

69071-0

69071-0

No. 69071-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ONE DER WORKS II, LLC,

Respondents,

v.

JAMES K. DUNCAN and JOHN DOE,

Appellants.

RESPONSE BRIEF

Christopher D. Cutting
Law Office of Evan L. Loeffler PLLC
Attorney for Respondent

2033 Sixth Avenue, Suite 1040
Seattle, Washington 98121
206-443-8678
WSBA No. 41730

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 FEB -4 AM 9:52

ORIGINAL

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES..... iii

II. STATEMENT OF ISSUES..... 1

III. STATEMENT OF THE CASE 1

IV. ARGUMENT 4

A. ISSUES RELATED TO THE FINAL JUDGMENT ENTERED ON JUNE 5, 2012,
ARE NOT BEFORE THIS COURT 4

B. UNCHALLENGED FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE
VERITIES ON APPEAL AND ISSUES IDENTIFIED BUT NOT DISCUSSED IN THE
OPENING BRIEF ARE WAIVED 5

C. THE COURT PROPERLY REFUSED TO STAY ENFORCEMENT OF
JUDGMENT ENTERED FOLLOWING A CR 2A SETTLEMENT 9

*1. The stipulation fully resolved the parties' dispute over possession
..... 10*

2. Duncan's change in circumstances does not excuse his breach... 12

D. THE COURT PROPERLY REFUSED TO GRANT A STAY OF THE WRIT OF
RESTITUTION..... 13

E. THE COURT PROPERTY REFUSED TO STAY ENFORCEMENT OF
JUDGMENT ENTERED FOLLOWING A CR 2A SETTLEMENT 15

V. CONCLUSION..... 16

I. TABLE OF AUTHORITIES

Cases

Angelo Prop. Co. v. Hafiz, 167 Wn. App. 789, 274 P.3d 1075 (2012)..... 8

Baird v. Baird, 6 Wn. App. 587, 494 P.2d 1387 (1972)..... 9

Bird v. Best Plumbing Group, 175 Wn.2d 756, 287 P.3d 551 (2012) 13

Boeing Co. v. Sierracin Corp., 43 Wn. App. 288, 716 P.2d 956 (1986).. 13

Burback v. Bucher, 56 Wn.2d 875, 355 P.2d 981 (1960)..... 5

Hous. Auth. v. Pleasant, 126 Wn. App. 382, 109 P.3d 422 (2005) 14

Munden v. Hazelrigg, 105 Wn.2d 39, 711 P.2d 295 (1985)..... 6, 7, 9

Red-Samm Mining Co., Inc. v. Port of Seattle, 8 Wn. App. 610, 508 P.2d
175 (1973) 8

Smyth Worldwide Movers, Inc. v. Whitney, 6 Wn. App. 176, 491 P.2d
1356 (1971) 9

State ex rel. Orth v. Benson, 21 Wash. 580, 59 P. 501 (1899) 13

State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994)..... 5, 6

The Plumbing Shop, Inc. v. Pitts, 67 Wn.2d 514, 408 P.2d 382 (1965)... 11

Weyerhauser Co. v. Comm. Union Ins. Co., 142 Wn.2d 654, 15 P.3d 115
(2000) 5

Civil Rules

CR 2A 9

CR 62 13, 15

Rules of Appellate Procedure

RAP 10.3..... 5, 6
RAP 12.1 5
RAP 18.1..... 15
RAP 2.4..... 4
RAP 2.5..... 6
RAP 8.1..... 13

Statutes

RCW 2.24.050 4, 7
RCW 59.18.060 6
RCW 59.18.312 8
RCW 59.18.410 15

Other Authorities

Black's Law Dictionary 1219 (18th ed. 2004)..... 11

II. STATEMENT OF ISSUES

- A. Whether any aspect of the June 5, 2012, judgment is before this court on appeal.
- B. Whether the June 5, 2012, Findings of Fact and Conclusions of Law are verities on appeal.
- C. Whether CR 2A bars challenge to the judgment.
- D. Whether the trial court properly denied the Appellant's motion to stay the eviction.
- E. Whether the court should award attorney's fees on appeal.

