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LOS ANGELES SUPERIOR COURT

DEC 05 2006

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES

Winston & Strawn LLP
333 South Grand Avenue
Los Angeles, CA 90071-1543

11 ANGELA BORLAZA, a.k.a., EVELYN)
12 MAGALING, an individual,)
13 Plaintiff,)
14 vs.)
15 MORRIS M. MEDAVOY, as a Co-executor of)
the Estate of Marlon Brando, LARRY J.)
16 DRESSLER, as a Co-executor of the Estate of)
Marlon Brando, an Individual, and Does 1)
17 through 50, inclusive,)
18 Defendants.)

Case No. BC354855

MOTION TO DISMISS PURSUANT TO
C.C.P. § 418.10(a)(3); MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF

[Request For Judicial Notice Filed
Concurrently]

The Honorable Rita Miller presiding
Department 16
Hearing Date: January 23, 2007
Hearing Time: 9:00 a.m.

CIT/CASL BORGARDT (LVA/EPF)
RECEIPT #: 02946772000
DATE PAID: 12/05/06 04:11:40 PM
PAYMENT: \$50.00 02/0
RECEIVED:
CHECK: 500.00
CASH:
CHARGE:
CARD:

Winston & Strawn LLP
333 South Grand Avenue
Los Angeles, CA 90071-1543

1 TO PLAINTIFF AND HER ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on January 23, 2007 at 9:00 a.m. or as soon thereafter as this
3 matter may be heard before the Honorable Rita Miller in Department 16 of the above-entitled court,
4 located at 111 North Hill Street, Los Angeles, California, defendant Larry J. Dressler ("Defendant")
5 will and hereby does move to dismiss the Complaint of Plaintiff Angela Borlaza, a.k.a. Evelyn
6 Magaling ("Plaintiff").

7 This motion is made on the grounds that Plaintiff has failed to timely prosecute this action,
8 waiting years to bring the action and then ignoring the deadlines imposed by California Rule of
9 Court 201.7.

10 This motion is based on this Notice of Motion the attached Memorandum of Points and
11 Authorities, Request for Judicial Notice, all papers and pleadings in the Court's file, and upon such
12 oral argument as may be made at the hearing on this motion.

13 DATED: December 5, 2006

WINSTON & STRAWN LLP
LAURA R. PETROFF
MICHAEL S. BROPHY

14
15
16 By: 

Michael S. Brophy

17 Attorneys for Defendant
18 LARRY J. DRESSLER, IN HIS INDIVIDUAL
19 CAPACITY
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1 **I. INTRODUCTION**

2 Plaintiff Angela Borlaza, a.k.a. Evelyn Magaling ("Plaintiff") has failed to comply both with
3 the statutes governing the quick resolution of after-death claims and the service rules imposed by the
4 Trial Court Delay Reduction Act. Plaintiff filed her complaint well over a year after the expiration
5 of the governing statute of limitations for her underlying claim regarding certain property the subject
6 of this lawsuit. She then served this complaint on Defendant Larry Dressler ("Defendant") months
7 after the deadline for service imposed by the local rules. To date, Plaintiff still has not served named
8 defendant Morris M. Medavoy.

9 There is no good cause for her continued delay. Indeed, Plaintiff served her Probate petition,
10 based on the same underlying property claims, on the Estate of Marlon Brando almost five weeks
11 prior to her service of the civil complaint. By this motion, Defendant seeks an order dismissing this
12 action under California Code of Civil Procedure sections 418.10 and 583.150 for failure to comply
13 with California Rule of Court 201.7. This motion is intended to supplement the Court's order to
14 show cause regarding Plaintiff's failure to comply with California Rule of Court 201.7 scheduled for
15 hearing on December 26, 2006.

16 **II. FACTUAL AND PROCEDURAL SUMMARY**

17 Marlon Brando ("Decedent") died on July 1, 2004. At that time, he was the sole shareholder
18 of Penny Poke Farms, Ltd., a California Corporation ("PPF"). Plaintiff is a former employee of
19 PPF.

