

# Successive motions do not extend time

Today's 7th U.S. Circuit Court of Appeals case proves the old adage, "timing is everything." The case discusses the time for filing an appeal from a judgment dismissing plaintiff's action, denial of a motion to vacate the dismissal and two subsequent motions for reconsideration and denial of the motions. *Borrero v. City of Chicago, et al.*, 456 F.3d 698 (7th Cir. 2006).

The case involves the sometimes confusing interplay between Rule 59(e) of the Federal Rules of Civil Procedure, which says a motion to alter or amend a judgment must be filed within 10 days of entry of judgment, Rule 58(b)(2), which says judgment is entered when docketed, and the 30-day notice of appeal time period under Rule 4(a)(1) of the Federal Rules of Appellate Procedure.

The 7th Circuit dismissed the appeal as untimely filed. The underlying facts involved are a bit confusing because three post judgment motions were filed: a motion to vacate the dismissal order and two motions for reconsideration of the denial of the motion to vacate.

On May 9, 2005, the U.S. District Court dismissed the plaintiff's suit for failure to prosecute it. The dismissal, however, was not docketed until June 10, 2005.

Prior to the docketing on June 10 of the dismissal order, plaintiff filed a motion to vacate the dismissal on June 1. The district judge denied the motion to vacate the dismissal on June 8 and this denial order was docketed on June 10.

On June 9, the plaintiff filed a motion for reconsideration of the district court's denial on June 8. This second post-judgment motion of June 9 was denied on June 16 and the order docketed on the same day.

A third post-judgment motion, a second motion for reconsideration of the denial of the motion to vacate the dismissal order, was filed on June 22, denied on July 14 and docketed on July 15.

On Aug. 10, the plaintiff filed his notice of appeal from the orders denying his three post-judgment motions — denial of the motion to vacate the dismissal of May 9 and the two motions to reconsider that denial.

The 7th Circuit, in an opinion written by Judge Richard A. Posner, dismissed the appeal as untimely filed beyond the 30-day time period. The Court held that the 30-day appeal time period began to run from denial of the first post-judgment motion — the motion to vacate the dismissal order. Successive



## Federal Courts

By Jay S. Judge

Judge, a name partner of Judge, James & Kujawa LLC in Park Ridge, is a defense attorney who specializes in trials, appeals and insurance coverage. Judge graduated with honors from The John Marshall Law School and served as editor-in-chief of the school's law review.

post-judgment motions do not extend the time.

Noting that the appeal was untimely, Posner stated:

"But by Aug. 10, when the plaintiff filed his notice of appeal, the time for appealing from that judgment had lapsed. For only the first Rule 59(e) motion tolls the time to appeal from the judgment, unless the judgment is subsequently altered, *Charles v. Daley*, 799 F.2d at 348, which did not happen here. E.g., *Berwick Grain Co. v. Illinois Dept of Agriculture*, 189 F.3d 556, 558 (7th Cir. 1999). Otherwise a litigant could extend the time to appeal indefinitely simply by filing successive Rule 59(e) motions. *Venable v. Haislip*, 721 F.2d 297, 299 (10th Cir. 1983) (per curiam). If the denial of the plaintiff's June 22 motion were appealable, he would have succeeded in circumventing the rule that only the first Rule 59(e) motion tolls the time for appealing from the judgment, because by asking us to reverse the denial of the June 22 motion he would, by reason of the merger doctrine we mentioned, be attacking the underlying judgment."

The court began consideration of the timeliness of the appeal by discussing the interplay between Rule 59(e) and Rule 58(b)(2):

"A motion to alter or amend a judgment is deemed filed under Rule 59(e) of the civil rules, which tolls the time for filing an appeal from the judgment, if the motion is filed within 10 days after entry of the judgment, which means after the Rule 58 judgment order has been docketed. Fed.R.Civ.P. 58(b)(2); *Laborers' Pension Fund v. A & C Environmental Inc.*, 301 F.3d 768, 755 n. 5 (7th Cir. 2002). It is deemed filed under Rule 59(e) even if, as in this case, the motion is not labeled a Rule 59(e) motion and, again as in this

case, does not say 'alter or amend' (the language of Rule 59(e)), but instead uses a synonym, such as 'vacate' or 'reconsider.' *Curry v. United States*, 507 F.3d 664, 666 (7th Cir. 2002)."

