

NO. 66558-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

RICHARD AZPITARTE,

Appellant,

v.

KING COUNTY,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ANDREA DARVAS

BRIEF OF RESPONDENT

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## **I. INTRODUCTION**

Appellant Richard Azpitarte seeks review of the trial court's denial of his motion to vacate an order extending judgment. The order extending judgment was entered in May 2007. Appellant filed a motion to vacate the extension in November 2009 but the hearing was stricken and no further action was taken until almost one year later. At that time appellant filed the same motion and the trial court denied his motion. Appellant seeks review of the trial court's order.

## **II. STATEMENT OF ISSUES**

1. Did the trial court abuse its discretion in granting a continuance of a show cause hearing?
2. Did the trial court abuse its discretion in denying appellant's motion to vacate an order extending judgment?
3. Did the trial court properly decline to address an issue that was not raised in a motion to vacate?

## **III. STATEMENT OF THE CASE**

On June 16, 1997 Respondent King County obtained a judgment against Appellant Richard Azpitarte in King County Superior Court. CP 11-13. As of May 2007 Mr. Azpitarte had not satisfied the judgment, and on May 14, 2007 King County Superior Court Commissioner Carlos Velategui entered an order extending

the 1997 judgment for an additional ten years pursuant to RCW 6.17.020(3). CP 16-18.

On November 24, 2009 Mr. Azpitarte filed a motion to vacate the order extending judgment which had been entered in 2007. CP 52-77. A hearing was scheduled for December 4, 2009 but it was stricken. CP 78. Mr. Azpitarte took no further action on the matter for nearly one year until he noted another show cause hearing for November 19, 2010 and again moved to vacate the order extending judgment. CP 79-80; 81-99. King County moved to continue the show cause hearing and the trial court granted the motion. CP 100-106.

The show cause hearing was held on December 3, 2010 and the court denied Mr. Azpitarte's motion to vacate the order extending judgment. CP 174-176. The court subsequently denied Mr. Azpitarte's motion for reconsideration. CP 189-190. Mr. Azpitarte timely appealed the denial of his motion.

#### **IV. ARGUMENT**

A. The Trial Court Did Not Abuse its Discretion in Denying Appellant's Motion to Vacate.

A trial court's denial of a motion to vacate a judgment or order is reviewed for abuse of discretion. Beckett v. Cosby, 73

Wn.2d 825, 829-30, 440 P.2d 831 (1968). "Discretion is abused when it is exercised on untenable grounds or for untenable reasons." Lane v. Brown & Haley, 81 Wn. App. 102, 105, 912 P.2d 1040, 1042 (1996) (citing In re Marriage of Tang, 57 Wn. App. 648, 653, 789 P.2d 118 (1990)).

1. Appellant failed to bring his motion within the time limits required under CR 60(b).

Appellant's motion to vacate was based on CR 60(b)(1),(4),(5), and (11) stemming from a claim that the lack of notice prior to entry of the judgment extension entitled him to relief under the rule.<sup>1</sup> Under CR 60(b), a motion to vacate based on CR 60(b)(1) must be brought within one year of entry of the order. A motion to vacate based on CR 60(b)(4),(5), or (11) must be made "within a reasonable time...." CR 60(b). Appellant filed his motion more than three years after the order extending judgment was entered. Furthermore, the motion was filed one year after abandoning the first motion he filed in 2009. CP 78. The trial court denied appellant's motion on the ground that it was made too late. NRP at 2, ¶ 3. The trial court was well within its discretion in finding

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<sup>1</sup> Appellant cites CR 60(b)(6) in his opening brief, but this was not a basis for relief that he relied on in the trial court and any arguments pertaining to this rule should not be considered.

that a delay of more than three years was not a "reasonable" amount of time under CR 60(b).

Appellant's motion was made well beyond the one-year time limit for relief under CR 60(b)(1). The order extending judgment was entered on May 14, 2007 and appellant filed his motion to vacate on November 5, 2010. The trial court correctly denied appellant's motion to the extent he was relying on CR 60(b)(1). See Suburban Janitorial Services v. Clarke American, 72 Wn. App. 302, 306-07, 863 P.2d 1377 (1993) (a motion to vacate based on CR 60(b)(1) and filed 17 months after entry of default judgment was time barred).

