

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

May 29, 2024

Christopher M. Wolpert
Clerk of Court

DANIEL P. RICHARDS,

Plaintiff - Appellant,

v.

LOCKHEED MARTIN CORPORATION,
d/b/a Lockheed Martin Space,

Defendant - Appellee.

No. 24-1144
(D.C. No. 1:22-CV-01640-CNS-MDB)
(D. Colo.)

ORDER

Before **HOLMES**, Chief Judge, **MORITZ**, and **CARSON**, Circuit Judges.

Plaintiff-appellant Daniel P. Richards, who is represented by retained counsel, seeks appellate review of the District of Colorado’s dismissal of his civil action with prejudice for failure to exhaust administrative remedies. This matter is before the court on: (1) defendant-appellee Lockheed Martin Corporation’s motion to dismiss the appeal; (2) Mr. Richards’ response to that order; and (3) Lockheed Martin’s reply in support of its motion to dismiss. Upon consideration of these filings, the district court docket, and the applicable law, the court dismisses the appeal as untimely filed for the reasons set forth below.

“A timely notice of appeal is both mandatory and jurisdictional.” *Allender v. Raytheon Aircraft Co.*, 439 F.3d 1236, 1239 (10th Cir. 2006) (quotation omitted). The

district court dismissed the action underlying this appeal and entered final judgment on March 13, 2024. [ECF Nos. 65-66]. Mr. Richards did not file any post-judgment motions that would serve to toll or extend the time he had to file a notice of appeal from the judgment. *See* Fed. R. App. P. 4(a)(4)(A)(vi). Accordingly, the notice of his intent to appeal the judgment was due on or before April 12, 2024. *See* Fed. R. App. P. 4(a)(1)(A) (notice of appeal in a civil case in which the United States is not a defendant “must be filed with the district clerk within 30 days after entry of the judgment or order appealed from”). However, the district court did not receive Mr. Richards’ notice of appeal until April 13, 2024. [ECF No. 67].

In response to the motion to dismiss, Mr. Richards’ counsel states that he “understands from his paralegal that [Mr.] Richards’ Notice of Appeal was filed on April 12th, not April 13th,” but, “[a]t the time of filing, PACER was having problems with its electronic payment system. That is what caused the ECF notice to be issued the morning of the 13th.” [Response to Mtn. to Dismiss at 2-3].

The district court clerk did not, however, “deem the ECF site subject to a technical failure on [April 12, 2024].” *See* Electronic Case Filing Procedures for the District of Colorado (Civil Cases) 4.2(a) (“The clerk’s office may deem the ECF site subject to a technical failure on a given day if the site is unable to accept filings. In the event of a technical failure, notice thereof will be posted on the court’s web site, and documents due that day shall be due the next business day.”); *see also* Fed. R. Civ. P. 6(a)(3) (addressing inaccessibility of the clerk’s office).

Nor did Mr. Richards' counsel file a motion for extension of time to file his notice of appeal as the district court's ECF Civil Procedures require in the event of technical difficulty counsel or his paralegal encountered in filing the notice of appeal on the date it was due. *See* Electronic Case Filing Procedures for the District of Colorado (Civil Cases) 4.2(c) ("A filer who cannot file a pleading or document due on a given date in ECF because of a technical difficulty not covered in Section 4.2(b) above must file as soon as practicable a motion for extension of time to file the pleading or document."); *see also* Fed. R. App. P. 4(a)(5) (setting forth the requirements for filing a motion for extension of time to appeal).

The time for requesting an extension of time from the district court has expired, *see* Fed. R. App. P. 4(a)(5)(A)(1), and this court cannot itself extend the time for filing a notice of appeal. *See Savage v. Cache Valley Dairy Ass'n*, 737 F.2d 887, 889 (10th Cir. 1984). Further, this court has no authority to make equitable exceptions to jurisdictional requirements. *See Bowles v. Russell*, 551 U.S. 205, 216 (2007).

This court has fully considered Mr. Richards' arguments regarding the timeliness of his notice of appeal and finds that he has not met his burden to establish this court's jurisdiction. *See United States v. Ceballos-Martinez*, 387 F.3d 1140, 1143 (10th Cir. 2004); *see also* Electronic Case Filing Procedures for the District of Colorado (Civil Cases) 1.3(c) ("Electronic transmission of a document to ECF consistent with these procedures, together with the transmission of a Notice of Electronic Filing (NEF) that the court's system generates from the electronic submission, constitutes filing of the document for purposes of the Federal Rules of Civil Procedure and the local rules of this

court, and constitutes entry of the documents on the docket kept by the clerk under Fed. R. Civ. P. 58 and 79.” “The time limit has run and we are without jurisdiction under the facts of this case.” *Jenkins v. Burtzloff*, 69 F.2d 460, 464 (10th Cir. 1995).

APPEAL DISMISSED.

Entered for the Court

A handwritten signature in black ink, appearing to read 'Chris Wolpert', with a long horizontal stroke extending to the right.

CHRISTOPHER M. WOLPERT, Clerk