Posner further explained that a motion to alter or amend (vacate the judgment in this case) can be filed before a Rule 58 order has been docketed without jeopardizing an appeal:

"But we and most other courts do not cavil if, as also in this case, the motion is filed before the Rule 58 judgment order has been docketed or even before there is a Rule 58 judgment, provided that a final judgment has been rendered. E.g., *Dunn v. Truck World Inc.*, 929 F.2d 311 (7th Cir. 1991). *Chicago United Industries Ltd. v. City of Chicago*, 445 F.3d 940, 943 (7th Cir. 2006). Rule 58 prescribes a formality, a useful one but not one that is prerequisite to appealing. The losing party can appeal a judgment (in this case, the dismissal of the suit on May 9) before the entry of the Rule 58 judgment order if though not embodied in the separate document that Rule 58 requires the judgment really is final within the meaning of 28 U.S.C. § 1291. *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978) (per curiam); *Otis v. City of Chicago*, 29 F.3d 1159, 1165 (7th Cir. 1994). By the same token, the party should be allowed to file a motion to alter or amend the judgment within the time permitted for such motions even if the Rule 58 judgment order has not yet been made or docketed."

The 7th Circuit then determined that the time for appeal ran from the denial of the motion to vacate the dismissal filed on June 1 and denied on June 8 and docketed on June 10:

"But the first such motion that the plaintiff filed was denied on June 8 and docketed on June 10, which was when his 30-day period for appealing began to run. Fed.R.Civ.P. 58(a)(1)(D), (b)(1). He did not file his notice of appeal until Aug. 10, which was too late."

After finding the second post-judgment motion, the first motion for reconsideration and its appeal was untimely, the court next addressed the issue of the third post-judgment motion, the second motion for reconsideration. Posner noted it was filed within 30 days of its denial on July 14 and docketing on July 15, but the question was whether it was an appealable kind of order:

"However, his third motion, filed on June 22, was filed within 10 business days after the Rule 58 judgment order

(and so it was a Rule 59(e) motion) and was denied fewer than 30 days before he filed his notice of appeal. The question concerning the appealability of the order denying that motion is not whether the appeal was untimely, which it was not, but whether the denial was an appealable kind of order.

"*Abbs v. Sullivan*, 963 F.2d 918, 925 (7th Cir. 1992), holds that the denial of a timely Rule 59(e) motion is not appealable separately from the judgment that it seeks to alter or amend. See also *Cardoza v. CFTC*, 768 F.2d 1542, 1546-47 (7th Cir. 1985). The two orders — the judgment and the denial of the motion to change it — merge. They merge because the purpose of the motion, so far as suspending the time within which to appeal is concerned, is to delay the appeal from the judgment until the district court has ruled on the motion, at which point the judgment is ripe for review. Since that is the only purpose of the motion should it be denied, the court of appeals will construe an appeal from the denial (should the appellant's notice of appeal mistakenly cite only the denial) as being an appeal from the judgment. The notice of appeal in this case mentions only the orders denying the motions to vacate or reconsider the dismissal of his suit; that dismissal was the underlying judgment."

The 7th Circuit opinion then concludes that the Aug. 10 notice of appeal was untimely — filed more than 30 days after the denial of the motion to vacate on June 8 and docketing on June 10:

"But by Aug. 10, when the plaintiff filed his notice of appeal, the time for appealing from that judgment had lapsed. For only the first Rule 59(e) motion tolls the time to appeal from the judgment, unless the judgment is subsequently altered, which did not happen here. Otherwise a litigant could extend the time to appeal indefinitely simply by filing successive Rule 59(e) motions. *Venable v. Haislip*, 721 F.2d 297, 299 (10th Cir. 1983) (per curiam). If the denial of the plaintiff's June 22 motion were appealable, he would have succeeded in circumventing the rule that only the first Rule 59(e) motion tolls the time for appealing from the judgment, because by asking us to reverse the denial of the June 22 motion he would, by reason of the merger doctrine we mentioned, be attacking the underlying judgment."

Finally, the court addressed plaintiff's contention that the motion to vacate the

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dismissal filed June 1 and first motion for reconsideration filed June 9 were filed prematurely before the docketing of the dismissal order on June 10, they should be treated as a nullity and the time for appeal run from docketing of the denial of the second motion for reconsideration on July 15 — rendering the Aug. 10 notice of appeal timely.

Finding plaintiff's position untenable, Posner reasoned:

"But it does not follow that because the motions filed on June 1 and June 9 were premature, having been filed before the Rule 58 judgment order was docketed, they should be ignored and the motion filed on June 22 considered the first Rule 59(e) motion rather than a repetition of the previous motions. Nothing in the rules compels such a result, and it would not make good sense. The appellate rules provide a

safe harbor for litigants uncertain whether a judgment that is not entered on a separate document as required by Rule 58 really is a final, appealable judgment. The plaintiff in our case took advantage of the safe harbor by filing his first Rule 59(e) motion more than 10 days after the judgment was rendered (May 9) but fewer than 10 days after the Rule 58 judgment order was docketed (June 10). He was protected because, as we noted earlier, a premature Rule 59(e) motion is timely. There is not reason to allow him to file a second identical motion and get more time to appeal just because his first motion was premature. He should not be rewarded for prematurity."

Holding the appeal was untimely and the Court of Appeals lacked jurisdiction to consider the appeal, the court dismissed the appeal.