

# **GENESIS PVB, LLC v GRAFER**

**18CV43485**

## **CROSS-COMPLAINANT'S MOTION FOR TRIAL SETTING PREFERENCE**

Genesis PVB, LLC, 3NT Management, LLC, and Craig Bordon ("Bordon") (collectively "Plaintiffs") filed a Complaint in this matter on August 13, 2018. On May 23, 2019, Defendant/Cross-Complainant George Grafer ("Cross-Complainant") filed a cross-complaint against Genesis PVB, LLC, 3NT Management, LLC, Craig Bordon and Nickitas Panayotou. A consolidated cross-complaint was filed on March 27, 2019 (after transfer from Marin County).

Mr. Panayotou was dismissed from the action on March 28, 2024. The Corporate Plaintiffs were dismissed on February 22, 2023. (Declaration of Timothy Barteau ("Barteau Decl." ¶ 3, Ex. A ¶ 2.) Plaintiff's Complaint was dismissed pursuant to Code Civ. Proc. Section 583.310 on April 19, 2024.

Now before the Court is Cross-Complainant's motion to specially set the cross-action for trial before expiration of the 5-year statute under Code of Civil Procedure section 583.310. Cross-Defendants have not filed an opposition.

Code of Civil Procedure section 583.310(a) provides that "an action shall be brought to trial within five years after the action is commenced against the defendant." Subsection (b) provides that the requirement of dismissal is mandatory and "not subject to extension, excuse, or exception except as expressly provided by statute."

The consolidated cross-complaint was originally filed on March 27, 2019 and the cross-complaint on May 23, 2019, meaning that a trial date needed to commence within five years or by March 27, 2024. That statutory period was extended 6 months, however, pursuant to California Rules of Court, Appen. I, Emergency Rule 10(a), passed by the California Judicial Council during the COVID pandemic. As a result, the date by which this cross-action must be brought to trial is extended to September 27, 2024.

Recognizing that time is running on his claims, Cross-Complainant brings this motion pursuant to Code of Civil Procedure section 36(e) which states:

Notwithstanding any other provision of law, the court may in its discretion grant a motion for preference that is supported by a showing that satisfies the court that the interests of justice will be served by granting this preference.

If the court grants a motion for trial preference under CCP § 36(e), then it must set trial “not more than 120 days from that date and there shall be no continuance beyond 120 days from the granting of the motion for preference except for physical disability of a party or a party’s attorney, or upon a showing of good cause stated in the record.” (CCP § 36(f).)

A motion for preferential trial setting raises the same issues for the trial court as a motion to dismiss for failure to prosecute. (*Wilson v. Sunshine Meat Liquor Co.* (1983) 34 Cal.3d 554, 561.) The *Wilson* court further stated:

In passing upon a motion for an early and preferential setting, the court was not limited to a consideration of the single fact that the five-year period was about to expire but was required to view the total picture, including the dilatory action of the plaintiff, the condition of the court’s calendar, the rights of other litigants, and the prejudice to the defendant resulting from the delay. (*Wilson, supra* 34 Cal.5d at 561.)

Cross-Complainant argues that the motion should be granted because he has not been dilatory, the court’s calendar will not be overburdened, and the other litigants will not be prejudiced by a trial commencing before September 27, 2024. Specifically, Cross-Complainant state that he has diligently pursued the matter, including pursuing discovery, but Bordon has engaged in a lengthy history of delays and obstacles. Apparently Bordon represented himself to be custodian of record and person most qualified to be deposed on behalf of 3NT Management, LLC and Genesis PVB, LLC and was deposed. Thereafter, Cross-Complainant learned that Bordon did not have such authority and had to depose Nickitas Panayotou, the actual managing partner for the entities.

Cross-Defendant have also been through at least two different attorneys. His first attorney, Amanda J. Potier, had her motion to withdraw as counsel granted due to the fact that the Cross-Defendants refused to pay their attorney’s fees. (Barteau Decl., ¶ 3, Ex. E.) Despite their intent to fire their initial attorney, Cross-Defendant Borden failed to communicate with her regarding her withdrawal, causing delay. (Id. at ¶¶ 4-9.) Cross-Defendants then obtained another attorney, David Furtado. Upon learning that Borden did not have the authority to pursue this matter on behalf of the entities, Furtado sought to withdraw as counsel. (Barteau Decl., ¶¶ 3-5, Ex. A¶ 2].) In support of his Motion to be Relieved as Counsel, Mr. Furtado filed a declaration demonstrating the lack of diligence exerted by Cross-Defendant Borden in seeking to bring this matter to trial.

Cross-Defendant Borden then intentionally avoided service of his attorney’s Motion to Withdraw at his personal and business addresses, forcing his then attorney to enlist the aid of the Los Angeles Sheriff’s Department. (Furtado Decl., ¶ 4-5). Only after personal service was achieved by the Sheriff and the Motion was finally allowed to go forward, without opposition, did Cross-Defendant Borden immediately enlist new counsel, Michael Creamer. During the period Mr. Creamer served as counsel, the statute was

allowed to run, with no effort made by Cross-Defendant Borden or his counsel to bring the matter to trial or even notify the Court of such.

Cross-Defendants have not filed any opposition to the instant motion. The Court notes that while the traditional reasons for setting trial preference -- a party's health, age or other condition -- are not present here (see Code Civil Procedure sections 36(a) to (d)), the interests of justice support the granting of trial preference. Cross-Complainant has diligently attempted to pursue this matter and has been met with delay and obstacles caused by Bordon.

Accordingly, Cross-Complainant's motion for preferential trial setting is conceptually granted; however, if the matter is not settled at the Mandatory Settlement Conference on August 12, 2024, the Court will then determine if the condition of the Court's calendar allows for this trial to be scheduled and commenced within a six week timeframe.