IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MICHAEL D. MCPHEE, d/b/a THE MICHAEL D. MCPHEE COMPANY, Appellant, v. STEINHAUER FAMILY INVESTMENTS, LLC, a Washington Limited Liability Company, Respondent.	No. 37977-5-II UNPUBLISHED OPINION

Penoyar, A.C.J. — In 2001, Michael McPhee sued Steinhauer Family Investments, LLC, for breach of contract, and Steinhauer counterclaimed. Six years later, the trial court entered an order dismissing the case for want of prosecution. McPhee filed a CR 60 motion to vacate, which he argued was timely. The trial court disagreed and we affirm.

FACTS

On October 6, 2000, McPhee and Steinhauer signed a contract providing that McPhee would remove undesirable material, including peat moss, from Steinhauer's property. The contract included an arbitration clause. A dispute arose, and McPhee filed a lien against Steinhauer's property. On June 29, 2001, McPhee sued Steinhauer in Pierce County Superior Court for breach of contract and to foreclose the lien. Steinhauer counterclaimed for breach of contract and it alleged a Consumer Protection Act violation.

On October 18, 2001, the parties signed a "Stipulation for Transfer to Private Arbitration and to Set Aside Case Schedule," which stated:

> This matter should be stayed and the case schedule set aside so that the parties may pursue private arbitration, as required by contract by the parties. Nonetheless, the Court shall retain jurisdiction for entry and enforcement of the Arbitrator's

> decision once arbitration has been had. The parties request that this court enter an order in accordance.

Clerk's Papers (CP) at 34-35. Six days later, the trial court signed an order to transfer the case to arbitration. The order did not refer to a "stay," but it stated that "this matter shall be transferred to private arbitration as required by the contract . . . and . . . the case schedule on this matter shall be set aside." CP at 36.

During the next three years, McPhee apparently had difficulty raising the money required to arbitrate. After McPhee acquired sufficient funds, the American Arbitration Association (AAA) set an arbitration date in August 2004. A month before arbitration, however, Steinhauer advised McPhee that it could not pay its portion of the arbitration fees, and AAA cancelled the arbitration.

Over one year later, in October 2005, McPhee moved to remove the case from arbitration and set a trial date. Steinhauer opposed the motion, stating that its finances had improved. The trial court denied McPhee's motion. The parties discussed getting the case back on track during the week following the trial court's denial of the motion, but the parties never arbitrated their claims.[1]

[1] Nothing in the record indicates that either party had contact with AAA after February 2005, when AAA sent an account statement bearing that date.

On February 2, 2007, a Pierce County deputy clerk informed both parties that the trial court would dismiss the lawsuit without prejudice under CR 41(b)(2)[2] for "want of prosecution" since "no action of record has been taken in this case in the past twelve months." CP at 82. McPhee's counsel received this notice but failed to send the trial court a letter that he had drafted explaining that the case was in arbitration, which he called an "oversight on [his] part." CP at 258. On April 26, 2007, the trial court issued an order of dismissal for want of prosecution.[3]

Almost one year later, McPhee filed a CR 60 motion to vacate the order, asserting that the CR 41(b)(2) dismissal was improper. On May 23, 2008, the trial court denied McPhee's CR 60 motion, and, on June 20, 2008, it denied his motion for reconsideration. McPhee now appeals.

ANALYSIS

I. Standard of Review

We review a trial court's denial of a CR 60(b) motion to vacate for manifest abuse of discretion; we do not consider the underlying judgment. *Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000); *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450-51, 618 P.2d 533

[2] CR 41(b)(2)(A), entitled "Dismissal on Clerk's Motion," reads in pertinent part:

> In all civil cases in which no action of record has occurred during the previous 12 months, the clerk of the superior court shall notify the attorneys of record by mail that the court will dismiss the case for want of prosecution unless, within 30 days following the mailing of such notice, a party takes action of record or files a status report with the court indicating the reason for inactivity and projecting future activity and a case completion date. If the court does not receive such a status report, it shall, on motion of the clerk, dismiss the case without prejudice and without cost to any party.

[3] Apparently, McPhee's attorney did not inform McPhee of the dismissal order until about 10 months after the trial court entered the order.