III. STATEMENT OF THE CASE

The facts of this case are not disputed and were affirmatively admitted by Appellant James Duncan (Duncan) before the trial court. Clerk's Papers (CP) at 40.¹ Duncan rented a house in Kirkland, Washington from Respondent One Der Works II, LLC (One Der Works) for \$900.00 per month. CP at 1. In March 2012, Duncan began withholding rent. *Id.* On April 5, 2012, One Der Works hand-delivered a three-day notice to pay rent or vacate to Duncan for \$1,800.00 in unpaid

¹ Duncan "stipulate[d] to the accuracy of the allegations contained [in the complaint]" as a component of the parties' stipulation for settlement. CP at 40. For brevity, all further citations to the facts will only identify the location of the allegation in the pleadings unless the admission in the stipulation is particularly relevant.

rent and a \$100.00 late fee. CP at 6–8. Duncan did not comply with this notice within the time allowed. CP at 2.

Following service of the summons and complaint for unlawful detainer, Duncan raised a variety of affirmative defenses and counterclaims as well as “retroactively” claiming a set-off for alleged defects in the house. CP at 13. A show cause hearing was scheduled for May 10, 2012. CP at 29. On the day of the hearing, prior to the court calling the case, the parties entered into a stipulation for settlement. CP at 37–42. That stipulation was negotiated and signed by the parties’ attorneys without any direct interaction between the parties; the agreement was also signed by Duncan and Leo Francis, the manager for One Der Works. *See* CP at 42. On appeal, three aspects of the stipulation for settlement are particularly relevant:

1. Duncan admitted the truth of all the allegations in the complaint (¶ 1);
2. Both parties waived a variety of claims and defenses against each other (¶¶ 1, 4); and
3. Duncan agreed that a writ of restitution and judgment would issue without notice to him if he did not vacate the premises by May 31, 2012 (¶ 2, 7). CP at 40–41.

It is also not disputed that Duncan remained in possession of the property on June 1, 2012. Report of Proceedings (RP) at 4. Duncan accurately stated that he returned the keys some days later, but he continued to keep personal property at the premises and to assert a right to come and go from the premises. RP at 4, 9–10; CP at 43. On June 5, 2012, One Der Works successfully moved the trial court to issue findings of fact, conclusions of law, judgment, and an order issuing a writ of restitution. CP at 37. The King County Sheriff posted the writ of restitution on June 8, 2012. CP at 47. Duncan continued coming and going from the premises through the date of his physical eviction. RP at 4, 9–10; CP at 47.

On June 12, Duncan moved the trial court to stay execution on the writ of restitution, alleging the terms of the agreement did not require him to vacate the premises, only the buildings. RP at 3. Duncan's motion was denied. CP at 46; RP at 10. Duncan was physically evicted by the sheriff on June 15. CP at 47.

Duncan did not file a motion to reconsider or amend the final judgment. Thirty-seven days after entry of final judgment and thirty days after his motion to stay the writ was denied, Duncan appealed. CP at 52.

IV. ARGUMENT

A. Issues Related to the Final Judgment Entered on June 5, 2012, are not Before This Court

“The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal.”

RAP 2.4 (a). Sections (b) through (g) provide additional orders that are brought before the appellate court although they were not designated in the notice of appeal. RAP 2.4 (b)–(g). These additional orders are from motions made *after* the order appealed, such as motions for reconsideration and motions for attorney’s fees. *See id.* Appealing the court’s refusal to stay an order does not automatically bring the order sought to be stayed up for review. *See* RAP 2.4.

In his notice of appeal, Duncan only identifies the court’s denial of his motion to stay enforcement of the writ of restitution, not the court’s² order issuing that writ. CP at 52–54. Nor did Duncan ever make a motion

² All the orders in this case were made by the Court Commissioner. However, “unless a demand for revision is made within ten days from the entry of the order or judgment of the court commissioner, the orders and judgments shall become the orders and judgments of the superior court.” RCW 2.24.050.

to reconsider or amend the order issuing the writ of restitution.³ When he did appeal, it was more than 30 days after entry of final judgment. *Id.* Therefore, the only issues properly before the court are those issues related to the court's order denying Duncan's request for a stay of the writ of restitution.

