IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of	)	No. 77654-1-I
ERZSEBET REIKO DORNAY,	)	DIVISION ONE
Petitioner,	)	UNPUBLISHED OPINION
and	)	
MOUAD AIMEME ELBOU,	)	
Respondent.	)	FILED: January 22, 2019

LEACH, J. — In 2011, Erzsebet Dornay obtained a default decree dissolving her marriage to Mouad Aimeme Elbou[1] and associated orders providing for the care and support of their young child. Six years later, El Boukhari asked the court to vacate the order of child support, parenting plan, and a continuing restraining order included in the decree of dissolution. He claimed that the trial court could not exercise personal jurisdiction over him because Dornay did not properly serve him with the lawsuit. The court denied his motion. By acceding to the validity of the decree and challenging only certain aspects of the final orders, El Boukhari implicitly waived his personal jurisdiction defense. We affirm.

[1] The record also refers to Mouad Aimeme Elbou as Mouad Harissi El Boukhari. We will refer to him as El Boukhari throughout our opinion.

FACTS

Mouad El Boukhari and Erzsebet Dornay married in Washington in 2006 and resided in Washington during the marriage. Dornay gave birth to the parties' son in 2007.

In December 2010, the family traveled from Seattle to Morocco to visit El Boukhari's family. They planned to stay for 18 days. While in Morocco, the family stayed at the Casablanca home of El Boukhari's mother.

On January 10, 2011, the day before the family's scheduled return flight to Seattle, El Boukhari told Dornay that he intended to remain in Morocco indefinitely. He "forbade" Dornay from leaving Morocco with their son. For the next several days, El Boukhari's family restricted Dornay's access to the child and prevented her from communicating with her family in the United States.

Upon learning of Dornay's situation, her family hired an attorney in Washington to represent her. Around January 15, 2011, Dornay's brother and her brother-in-law arrived in Morocco in the hope of persuading El Boukhari to voluntarily relinquish the child to Dornay and to allow her to return home with the child.

On January 18, 2011, Dornay filed a petition for legal separation in King County Superior Court. In addition to seeking a decree of separation, Dornay requested entry of a child support order, a parenting plan, and a continuing

restraining order. The same day, the court issued a temporary order directing El Boukhari to allow and facilitate the child's return to the United States. The order stated that the child would reside with Dornay until the next court hearing.

The next day, on January 19, Dornay's brother and brother-in-law went to El Boukhari's mother's home. El Boukhari's mother does not speak English but communicated that El Boukhari was not available. The two men then served the summons, petition for legal separation, and a motion and declaration for a temporary restraining order on El Boukhari's mother. El Boukhari's mother angrily refused to accept the papers and attempted to shove them underneath Dornay's brother's shirt. Dornay's brother set the papers on a sofa, and the two men left the home. El Boukhari's mother yelled at the men, followed them to the door, and threw the papers into the street behind them as they left.

About thirty minutes later, the two men returned to the home with Dornay. The papers were no longer in the street. They saw additional cars belonging to family members and to the family's attorney parked outside the home. One of El Boukhari's brothers answered the door and told Dornay's brother that United States law does not apply in Morocco.

Dornay and her brother spoke with United States Consulate staff in Casablanca and a Moroccan attorney. El Boukhari allowed United States diplomatic agents to conduct a welfare check on the child at his mother's home

on January 21, 2011. El Boukhari was present during the welfare check. He showed the agents his son's newly furnished bedroom and discussed his plans to enroll the child in an American school in Casablanca.

Dornay returned to Seattle for a brief period in late January 2011. When she returned, Dornay discovered that El Boukhari had removed his personal property from their home and sold her vehicle. Dornay returned to Morocco in February. Although she had to leave periodically and reenter Morocco for visa purposes, she stayed in Casablanca for the remainder of the year.

On January 24, 2011, Dornay filed an amended petition for dissolution of marriage in King County Superior Court. On February 4, the court granted Dornay's request to serve process by mail or by consular or diplomatic officer. On the same day, the court entered an order encompassing the terms of the January 18 temporary order requiring El Boukhari to relinquish custody of the parties' child and to facilitate the child's return to Washington with Dornay.