20 Plaintiff, using the name Angela Borlaza Magaling, by and through her attorney, Richard A.
21 Lewis, filed a creditor's claim in the Estate probate proceeding on November 30, 2004. (*See*
22 Request for Judicial Notice ("RJN"), Ex. A.) Plaintiff's creditor's claim identifies the following four
23 items sought by her as a creditor: (1) residence at 20410 Runnymede [sic] Street, Winnetka, CA,
24 (2) 1992 Lexus, (3) \$1,000 Line of Credit at Electronic Store, (4) \$4,000 Severance Pay. The Estate
25 rejected in full Plaintiff's creditor's claim on January 20, 2005, and on that same day the Estate
26 mailed the rejection to both Plaintiff and her attorney, Mr. Lewis. (*See* RJN, Ex. B.) As stated in the
27 notice of rejection, the Probate Code provided Plaintiff three months from the date of rejection (or
28 until April 20, 2005) to act on her rejected claim. (*See* RJN, Ex. B.) Plaintiff did not act on her

1 rejected claim and it is now time-barred. *See* Probate Code § 9353(a). In addition, because more
2 than one year has passed since Decedent's July 1, 2004 death, all claims against Decedent not
3 previously initiated in a timely manner are now barred. *See* Cal. Code of Civ. Proc. § 366.2.

4 To establish its lawful entitlement to the Runnymede Property, PPF filed an unlawful
5 detainer complaint against Plaintiff on February 2, 2005. Petitioner did not respond to the complaint
6 and on February 24, 2005, a default judgment was entered against Plaintiff. (*See* RJN, Ex. C, Los
7 Angeles Superior Court Case Number 05B00602.) On March 23, 2005 a Writ of Possession was
8 returned in favor of PPF and PPF sold the Runnymede Property shortly thereafter.

9 On June 30, 2006, Plaintiff filed a Petition For Order Determining Interest In Real Property;
10 For Release Of Personal Property; For Imposition Of Constructive Trust And Award Of Damages,
11 Attorney's Fees And Costs ("The 850 Petition") in the Estate probate proceeding. (*See* RJN, Ex. D.)
12 On the same day, Plaintiff filed the instant civil action in Los Angeles Superior Court against two of
13 the three individual executors of the Estate alleging breach of oral contract, fraud and deceit.

14 The Estate received The 850 Petition and a Notice of Hearing on that Petition August 17,
15 2006. The 850 Petition alleges that Decedent died holding title to real property, located at 20410
16 Runnymede Street in Winnetka, California (the "Runnymede Property"), owned by Petitioner. (*See*
17 The 850 Petition, ¶ 12.) On October 10, 2006, over 100 days after the filing date, Plaintiff served
18 Larry Dressler with the civil complaint and summons. (*See* Proof of Service at RJN, Ex. E.)

19 On October 26, 2006, the Court issued an Order to Show Cause Re Compliance With
20 Requirements for Proof of Service and Obtaining Entry of Default and Default Judgment Pursuant to
21 California Rule of Court 201.7 (the "OSC"), ordering Plaintiff to show cause on December 26, 2006,
22 as to why sanctions should not be imposed for this failure to prosecute. The Court also noticed a
23 case management conference for the same day. Plaintiff served the OSC and the CMC on counsel
24 on November 10, 2006. The parties stipulated on November 20, 2006 to postpone any response to
25 the complaint until a time after the Court's OSC hearing and after the parties' mediation set for
26 December 20, 2006. On December 5, 2006, Defendant learned that the Court declined to sign the
27 stipulation putting into question whether the Complaint was at issue. Defendant filed this motion on
28 that same day.

1 **III. ARGUMENT**

2 **A. The Court Should Dismiss the Complaint Under California Code Of Civil**
3 **Procedure Sections 418.10 And 583.150.**

4 **1. The Court Has the Authority To Dismiss the Complaint Prior to**
5 **Defendant's Filing of Responsive Pleadings.**

6 The California Code of Civil Procedure permits Defendant to request that this Court dismiss
7 Plaintiff's complaint on the basis of her belated service of the summons prior to addressing the
8 numerous substantive problems in Plaintiff's action. Section 418.10 permits a defendant, "on or
9 before the last day of his or her time to plead or within any further time that the court may for good
10 cause allow, may serve and file a notice of motion for one or more of the following purposes: ... (3)
11 To dismiss the action pursuant to the applicable provisions of Chapter 1.5 (commencing with
12 Section 583.110) of Title 8." Cal. Code of Civ. Proc. § 418.10(a).