B. Unchallenged Findings of Fact and Conclusions of Law Are Verities on Appeal and Issues Identified but Not Discussed in the Opening Brief are Waived

On appeal, any unchallenged orders, findings of fact, or conclusions of law are considered conclusively established. This doctrine is waiver when applied in reference to the trial court's orders and conclusions. *See* RAP 10.3 (a), (g). The appellant must designate "a separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error." RAP 10.3 (a)(4); *see Burback v. Bucher*, 56 Wn.2d 875, 877, 355 P.2d 981 (1960). The appellant must then discuss each alleged error in the argument section of his brief. RAP 10.3 (a)(6); RAP 12.1 (a); *Burback*, 56 Wn.2d at 877. Any issue not both identified in the statement of error and

³ Duncan presented a written motion and declaration to the trial court, but that motion was never filed with the clerk of the superior court or designated with the clerk's papers. His oral motion only raised issues related to a stay

discussed, with citation to the record and supporting authority, is waived and will not be considered by the appellate court. *Weyerhaeuser Co. v. Comm. Union Ins. Co.*, 142 Wn.2d 654, 692–93, 15 P.3d 115 (2000). In a related doctrine, unappealed facts become verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); *see* RAP 10.3(g).

Here, Duncan has not appealed the trial court’s findings of fact or conclusions of law nor has he identified a single finding or conclusion that was entered in error. CP at 52–54; Brief of Appellant, at 9–10, 31–38. The trial court’s findings of fact, CP at 35, are verities on appeal. *Hill*, 123 Wn.2d at 644; RAP 10.3(g).

The appellate court will not consider an issue raised for the first time on appeal. RAP 2.5(a). The appellate court should not consider the following issues that Duncan raises for the first time on appeal:

- Constructive eviction. Appellant’s Brief, at 5. Duncan waived all counterclaims in the parties’ settlement agreement. CP at 40.
- Unlawful harassment. Appellant’s Brief, at 5, 6. Duncan waived all counterclaims in the parties’ settlement agreement. CP at 40. Additionally, an unlawful detainer is a special proceeding and the defendant cannot raise issues not related to his right to possession

of the premises. *Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985).

- Disregard of tenants complaints. Appellant's Brief, at 5. Duncan waived all counterclaims in the parties' settlement agreement. CP at 40. Additionally, this does not breach any of the landlord's duties. *See* RCW 59.18.060.
- Discrimination. Appellant's Brief, at 6. Duncan waived all counterclaims in the parties' settlement agreement. CP at 40. Additionally, an unlawful detainer is a special proceeding and the defendant cannot raise issues not related to his right to possession of the premises. *Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985).
- Refusal to make repairs. Appellant's Brief, at 6–7. Duncan waived all counterclaims in the parties' settlement agreement. CP at 40.
- Breach of the Code of Judicial Conduct. Appellant's Brief, at 12–14. Duncan did not seek reconsideration or revision of the court commissioner. *See* RCW 2.24.050.
- Failure to place the parties under oath. Appellant's Brief, at 12–13. Duncan did not seek reconsideration or revision of the court commissioner. *See* RCW 2.24.050. Additionally, respondent is

not aware of any requirement for non-testifying parties to a non-evidentiary motion hearing to be placed under oath.

- Unjust enrichment. Appellant's Brief, at 15. Duncan waived all counterclaims in the parties' settlement agreement. CP at 40.
- Failure to safeguard defendant's property following eviction. Appellant's Brief, at 15. A landlord is under no duty to store a defendant's property following eviction unless timely requested by the tenant. RCW 59.18.312.
- Lack of personal knowledge. Appellant's Brief, at 17. Before the trial court, Duncan admitted he was in possession of the premises at the time the writ of restitution was issued. RP at 4, 9–10. One Der Works also presented physical evidence that Duncan was still claiming a right to possession. CP at 47; *see generally Angelo Prop. Co. v. Hafiz*, 167 Wn. App. 789, 811–16, 274 P.3d 1075 (2012) (unlawful detainer still at issue as long as tenant claims a legal right to possession).
- Notice of Withdrawal and Substitution not Filed. Appellant's Brief, at 17. The notice was e-filed along with the complaint and other documents on April 23, 2012. CP at 57. The notice was served on Duncan on the same day. CP at 26.

- Duress. Appellant’s Brief, at 18–21. Duncan did not raise any issues with the parties’ stipulation until after accepting the full benefit of the stipulation *and* breaching it. Additionally, “it is not duress to threaten to do what one has a legal right to do.” *Red-Samm Mining Co., Inc. v. Port of Seattle*, 8 Wn. App. 610, 614, 508 P.2d 175 (1973).

Throughout his brief, Duncan also raises what amounts to a claim of ineffective assistance of counsel but does not identify any legal theory to hold One Der Works liable for this alleged breach of his attorney’s duty to him. These issues were not factually developed before the trial court and there is an insufficient record to support or refute them.