The trial court also did not abuse its discretion in ruling that a delay of three and a half years was "too late". NRP at 2, ¶ 3. "The critical period in determining whether a time is reasonable is the time between learning of the default judgment and filing the CR 60 motion." Id. at 308. See also Lockett v. Boeing Co., 98 Wn. App. 307, 312, 989 P.2d 1144, 1147 (1999) ("What constitutes a reasonable time depends on the facts and circumstances of each case") (citations omitted). Appellant provided no admissible evidence as to when he learned of the order extending judgment

and what occurred in the intervening three and a half years that prevented him from bringing his motion sooner.<sup>2</sup> Appellant relied exclusively on the lack of notice of the order extending judgment, arguing that it amounted to "misconduct" under CR 60(b)(4); that it made the judgment void under CR 60(b)(5); and that it entitled him to relief under the catch-all provision of CR 60(b)(11). With no basis to justify the lengthy delay, the trial court was left with no choice but to deny the motion.

2. Notice to appellant was not required before entry of the order extending judgment.

Appellant has appealed the trial court's denial of his motion to vacate the order extending judgment. In doing so he challenges the entry of the underlying order itself. But appellant may not challenge the propriety of the order extending judgment in this appeal. See Bjurstrom v. Campbell, 27 Wn. App. 449, 450-51, 618 P.2d 533, 534 (1980). The court in Bjurstrom reviewed a trial court's denial of a motion to vacate based on an eight year delay in entry of a judgment. Id. at 450. The court found that that the

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<sup>2</sup> Appellant may claim that he provided such evidence in the form of a declaration filed in conjunction with the motion he filed on November 5, 2009. But that motion was stricken and no action was taken on the motion. Any reliance on the contents of the earlier motion would be misplaced as it was not properly before the court.

appellant's basic contention was that the judgment was improper because of the lapse in time before the judgment was entered. Having failed to appeal the judgment itself, the appellants were precluded from challenging it in their appeal of the denial of the motion to vacate. Id. at 452. In affirming the trial court, the court of appeals explained,

An appeal from denial of a CR 60(b) motion is limited to the propriety of the denial not the impropriety of the underlying judgment. The exclusive procedure to attack an allegedly defective judgment is by appeal from the judgment, not by appeal from a denial of a CR 60(b) motion...Washington has long recognized the principle that a mistake of law will not support vacation of a judgment.

Id. at 451 (footnote and citations omitted). Likewise, appellant is claiming that the court should not have entered the extension of judgment because he was entitled to notice. Bjurstrom makes it clear that any error in extending the judgment cannot be challenged through this appeal.

Even if the Court reviews the propriety of the underlying order extending judgment, appellant is incorrect that notice was required before entry of the order extending judgment. RCW 6.17.020(3) authorizes extensions of judgments for an additional ten years beyond the initial ten years that creditors may enforce a

judgment. The statute states that an application for extension of judgment "shall be granted as a matter of right, subject to review only for timeliness, factual issues of full or partial satisfaction, or errors in calculating the judgment summary amounts." RCW 6.17.020(3).

Appellant relies on CR 5(a) for his contention that he was entitled to notice of the motion for extension of judgment. But CR 5(a) explicitly excludes motions "which may be heard ex parte" and a motion for extension of judgment is such a motion. See State v. Hotrum, 120 Wn. App. 681, 685, 87 P.3d 766, 768 (2004). In Hotrum a defendant moved to vacate the extensions of three restitution orders that had been entered ex parte. Division III rejected his claim that the ex parte orders violated due process. The court held, "there is no requirement that a formal hearing take place in order to statutorily extend jurisdiction for the purpose of collecting restitution owed." Id. at 685. In concluding that the ex parte orders were valid, the court noted that the extensions "did not modify the original terms of the judgments and sentences entered in 1990, which would have necessitated his presence at such hearings". Id. at 684 (citing State v. Shultz, 138 Wn.2d 638, 643–

44, 980 P.2d 1265 (1999)). The extension of the judgment simply authorized a longer period of time for enforcing the original judgment. Under the plain language in CR 5(a) and the court's holding in Hotrum, King County was not required to serve appellant with notice prior to seeking the extension. The trial court should be affirmed.

3. The trial court had jurisdiction to enter the order extending judgment.

Appellant's claim that the judgment was void because the court lacked personal jurisdiction to extend the judgment is without merit. As discussed in the preceding section, notice was not required before obtaining the extension. The court had personal jurisdiction when the original judgment was entered and retained jurisdiction to enter the order extending judgment. RCW 4.28.020 states that "[f]rom the time of the commencement of the action by service of summons, or by the filing of a complaint, or as otherwise provided, the court is deemed to have acquired jurisdiction and to have control of all subsequent proceedings." The statute has been applied to reject a claim that improper service of a motion to vacate deprived the court of jurisdiction. See Lindgren v. Lindgren, 58 Wn.

App. 588, 794 P.2d 526, 529 (1990). The Lindgren court concluded that RCW 4.28.020

declares that once original jurisdiction is properly acquired, a superior court has continuing jurisdiction over a controversy from beginning to end. A motion to vacate under CR 60(b) is part of the original suit and, as such, does not require independent jurisdictional grounds.

