

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

NOV 9 1990

ROBERT L. HOECKER
Clerk

DAVID L. WALRAVEN, DOROTHY WALRAVEN,)

Plaintiffs-Appellees,)

v.)

WESTERN BANK, a New Mexico Banking)
Corporation,)

Defendant-Appellant.)

Nos. 89-2267

&

90-2070

(D.C. No. 88-118-M)

(D. N.M.)

ORDER AND JUDGMENT*

Before MCKAY, McWILLIAMS, and EBEL, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. These cases are therefore ordered submitted without oral argument.

Defendant appeals from an order of the district court entering judgment against defendant. Plaintiffs brought suit against defendant and the Small Business Administration (SBA) for declaratory relief and to recover damages for alleged violations

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

of the New Mexico Uniform Commercial Code following the sale of collateral by the bank, a secured party, after it was awarded judgment in state court. Plaintiffs settled with the SBA prior to trial and dismissed the SBA from the suit.

The district court entered judgment October 2, 1989. Defendant filed its notice of appeal, No. 89-2267, with the district court November 2, 1989, thirty-one days after the entry of judgment. Following this court's request for briefing on the issue of whether this court had jurisdiction over this appeal because the notice of appeal was filed one day late, see Fed. R. App. P. 4(a)(1), defendant filed a motion pursuant to Rule 4(a)(5) with the district court requesting an extension of time in which to file its notice of appeal. The district court subsequently denied the motion, and defendant filed a timely notice of appeal from that order, No. 90-2070.

Defendant raises two arguments in support of its position that appeal No. 89-2267 is timely: (1) the SBA, an agency of the United States, was a party and, therefore, defendant had sixty days within which to file its notice of appeal; and (2) excusable neglect exists such that the district court should grant an extension of time to appeal pursuant to Rule 4(a)(5). We find neither argument persuasive.

The SBA was dismissed with prejudice prior to trial. However, defendant argues that because the SBA and defendant had entered into an agreement concerning the SBA's guarantee of plaintiffs' debt, "it is possible" the SBA will pay a portion of the judgment. Therefore, defendant argues, the resolution of the

appeal is of interest to the SBA and the sixty-day period of time for filing a notice of appeal should apply.

This court has held that when "the interest of the United States has been finally determined prior to the entry of a judgment from which an appeal is sought, the United States is not a party and the time for appeal is thirty days rather than sixty." Maryland Casualty Co. v. Conner, 382 F.2d 13, 15 (10th Cir. 1967); accord Costner v. Oklahoma Army Nat'l Guard, 833 F.2d 905, 906 (10th Cir. 1987). Here the SBA was dismissed by stipulation and was no longer a party. Because the government no longer has any right to be actively involved, there is no reason to grant a sixty-day period in which to file a notice of appeal. See United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall & McCarthy, 588 F.2d 1327, 1328 (10th Cir. 1978) (Sixty-day period enacted because "the government must process its decision through internal channels before a decision [to appeal] is made. Fairness dictates that opposing non-governmental parties be given the same time."), cert. denied, 444 U.S. 839 (1979).¹

Defendant filed a Rule 4(a)(5) motion with the district court which was denied. Defendant argues that under United States v. Lucas, 597 F.2d 243 (10th Cir. 1979), this court has allowed an appeal to continue even though the notice of appeal was late if excusable neglect or good cause exists so that the district court will permit a late notice of appeal under Rule 4(a)(5).

¹ For purposes of this case we need not decide, nor do we decide, the instance in which the government is involuntarily dismissed, but fails to obtain a Fed. R. Civ. P. 54(b) certification so that the possibility of appeal at the end of the case is still extant.

However, in 1979, after Lucas was decided, amendments to the Federal Rules of Appellate Procedure were enacted which changed Rule 4(a)(5) to provide that "[t]he district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a)." (Emphasis added.)

This court has held that the

amended rule makes clear that in a civil case a request for an extension must be made by motion and that the motion must be filed within thirty days after expiration of the time fixed in Rule 4(a)(1) for filing of the notice of appeal. . . . Appellant's failure to make a motion before the end of the thirty-day grace period extinguished his right to appeal beyond revival by either this court or the district court.

Mayfield v. United States Parole Comm'n, 647 F.2d 1053, 1055 (10th Cir. 1981), see also Notes of Advisory Committee on Appellate Rules, Note to Subdivision (a)(5).

Here, defendant filed its Rule 4(a)(5) motion February 7, 1990, more than sixty days after judgment was entered. The district court properly denied the motion.

Defendant's appeal No. 89-2267 is DISMISSED for lack of appellate jurisdiction. The judgment of the United States District Court for the District of New Mexico in No. 90-2070 is AFFIRMED.

ENTERED FOR THE COURT
PER CURIAM