(1980). An abuse of discretion occurs when a trial court bases its decision on untenable grounds or untenable reasons. *Noble v. Safe Harbor Family Preservation Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009).

II. Denial of the Motion to Vacate

A. Reasonable Time

McPhee argues that the trial court should have vacated his CR 41(b)(2) dismissal and reinstated his case under CR 60(b)(1). CR 60(b)(1) permits the trial court to relieve a party from a final judgment because of "[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order[.]" CR 60(b)(1) motions must be filed "within a reasonable time" and not more than one year after the trial court enters the order from which the party seeks relief. We agree with the trial court's determination that McPhee did not bring his CR 60 motion within a reasonable time after the dismissal order.

The "reasonable time" requirement depends on the facts and circumstances of each case. *Luckett v. Boeing, Co.*, 98 Wn. App. 307, 312, 989 P.2d 1144 (1999). The critical period in the determination of whether a motion to vacate a judgment or order is brought within a reasonable time is the period between when the moving party became aware of the judgment and the filing of the motion. *Luckett*, 98 Wn. App. at 312. Other major considerations in determining a motion's timeliness are: (1) prejudice to the nonmoving party due to the delay; and (2) whether the moving party has good reasons for failing to take appropriate action sooner. *Luckett*, 98 Wn. App. at 312.

In its oral ruling, the trial court stated:

> Here we have a motion to vacate that was made 11 days shy of one year after the order dismissing the case . . . . The plaintiff received the copy of the order dismissing this case. There's no dispute about that. I've reviewed carefully all of the pleadings provided, and the plaintiff does not offer a reason for not bringing a motion to vacate sooner. I understand that [the] plaintiff was trying to get the case prepared. However, there's nothing to explain why the motion could not have been brought sooner than days shy of the one-year time period. This case was filed in June of 2001, and dismissed in April of 2007. The defendants did rely upon the dismissal and [have] acted in reliance on that dismissal. Under the specific facts and circumstances of this case, this Court is finding that the CR 60(b) motion has not been made within a reasonable time.

Report of Proceedings (May 23, 2008) at 6-7.

We find that the trial court properly exercised its discretion. The trial court carefully considered McPhee's request and applied the *Luckett* factors on the record. The trial court noted that, in *Luckett*, only 4 months elapsed between counsel's discovery of the dismissal and counsel's CR 60 motion to vacate. The *Luckett* court determined that the motion was not brought within a reasonable time because the appellant "fail[ed] to put forth any good reason" for the four month delay in bringing her motion to vacate. 98 Wn. App. at 313. Here, McPhee explains that his delay resulted from the fact that he was reevaluating his case to see if it was still viable. We agree with the trial court that this reason is inadequate to excuse a nearly one year delay.

Additionally, we note that McPhee's delay prejudiced Steinhauer. Though the trial court did not specifically note this fact in its oral ruling, Steinhauer represented to the trial court that it had destroyed many files and records related to the case as a result of the dismissal. Steinhauer stated that if the case was reinstated, it "would be impossible" to "reconstruct" its case. CP at 227. The trial court did not abuse its discretion by finding that McPhee failed to bring his motion to vacate within a reasonable period as CR 60(b)(1) requires. Also, to the extent that McPhee

relies on other CR 60(b) provisions to support his motion to vacate, we agree with the trial court that he failed to bring his motion under those provisions within a reasonable time.

B. Subject Matter Jurisdiction

McPhee also argues that the trial court lacked jurisdiction to dismiss the case under (1) its order setting aside the case schedule and (2) former RCW 7.04.030 (1943), *repealed by* Laws of 2005, chapter 433, section 50, a provision of the Uniform Arbitration Act in effect when McPhee filed the lawsuit. McPhee asserts that since the trial court lacked jurisdiction to dismiss the case, it abused its discretion by denying his CR 60 motion. We disagree.[4]

The trial court's order stated that "this matter shall be transferred to private arbitration as required by the contract . . . and . . . the case schedule on this matter shall be set aside." CP at 36. This language indicates that the trial court only suspended the case schedule, not the case itself.[5] Superior courts have original jurisdiction over "all cases [and] proceedings in which jurisdiction shall not have been by law vested exclusively in some other court[.]" Wash. Const. art. IV, § 6; RCW 2.08.010. The trial court's referral of the parties' claims to arbitration simply did not deprive the superior court of its original jurisdiction over the parties' contract claim under the state constitution.