On February 7 and on February 12, Dornay mailed the summons and amended petition to El Boukhari's mother's home. This service did not comply with CR 4(c), which requires that a nonparty mail the summons and complaint.[2]

On March 4, 2011, the court entered a temporary order placing the child with Dornay pending trial, ordering El Boukhari to release the child and his

[2] CR 4(c) permits service of summons to be completed by either (i) "the sheriff of the county wherein the service is made," or (ii) "any person over 18 years of age who is competent to be a witness in the action, other than a party."

passport to Dornay, and restraining El Boukhari from removing the child from Washington.

Dornay retained counsel in Morocco who arranged for the translation of her Washington court documents into Arabic and, in March 2011, initiated Moroccan court proceedings on her behalf. These proceedings asked the Moroccan court to recognize and enforce the Washington court's temporary orders and to provide for Dornay's access to the child in the interim. The Moroccan court granted Dornay visitation rights on March 17. El Boukhari refused to obey the court's order.

El Boukhari did not respond or appear in the Washington proceeding. In May 2011, the Washington court entered an order granting Dornay's motion for default and then entered a decree of dissolution, order of child support, findings of fact and conclusions of law, and a final parenting plan.

The Moroccan court ultimately decided that it was required to cede jurisdiction to Washington and ordered that the child be returned. El Boukhari unsuccessfully appealed the Moroccan court's decision. On December 24, 2011, United States regional security officers took Dornay and the child into protective custody and assisted their return to Washington.

El Boukhari returned to Washington at some point. In 2016, a jury acquitted him of a criminal charge of custodial interference. In June 2017, El

Boukhari filed a CR 60 motion to vacate, challenging the orders entered six years earlier. Specifically, he sought to vacate the final parenting plan and order of child support entered by default in 2011. As to the decree of dissolution which the court entered at the same time, El Boukhari sought to invalidate only a continuing restraining order provision of the order but did not challenge the provisions terminating his marriage or those dividing assets and liabilities.

El Boukhari claimed that he first became aware of the final orders in October 2016 when he received a notice of garnishment from the Division of Child Support.[3] He contended that the restraining order, the parenting plan, and the child support order were void under CR 60(b)(5) due to improper service and voidable under CR 60(b)(4) because Dornay obtained the orders by means of fraud, misrepresentation, or other misconduct.

After a hearing, the court denied his request. The court concluded that El Boukhari failed to establish any of the elements of fraud and the doctrine of laches otherwise barred his claims under CR 60(b)(4). For his claim under CR 60(5), the court concluded:

> 3. The non-movant's mail service of the amended Petition for Dissolution on movant in February, 2011 was insufficient as original process as not in compliance with the alternate service order and CR 4(c) as it was done by a party (Petitioner). However, this mailing is sufficient to provide the Respondent with constructive notice of the WA proceeding under RCW 26.27.201(3) and RCW 26.27.081 for purposes of child custody jurisdiction.

[3] He later admitted he knew about the orders in 2015.

> 4. The court finds that [Dornay's brother and brother-in-law] effectuated proper substitute service of all necessary original process on January 19, 2011 by serving the legal separation papers on the movant's mother. At that time, the non-movant had no knowledge of any other residence, temporary or permanent, of the movant, other than his mother's residence in Casablanca.

At the hearing to present a written order, El Boukhari argued for the first time that even assuming the effective substitute service of Dornay's petition for legal separation, Dornay had to serve a new summons after filing the amended petition for dissolution. He relied on a decision of Division Three of this court, In re Marriage of Markowski.[4] The court declined to consider El Boukhari's new argument.

El Boukhari asked the court to reconsider. Among other issues, he argued, based on Markowski, that service of Dornay's petition for legal separation did not confer jurisdiction for the court to enter a decree of dissolution and the other final orders. The trial court denied this request. El Boukhari appeals.

ANALYSIS

El Boukhari primarily claims that the court lacked personal jurisdiction over him because Dornay did not properly serve him with a new summons and the amended petition for dissolution.[5]

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[4] 50 Wn. App. 633, 749 P.2d 754 (1988).