Id. at 591-92 (citing In re Marriage of Parks, 48 Wn. App. 166, 171, 737 P.2d 1316 (1987)). The trial court had jurisdiction to extend the judgment.

Furthermore, appellant has waived any defense that the court lacked personal jurisdiction. Under CR 12(h)(1) a party waives a defense of lack of personal jurisdiction unless it is properly preserved. As the Washington Supreme Court has declared,

In order to preserve the jurisdictional question the defendant must, however, proceed without equivocation, precisely and with dispatch...To constitute a motion challenging jurisdiction the statement must be clear enough both to inform the trial judge as to the nature of the issue and to ask for an immediate ruling on it.

Sanders v. Sanders, 63 Wn.2d 709, 714-15, 388 P.2d 942 (1964) (citing In re Marriage of Maddix, 41 Wn. App. 248, 251, 703 P.2d 1062, 1064 (1985)). Appellant has argued lack of personal

jurisdiction, but he did not seek an immediate ruling from the trial judge and has therefore waived the defense.

Appellant has failed to demonstrate that the trial court abused its discretion in denying relief under CR 60(b)(5).

B. The Trial Court Did Not Abuse its Discretion in Granting a Continuance.

A trial court's decision to grant a continuance is reviewed for abuse of discretion. Coggle v. Snow, 56 Wn. App. 499, 784 P.2d 554 (1990). Discretion is abused if it is "exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court's discretion". Id. at 507. Although appellant contends there were "multiple" continuances, only one continuance was requested, namely the motion to continue the show cause hearing which was originally scheduled for November 19, 2010. The trial court offered to continue the December 3, 2010 when appellant represented that he had not received King County's response, but the offer was refused.

Appellant appears to be arguing that court abused its discretion in granting the motion to continue the November 19, 2010 because he had not received notice of the motion. But the

rules permit such motions to be filed without notice. See CR 6(b).

The rule states in pertinent part:

CR6(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion, (1) **with or without motion or notice**, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order....

CR 6(b) (emphasis added). Given that the court rules explicitly authorized the continuance without notice, there was no abuse of discretion in granting the motion to continue.

Appellant's claim that the trial court erred in proceeding with the December 3, 2010 hearing also should be rejected. Any error has been invited by appellant's refusal of the court's offer of a continuance. See, e.g., In re Estate of Stevens, 94 Wn. App. 20, 31, 971 P.2d 58, 63 (1999) (under the doctrine of invited error, [a party] cannot set up an error at trial and then complain about it on appeal) (citations omitted). Having declined the available remedy before the trial court, appellant cannot claim error now.

Appellant also argues extensively about his Americans with Disabilities Act ("ADA") status and its impact on the trial court's ruling. Brief of Appellant at 18-21. But the court had no evidence

of appellant's ADA certification before it; thus could not be properly considered. During the December 3, 2010 hearing appellant complained about the difficulties he faced in coming to court, but such argument is not evidence and cannot serve as a basis to find that the court abused its discretion. The Court should reject appellant's attempts to substitute argument as fact.<sup>3</sup>

C. The Trial Court Properly Declined to Address Appellant's Claim that the Judgment Had Been Satisfied.

Appellant argues the trial court erred in not finding that the judgment has been satisfied. But the trial court did not rule on the issue of satisfaction because that was not properly raised in appellant's motion to vacate. Appellant's motion was based on CR 60(b)(1),(4),(5) and (11), stemming from his claim that he was entitled to notice before the judgment can be extended. Appellant did not cite to CR 60(b)(6) nor did he make anything more than passing reference to the judgment having been satisfied.

Additionally, references to the judgment having been satisfied were limited to unsupported or hearsay statements. The trial court was

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<sup>3</sup> The Court should also disregard those portions of appellant's recitation of facts drawn from his motion for reconsideration of the trial court's denial of his motion to vacate. Appellant has not assigned error to the trial court's denial of his motion for reconsideration. The "facts" derived from his motion for reconsideration are therefore not relevant.

not required to rule on an issue that was not properly raised or briefed. Furthermore this Court is not required to review an issue that was not decided by the trial court. Talps v. Arreola, 83 Wash. 2d 655, 658, 521 P.2d 206, 208 (1974) (appellate court "will not consider a theory as ground for reversal unless we can ascertain from the record that the issue was first presented to the trial court").

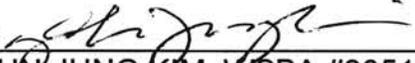
#### V. CONCLUSION

For the foregoing reasons, the trial court's denial of the motion to vacate should be affirmed.

DATED this 23<sup>rd</sup> day of March, 2012.

Respectfully submitted,

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