As noted in *Snohomish County v. Thorp Meats*, "[a] court of general jurisdiction has the

[4] We decline to address McPhee's judicial estoppel argument with regard to jurisdiction, which he raises for the first time in his reply brief. *See* Appellant's Reply Br. at 9; RAP 10.3(c) ("A reply brief should be limited to a response to the issues in the brief to which the reply brief is directed.").

[5] We are not persuaded by McPhee's argument that the parties' stipulation deprived the trial court of its original jurisdiction over the dispute even if, as he argues, the stipulation was incorporated into the trial court's order.

inherent power to dismiss actions for lack of prosecution, but only when no court rule or statute governs the circumstances presented." 110 Wn.2d 163, 166-67, 750 P.2d 1251 (1988) (footnote omitted). McPhee relies on former RCW 7.04.030 to argue that the trial court lacked inherent authority to dismiss the case. Former RCW 7.04.030 provided:

> If any action for legal or equitable relief or other proceedings be brought by any party to a written agreement to arbitrate, the court in which such action or proceeding is pending, upon being satisfied that any issue involved in such action or proceeding is referable to arbitration under such agreement, shall, *on motion of any party to the arbitration agreement, stay the action or proceeding until an arbitration has been had in accordance with the agreement*.

(Emphasis added). Even assuming, without deciding, that this statute limits the trial court's ability to dismiss an action for lack of prosecution, we note that neither party made a motion in the trial court to stay the proceedings "until an arbitration has been had." Rather, the parties stipulated to set aside the case schedule to allow them to "pursue private arbitration." CP at 34. Therefore, the trial court had authority to dismiss the parties' claims for want of prosecution.[6, 7] We find no error, clerical[8] or otherwise.

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[6] McPhee's extensive reliance on *Allied Fidelity Insurance Co. v. Ruth*, 57 Wn. App. 783, 790 P.2d 206 (1990), is misplaced because that case did not involve an arbitration or a CR 41 dismissal. Rather, it involved the question of whether Indiana and Washington were "reciprocal states" under Washington's insurers liquidation act. *Allied Fidelity Ins. Co.*, 57 Wn. App. 790. Moreover, *Allied Fidelity* involved the interplay of jurisdiction between courts from two states whereas this case involves one court interpreting its own order. 57 Wn. App. at 786-91.

[7] CR 41(b)(2) is an administrative mechanism to clear trial court dockets of inactive cases. *Vaughn v. Chung*, 119 Wn.2d 273, 282, 830 P.2d 668 (1992). Here, AAA cancelled the arbitration approximately 30 months before the trial court sent the dismissal notice. No action of record had occurred for 15 months. If the arbitration had been proceeding, or if McPhee had intended for the case to proceed, his recourse was to notify the trial court in a status report that the case was still active, thereby avoiding dismissal.

[8] We reject McPhee's argument that the trial court's CR 41(b)(2) dismissal was nothing more than a "clerical error" that the trial court should have corrected under CR 60(a).

III. Statute of Limitations

We requested supplemental briefing on whether the trial court's referral of the parties' dispute to arbitration tolled the statute of limitations in the underlying dispute. We have carefully reviewed the parties' excellent briefing on this point, but we are now convinced that we do not need to reach this issue. The trial court dismissed the instant case for want of prosecution under CR 41(b)(2), and it reviewed the merits of the CR 60 dismissal without analyzing the statute of limitations. We limit our review to the trial court's actions below.

IV. Attorney Fees

Steinhauer requests reasonable attorney fees under the original contract, which states:

> ATTORNEY FEES. In the event either party institutes an arbitration proceeding or a suit in court against the other party or against the surety of such party, in connection with any dispute or matter arising under this Contract, the prevailing party shall be entitled to recover reasonable attorney fees in addition to any other relief granted by the arbitrator or court, including appellate proceedings.

CP at 18. Under the broad language of this fee provision, we award Steinhauer reasonable attorney fees and costs on appeal because he prevails in this action. Neither party is entitled to costs or attorney fees incurred in the trial court.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, A.C.J.

We concur:

Houghton, J.

Quinn-Brintnall, J.