13 Section 583.150, within Chapter 1.5 of Title 8, provide this Court the authority "to dismiss an
14 action or impose other sanctions under a rule adopted by the court pursuant to [Cal. Code of Civ.
15 Proc.] Section 575.1 or by the Judicial Council pursuant to statute, or otherwise under inherent
16 authority of the court." Cal. Code of Civ. Proc. § 583.150. Defendant seeks an order dismissing this
17 action under California Code of Civil Procedure sections 418.10 and 583.150 for failure to comply
18 with California Rule of Court 201.7.¹

19 The motion is also consistent with this Court's "inherent power to control its calendar." *See*
20 *Blue Chip Enterprises, Inc. v. Brentwood Savings & Loan Assoc.*, 71 Cal. App. 3d 706, 712-713
21 (1977). To this end, the trial court has the power "to dismiss an action where there has been
22 inexcusable delay in bringing it to trial." *Id.*, at 712.

23 **2. Plaintiff's Delayed Service Failed to Comply With California Rule of**
24 **Court 201.7(b).**

25 Rule 201.7(b) of the California Rules of Court states that "[t]he complaint must be served on
26 all named defendants and proofs of service on those defendants must be filed with the court within
27

28 ¹ Defendant intends to file his responsive pleadings, if necessary, after the Court rules on this motion as provided under California Code of Civil Procedure § 418.10(b).

1 60 days after the filing of the complaint...." Rule 201.7(f) provides that "[u]nless the court has
2 granted an order extending the time to serve a complaint or cross-complaint, the failure to serve and
3 file pleadings as required under this rule may result in an Order to Show Cause being issued as to
4 why sanctions shall not be imposed."

5 Faced with violation of Rule 201.7, the Trial Court Delay Reduction Act, Government Code
6 Section 68600, authorizes trial courts to "impose sanctions authorized by law, including the power to
7 dismiss actions or strike pleadings, if it appears that less severe sanctions would not be effective
8 after taking into account the effect of previous sanctions or previous lack of compliance in the case.
9 Judges are encouraged to impose sanctions to achieve the purposes of this article." Cal. Gov't Code
10 § 68608(b). Similarly, the California Code of Civil Procedure permits the Court to dismiss an action
11 for failing to comply with local rules. Cal. Code of Civ. Proc. § 575.2(a). On October 26, 2006,
12 utilized its authority the Court issued the OSC regarding Plaintiff's failure to comply with California
13 Rule of Court 201.7. Plaintiff did not serve the OSC on Defendant until November 10, 2006, two
14 weeks later.

15 Plaintiff filed both her Complaint and The 850 Petition on June 30, 2006. Although Plaintiff
16 served The 850 Petition and accompanying Notice of Hearing on the Estate on August 16, 2006,
17 Plaintiff did not serve the civil complaint on Defendant until October 10, 2006. Plaintiff did not file
18 any request for an extension of time to serve the Complaint, nor did the parties come to any
19 agreement regarding service. Plaintiff's four-month delay compounds the prejudice caused by her
20 almost year and a half of silence following the expiration of the statutory time to pursue her claims.
21 Plaintiff's delay disrupts Estate business and prevents the Estate from closing, raising Estate costs,
22 depleting Estate assets and thereby causing harm to Estate beneficiaries.

23 The Court has already recognized that Plaintiff has failed to satisfy the Rule 201.7's
24 requirements and has issued an order to show cause. Defendant requests by this motion that the
25 appropriate sanction for this continued pattern of delay is dismissal with prejudice.

26 ///

27 ///

28 ///

1 **3. Plaintiff Cannot Justify the Lengthy Delay In Both Filing and Serving the**
2 **Action.**

3 a. Plaintiff Waited More Than One Year To File This Action Precipitated
4 By The Denial Of Her 2004 Creditor's Claim.