[5] The trial court found that Dornay's brother "effectuated proper substitute service" on El Boukhari's mother at her home on January 19, 2011. The court further found that El Boukhari's mother's "one-line affidavit" denying service of

CR 60(b)(5) authorizes the court to relieve a party from a final judgment if that judgment is void. A default judgment against a party is void if the court did not have personal jurisdiction over that party.[6] Proper service of the summons and complaint is essential to invoke personal jurisdiction over a party.[7]

Although this court normally reviews a decision under CR 60 for abuse of discretion, a trial court must vacate a void judgment.[8] Thus, this court reviews de novo whether a trial court should have vacated a judgment alleged to be void.[9]

A party waives any claim of lack of personal jurisdiction if, before the court rules, he or she asks the court to grant affirmative relief or otherwise consents, expressly or impliedly, to the court's exercising jurisdiction.[10] Even when a

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process in any manner in 2011 was not credible. These unchallenged factual findings are verities on appeal. See Robel v. Roundup Corp., 148 Wn.2d 35, 42, 59 P.3d 611 (2002). El Boukhari nevertheless suggests that the court exhibited bias by crediting the testimony of American-born witnesses over those of Moroccan descent. However, the court explained the basis for its credibility determinations, and the record substantiates the court's findings. See In re Marriage of Rideout, 150 Wn.2d 337, 350-51, 77 P.3d 1174 (2003) (when the trial court makes findings of fact and credibility determinations based on affidavits alone, we must determine whether substantial evidence supports those findings and whether the findings support the conclusions of law). There is nothing in the record to support the position that cultural bias underlies the court's findings and its decision.

[6] Ahten v. Barnes, 158 Wn. App. 343, 349, 242 P.3d 35 (2010).

[7] Scanlan v. Townsend, 181 Wn.2d 838, 847, 336 P.3d 1155 (2014); Ahten, 158 Wn. App. at 349.

[8] Dobbins v. Mendoza, 88 Wn. App. 862, 871, 947 P.2d 1229 (1997).

[9] Dobbins, 88 Wn. App. at 871; Delex Inc. v. Sukhoi Civil Aircraft Co., 193 Wn. App. 464, 469, 372 P.3d 797 (2016).

[10] In re Marriage of Steele, 90 Wn. App. 992, 997-98, 957 P.2d 247 (1998).

decree is void, a party who procures this decree or consents to it is estopped from questioning its validity when he has obtained a benefit from it or has concurrently invoked the court's jurisdiction in order to gain affirmative relief.[11] Stated another way, if a party wishes to assert lack of personal jurisdiction as a defense, he or she must do so (a) as soon as reasonably practicable and (b) consistently.[12]

As he did in his request for reconsideration, El Boukhari relies on Markowski to argue that the court was required to grant his motion to vacate after finding that Dornay properly served him with only the initial petition for legal separation. Markowski involved parties who were married in Oregon and resided there during the marriage.[13] After the parties separated, the mother moved to Washington and filed a petition for legal separation.[14] When the father came to Washington to visit the children, the wife personally served him with a summons, the petition, and a motion to appear and show cause.[15] The father did not respond or appear, and the Washington court entered temporary orders related to child support, custody, and visitation.[16] Several months later, the mother filed a new petition seeking dissolution and mailed the new petition to the father's

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[11] Markowski, 50 Wn. App. at 638.
[12] Steele, 90 Wn. App. at 998.
[13] Markowski, 50 Wn. App. at 634.
[14] Markowski, 50 Wn. App. at 634.
[15] Markowski, 50 Wn. App. at 634.
[16] Markowski, 50 Wn. App. at 634.