C. The Court Properly Refused to Stay Enforcement of Judgment Entered Following a CR 2A Settlement

The parties to a case may settle that dispute by entering their settlement on the record or in writing, signed by their attorneys. CR 2A. Stipulations and agreements of counsel are viewed favorably by the court and will be enforced unless public policy requires otherwise. *Smyth Worldwide Movers, Inc. v. Whitney*, 6 Wn. App. 176, 178–79, 491 P.2d 1356 (1971). A court’s decision that a stipulation was entered with the understanding and the agreement of the parties will not be disturbed if it is

supported by the evidence. *Baird v. Baird*, 6 Wn. App. 587, 591, 494 P.2d 1387 (1972).

1. *The stipulation fully resolved the parties' dispute over possession*

An unlawful detainer is a special proceeding, limited to determining possession of real property. *Munden*, 105 Wn.2d at 45. This unlawful detainer was fully resolved by stipulation between the parties. CP at 37–43. On the courthouse steps, the parties stipulated that Duncan had unlawfully detained the premises, but would be allowed to remain in possession for an additional 21 days, from May 10 through May 31, 2012. CP at 40 (¶¶ 1, 3). If Duncan remained in possession after May 31, he consented to allow One Der Works to obtain a writ of restitution ex parte and without further notice or hearing. CP at 41 (¶ 7). That is exactly what happened.

Before the trial court, Duncan did not dispute that he remained in possession of the premises after May 31, continuing to keep his personal property in the yard at the premises and to come and go therefrom. CP at 43 (“I discussed with the Attorney the need to remove debris and plants from the yard.”); *see* RP at 3–4, 10. Rather, he alleged that only the buildings as the premises were covered by the stipulation. RP at 4 (“Well,

there is my corps, my emblements. And those were not covered in the agreement, in the stipulated agreement.”).

The error in Duncan’s argument arises out of the misunderstanding of the word “premises.” The word “premises” is defined as “a house or building, along with its grounds.” *Black’s Law Dictionary* 1219 (18th ed. 2004); *see* CP at 40 (¶ 2). In the complaint, the real property at issue in the case was identified as “the premises located at 14214 108th Ave. N.E., Kirkland.” CP at 1. In a written stipulation and with the assistance of counsel, Duncan agreed that he would vacate the house along with its grounds by May 31 and agreed that One Der Works could obtain a writ of restitution and judgment *ex parte*⁴ if he did not. CP at 40–42. He also agrees that he did not vacate the grounds. *See* RP at 3–4. He seeks to avoid the consequences of this agreement by narrowing the definition of the word premises to include only the house and exclude the rest of the premises. There is no basis for this narrow reading of the word.

Duncan’s interpretation of “premises” is also inconsistent with the clear intent of the parties when entering the settlement. The court will not consider unexpressed intent. *The Plumbing Shop, Inc. v. Pitts*, 67 Wn.2d

⁴ On appeal, Duncan challenges the validity of this portion of the agreement, relying on RCW 4.22.060. Appellant’s Brief, at 31. This statute applies to contributory negligence cases, not unlawful detainers. *See* Laws of 1981, ch. 27, § 1.

514, 517, 408 P.2d 382 (1965). The only evidence of the settlement discussions in the record is the stipulation itself. The stipulation was clearly intended to fully resolve the parties' dispute. It provided that the case would be dismissed "with prejudice" if Duncan fully complied and that One Der Works would be entitled to a judgment and a writ of restitution if he did not. CP at 41. Yet, Duncan's interpretation of "premises" that excludes the grounds would have left the central issue of the case—possession—still at issue even after the case was dismissed. It is unreasonable to expect the parties' intent was either to dismiss or enter final judgment in the unlawful detainer without wholly resolving the issue of possession, the only issue in an unlawful detainer, was still in dispute.

2. *Duncan's change in circumstances does not excuse his breach*

After final judgment was entered, Duncan sought to avoid the burden of his breach of the settlement because he alleges he was injured, because he alleges the weather prevented him from vacating, and because he alleges the plaintiff locked him out sometime around June 7. RP at 6, 7, 9. Under the agreement, "time is of the essence" and there is no exception for injury or a rain delay. CP at 40–42. Duncan's allegation that he was locked out is also not grounds to vacate the judgment because

the alleged events on June 7 could not have prevented him from compliance on May 31.

Nothing about the parties' agreement violates public policy or is unreasonable on its face. Duncan has not raised or properly preserved any basis to challenge that agreement and the court should affirm it on appeal.