5 Plaintiff's belated action attempts an end-run around the creditor's claim procedure, including
6 the three-month statute of limitations to initiate an action on a rejected creditor's claim and the one-
7 year statute of limitations on claims against decedents.

8 As set forth in her Complaint, Plaintiff first asserted her entitlement to the property at issue in
9 a letter to the Executors on September 24, 2004. (Complaint, ¶ 32.) Plaintiff filed a creditor's claim
10 with the Estate in November 2004, and the Executors denied Plaintiff's creditor's claim on January
11 20, 2005. (*Id.*) Plaintiff filed this civil action **17 months** after the denial, more than 14 months after
12 the statutory deadline. Cal. Prob. C. § 9353(a).

13 Plaintiff's underlying claim, that the Decedent allegedly provided her a house through an
14 alter ego corporation, is governed by a one-year statute of limitations. Cal. Code of Civ. Proc.
15 § 366.2. Decedent died on July 1, 2004 and more than one year has passed since the date of his
16 death.

17 Recognizing that the claims are now time-barred, Plaintiff has attempted to refashion her
18 claim for money as a request for property in the Probate Court, and as a case of extrinsic fraud in the
19 Civil Court. Even if Plaintiff could establish that extrinsic fraud delayed her filing of this claim,
20 Plaintiff waited more than a year to bring this claim. Plaintiff asserts in her verified complaint that
21 she discovered the alleged fraud in March of 2005. (Complaint, ¶ 45.) Plaintiff, however, waited
22 until June 30, 2006 to file the current action, more than one year after she alleges that she learned
23 that her claim had truly been denied. So even if any alleged extrinsic fraud occurred, Plaintiff still
24 waited over one year to bring the instant action. Plaintiff did not serve the civil action based on the
25 rejected claim until October 2006, adding an additional four-month delay.

26 b. Plaintiff's Failure to Comply With California Rule Of Court 201.7(B)
27 Further Compounded The Existing Delay Without Good Cause.

28 Plaintiff filed both a civil action against the individual executors and a probate petition

1 against the Estate premised on her alleged entitlement to the Runnymede Property. These
2 documents were filed on the same day, yet Plaintiff failed to serve the civil action on the individuals
3 until almost two months after serving the probate petition on the Estate. This additional delay not
4 only violated the California Rules of Court, but also compounded the already existing delay.
5 Plaintiff's counsel did not file any request with the Court for additional time to serve and did not
6 offer any explanation for the delay.

7 c. The Continued Delay Harms The Estate And The Individuals.

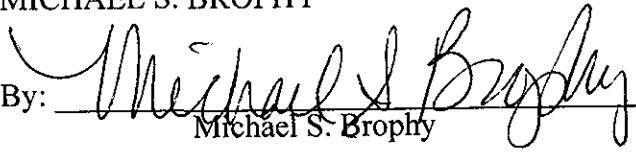
8 As stated above, Plaintiff's belated filing in two courts not only disrupts Estate business and
9 prevents the Estate from closing, but also unnecessarily reopens matters long closed, raising Estate
10 costs, depleting Estate assets and thereby causing harm to Estate beneficiaries. Plaintiff's delayed
11 civil action has also personally attacked Mr. Dressler's credibility, and Plaintiff's delay has
12 needlessly drawn out this attack. Plaintiff has no good cause for causing this prejudice to the Estate,
13 its beneficiaries, or the individual Executors.

14 **IV. CONCLUSION**

15 Plaintiff not only has failed to timely act on her rights, but she has also failed to timely serve
16 her belated action. The Court should use its powers to dismiss this action for Plaintiff's failure to
17 timely prosecute.

18
19 DATED: December 5, 2006

WINSTON & STRAWN LLP
LAURA R. PETROFF
MICHAEL S. BROPHY

20
21
22 By: 
Michael S. Brophy

23 Attorneys for Defendant
24 LARRY J. DRESSLER, IN HIS INDIVIDUAL
25 CAPACITY