Oregon address.[17] The court entered an order of default and decree of dissolution.[18] A year later, the father asked the court to vacate the decree. The trial court denied the motion.[19]

Division Three reversed. It concluded that service of the petition for legal separation did not adequately notify the father that if he failed to respond, the court could dissolve the marriage by default.[20] The court held that the mother had to serve a new summons because dissolution and separation have "distinctly different consequences" and the petition for dissolution asserted "'new or additional claims for relief'" not previously asserted in the petition for separation.[21] The court rejected the mother's argument that the father consented to entry of the decree and waived his jurisdictional defense by attempting to comply with the provisions for a year before filing his motion to vacate.[22] The court also noted that because the father lacked minimum contacts with Washington State, the court could not constitutionally exercise personal jurisdiction over the father without his consent.[23] Accordingly, the court concluded the trial court was required to grant the father's motion to vacate.[24]

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[17] Markowski, 50 Wn. App. at 634.
[18] Markowski, 50 Wn. App. at 634.
[19] Markowski, 50 Wn. App. at 634.
[20] Markowski, 50 Wn. App. at 637.
[21] Markowski, 50 Wn. App. at 637.
[22] Markowski, 50 Wn. App. at 637.
[23] Markowski, 50 Wn. App. at 637 n.2.
[24] Markowski, 50 Wn. App. at 638.

Unlike the father in Markowski, El Boukhari consented, albeit impliedly, to the court's exercise of personal jurisdiction. When he filed a motion asking the court to invalidate only the restraining order provision of the decree, he elected to treat all other provisions of the decree as valid. El Boukhari maintained this position consistently. When he moved for reconsideration and shifted the focus of his argument to the "distinct" legal consequences of dissolution versus separation, he still did not challenge the decree but sought to strike only the continuing restraining order. In doing so, El Boukhari implicitly accepted the decree itself, including the marital status and property division provisions. And, contrary to El Boukhari's assertion on appeal, the court did not deny his claim under CR 60(b)(5) because it was untimely but because he waived the defense of personal jurisdiction.[25] As a result, the decree and associated orders are not void. The trial court did not err in denying his motion under CR 60(b)(5).[26]

El Boukhari also challenges the denial of his motion under CR 60(b)(4).[27] He contends that the court failed to acknowledge his proof that Dornay made

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[25] See Allstate Ins. Co. v. Khani, 75 Wn. App. 317, 323-24, 877 P.2d 724 (1994) (motions to vacate void judgments under CR 60(b)(5) may be brought at any time and are not subject to a reasonable or one-year time limit).

[26] Because we conclude that El Boukhari waived his jurisdictional defense, it is unnecessary to address his challenge to the court's finding that a Washington trial court has authority to enter a decision regarding child custody under RCW 26.27.201 regardless of personal jurisdiction over the parties.

[27] CR 60(b) states, "The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken."

material omissions and misrepresentations when she obtained the default orders. But the trial court concluded that El Boukhari's motion to vacate under CR 60(b)(4), brought six years after the entry of the final orders, was "dilatory and barred by the doctrine of laches."

A party must bring a CR 60(b)(4) motion within a "reasonable time." What constitutes a reasonable time depends on the facts of the case.[28] Failure to act within a reasonable time under CR 60 has been equated to laches. Relevant considerations in determining timeliness include (1) whether the delay prejudices the nonmoving party and (2) whether the moving party has a good reason for failing to act sooner.[29]

El Boukhari maintains that he made his request within a reasonable time because he first became aware of the default orders in 2016 and had limited financial resources after being incarcerated pending criminal prosecution. The trial court did not believe him and found that his assertion was not "credible." The 2011 Moroccan litigation involved the jurisdiction of the Washington court and enforcement of its orders. Counsel represented El Boukhari in that litigation, and he acknowledged that he and Dornay were in court together in Morocco "several times." In light of the court's essential credibility determination, El

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[28] In re Marriage of Thurston, 92 Wn. App. 494, 500, 963 P.2d 947 (1998); see also State ex rel. Campbell v. Cook, 86 Wn. App. 761, 766, 938 P.2d 345 (1997).

[29] Thurston, 92 Wn. App. at 500.

Boukhari fails to establish that the court abused its discretion in denying his motion under CR 60(b)(4) based on alleged misrepresentations.

Finally, El Boukhari also appears to challenge the substantive provisions of the 2011 orders. It is well settled, however, that our review is limited to the decision denying the motion to vacate the orders, not the underlying orders.[30]

We affirm.

Leach, J.

WE CONCUR:

Chun, J.

Dwyer, J.

[30] Bjurstrom v. Campbell, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980).