D. The Court Properly Refused to Grant a Stay of the Writ of Restitution

“In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment.” CR 62(b). Under this rule, a trial court has discretion to stay its judgment, but it is not required to do so. *Compare id. with State ex rel. Orth v. Benson*, 21 Wash. 580, 582, 59 P. 501 (1899) (requiring the court to set the supersedeas amount upon appeal and application). A trial court abuses its discretion when its “decision is manifestly unreasonable or is based on untenable grounds or untenable reasons.” *Bird v. Best Plumbing Group*, 175 Wn.2d 756, 774–75, 287 P.3d 551 (2012). The court considers a variety of factors when deciding whether to grant a stay, including the comparable harms, the effect of refusal to grant a stay on the appeal, and the strength of the

appeal on the merits. *See Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 291, 716 P.2d 956 (1986) (interpreting RAP 8.1(b)(2)).

The court's written order denying the stay does not specify any reasoning, CP at 44–45, but its oral ruling made clear that Duncan had not shown sufficient likelihood of prevailing on any motion for reconsideration or revision to satisfy the court that it should exercise its discretion to stay the judgment. RP at 9-11. Duncan based his motion on the contradictory propositions that he had complied with the settlement agreement (and therefore that a judgment was inappropriate) and that his noncompliance was justified because he was injured and there was bad weather. RP at 3-4(complied); *id.* at 9 (injury and weather).

The court affirmed its conclusion that Duncan had not vacated, stating that “[r]eturning the keys while you claim a right to possession of personal property left on the property doesn’t mean you vacate[d].” RP at 11. By reaffirming its conclusion that Duncan had breached the party’s settlement agreement, the court acted reasonably in denying Duncan’s motion to stay enforcement of the judgment.

Duncan did not identify any basis for a stay. He did not identify when he was allegedly locked out of the premises. Assuming, *arguendo*, that he was locked out sometime after May 31, his remedy would be an

injunction restoring him to possession pending the physical eviction, not a delay in the physical eviction.

The trial court's refusal to grant a stay did not affect Duncan's remedies on reconsideration or revision. Any challenge would not have been rendered moot by the physical eviction if Duncan continued to assert a right to possession. *Hous. Auth. v. Pleasant*, 126 Wn. App. 382, 387-88, 109 P.3d 422 (2005). Ultimately, Duncan never filed a motion for reconsideration or revision, meaning a stay would have procedurally been inappropriate under any circumstances. *See* CR 62(b) (may stay pending disposition of a motion). The trial court decision was reasonable, well articulated under the circumstances, and not based on untenable grounds. The trial court should be affirmed.

E. The Court Should Grant Attorney's Fees to One Der Works on Appeal

One Der Works requests an award of its attorney's fees and costs on appeal. RAP 18.1. The court may award attorney's fees to the prevailing party in a residential unlawful detainer. RCW 59.18.410. The settlement agreement also provided for an award of attorney's fees to One Der Works if Duncan breached the agreement. CP at 41. The parties' lease agreement also provided for an award of attorney's fees to the

prevailing party in any litigation. The trial court exercised its authority to award fees below and that order is not challenged on appeal. CP at 34–36. This court should award fees on appeal.

V. CONCLUSION

For the reasons set forth above, the trial court's rulings should be affirmed and attorney's fees should be awarded to the respondent.

Respectfully submitted this 1st day of February, 2013.

LAW OFFICE OF EVAN L. LOEFFLER PLLC



Christopher D. Cutting, WSBA No. 41730
Attorney for Respondent One Day Works II

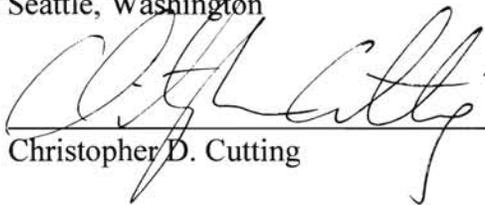
Certificate of Service

I hereby certify that on February 1, 2013, I caused to be served the foregoing on the following parties by delivering to the following address:

James Duncan
9805 NE 116th Street, Box 116
Kirkland, WA 98034

By: U.S. Postal Service, ordinary first class mail
 U.S. Postal Service, certified or registered mail
 return receipt requested
 legal messengers
 Facsimile

DATED February 1, 2013, at Seattle, Washington


Christopher D. Cutting