortencia Suarez. No joint status report had been filed. The minute order of this date states: "*Both counsel* are admonished to comply with court orders in the future. [¶] Order to Show Cause re why plaintiff's failure to comply with the court's process up to this point should not result in sanctions is set for September 7 . . . . [¶] Counsel are to file a joint status report by September 2 . . . .[3] [¶] *Order to Show Cause re Sanctions is vacated and ordered discharged*." (Italics added.) Notice was waived.

In August, counsel for Lopez (Perez) filed a motion to be relieved as counsel which was set for hearing on September 7. On that date, with both the motion to be relieved as counsel and the "Order to Show Cause re why plaintiff's failure to comply with the court's process up to this point should not result in sanctions" on calendar, the court found "no sufficient notice" on the motion, continued the "matter" to October 6, and directed plaintiff's counsel to give notice. On September 15, plaintiff's counsel filed a "notice []of conti[nued] m[o]t[io]n to be relieved as counsel."

On October 4, on the court's own motion (with telephonic notice to plaintiff's counsel by the courtroom assistant), the "Order to Show Cause and Motion [t]o[] be Relieved as Counsel set for October 6" were advanced and continued to October 11 with plaintiff's counsel to give notice. On October 11, with Jeffrey R. Davis specially appearing for Lopez, the trial court granted the motion to be relieved as counsel and set a status conference for November 9. "Both sides are ordered to appear. [¶] Counsel are to file a joint status report by November 3 . . . ." Plaintiff's counsel was to give notice. The October 11 minute order contains no disposition of the order to show cause also on calendar that date.

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[3] According to the Civil Case Summary, both sides apparently filed separate case management statements on or before September 7.

At the November 9 status conference, the trial court "note[d] that the parties were to file a joint status report by November 3 . . . . [Lopez] did not comply with this order. [Lopez] has failed to appear today. Defendant is making efforts to appear through court call. There is no appearance on court call. [¶] Case is ordered dismissed for failure to prosecute." The December trial date was advanced and vacated. Defense counsel was ordered to give notice. The Los Angeles Superior Court Civil Case Summary states that the case was dismissed for lack of prosecution "per [Code of Civil Procedure sections] 581a & 583." (All undesignated statutory references are to the Code of Civil Procedure.)

Lopez appeals.

DISCUSSION

"The court on its own motion may dismiss an action for delay in prosecution (§ 583.410)[ ] *provided that the plaintiff is afforded the same procedural rights he would have if the defendant had made the motion, i.e., notice and an opportunity to oppose*."[4] (*Cordova v. Vons Grocery Co.* (1987) 196 Cal.App.3d 1526, 1531, footnote and citations omitted; see also *Reid v. Balter* (1993) 14 Cal.App.4th 1186, 1193 ["At a minimum, [the procedural] requirements [which must precede any such dismissal] include notice to the plaintiff of a motion or intent to dismiss and an opportunity for plaintiff to be heard"].) Here, Lopez was not given any notice whatsoever that the trial court intended to dismiss her case on November 9, 2005—for failure to appear at the status conference set for that date, for failure to prosecute or for any other reason. On October 11, another attorney specially appeared in the absence of Lopez's attorney; at that time, her attorney's motion to withdraw was granted, and the trial court scheduled a status conference for November 9, 2005, with both sides ordered to appear. "Counsel for plaintiff" was then directed to give notice. According to the record, however, there was no notice or any other

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[4] Section 583.410 provides: "(a) The court may in its discretion dismiss an action for delay in prosecution pursuant to this article on its own motion or on motion of the defendant if to do so appears to the court appropriate under the circumstances of the case. [¶] (b) Dismissal shall be pursuant to the procedure and in accordance with the criteria prescribed by rules adopted by the Judicial Council."

document filed between September 15 and November 16--when defense counsel first filed a notice of dismissal and served it on Lopez.[5] Consequently, for this reason alone, "dismissal was a clear violation of [Lopez's] due process rights . . . and the order of dismissal is void . . . ." (*Reid v. Balter, supra,* 14 Cal.App.4th at p. 1193, citations omitted.)

Moreover, according to the record, the trial court dismissed the action for delay in prosecution, citing sections 581a and 583. Both provisions were repealed in 1984. Subdivision (a) of section 583.420 provides: "The court may *not* dismiss an action pursuant to this article for delay in prosecution except after one of the following conditions has occurred: [¶] (1) Service is not made within two years after the action is commenced against the defendant. [¶] (2) The action is not brought to trial within the following times: [¶] (A) Three years after the action is commenced against the defendant unless otherwise prescribed by rule under subparagraph (B). [¶] (B) Two years after the action is commenced against the defendant if the Judicial Council by rule adopted pursuant to Section 583.410 so prescribes for the court because of the condition of the court calendar or for other reasons affecting the conduct of litigation or the administration of justice. [¶] (3) A new trial is granted and the action is not again brought to trial within the following times: [all inapplicable here, but not less than two years]." (Italics added.)

This action was filed on January 19, 2005, and was dismissed by the trial court on the court's own motion on November 9, 2005—less than one year later. A delay of less than one year is not a ground for dismissal under the provisions apparently relied upon by the court. (*Hawks v. Hawks* 141 Cal.App.4th 1435; *Roman v. Usary Tire & Service Center* (1994) 29 Cal.App.4th 1422, 1430-1431.) Accordingly, dismissal under the sections governing delay in prosecution was improper.

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[5] The document Lopez's counsel filed on September 15 was a "notice []of conti[nued] m[o]t[io]n to be relieved as counsel."

An amended notice of dismissal was later filed on November 30. The original case caption was in error—it did not contain Lopez's name.

Although there is authority for a trial court's dismissal of an action at an earlier stage than contemplated by sections 583.410 and 583.420 (see, e.g., Gov. Code, § 68608, subd. (b) ["Judges shall have all the powers to impose sanctions authorized by law, including the power to dismiss actions or strike pleadings, if it appears that less severe sanctions would not be effective after taking into account the effect of previous sanctions or previous lack of compliance in the case. . . ."]; § 575.2 [imposition of penalties for failure to comply with local rules]), in addition to the necessity of affording the plaintiff notice and an opportunity to be heard, even then "there are at least two limitations or restrictions on the trial court's power to dismiss an action for noncompliance with local rules: (1) dismissal is inappropriate if the noncompliance was the responsibility of counsel alone, rather than the party . . . ; and (2) dismissal is appropriate only if less severe sanctions would be ineffective . . . ." (*Tliche v. Van Quathem* (1998) 66 Cal.App.4th 1054, 1061-1062, citations omitted.)

In any event, because Lopez was denied notice of the court's intention to dismiss her action on November 9, 2005, and the opportunity to be heard in this regard, the dismissal was improper.

DISPOSITION

The order of dismissal is reversed. The case is remanded to the trial court with directions to vacate the order of dismissal and to provide Lopez with notice and an opportunity to be heard regarding the court's intended sanctions. Lopez is to bear her own costs of appeal.

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WOODS, J.

We concur:

PERLUSS, P.J. **ZELON, J.**