

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DONALD SMITH EX REL :  
DONALD MUHAMMED EL ALI : CIVIL ACTION  
 :  
v. : NO. 02-CV-8221  
 :  
ALTEGRA CREDIT CO. and :  
LOUIS P. VITTI :

**SURRICK, J.**

**NOVEMBER 5, 2004**

**MEMORANDUM AND ORDER**

Presently before the Court is Plaintiff's Motion for Leave to File This Notice of Appeal One Day Out of Time & Reinstate the Appeal And Objection to the Pretrial Conferences of August 25th, 2004 And the Notice of Removal Filed August 24th, 2004. (Doc. No. 53.) Plaintiff asserts that his Notice of Appeal from our Order to Dismiss (Doc. No. 52) is not untimely, even though it was filed more than thirty (30) days after the entry of the Order. Alternatively, Plaintiff argues that, even if it is untimely, we should grant him permission to file a late appeal. For the reasons that follow, we reject Plaintiff's arguments and the Motion will be denied.<sup>1</sup>

Under Federal Rule of Appellate Procedure 4(a)(1), a notice of appeal must be filed with the District Court clerk within thirty days after entry of the relevant judgment or order. R. App. P. 4(a)(1)(A); *Sonnenblick-Goldman Corp. v. Nowalk*, 420 F.2d 858, 859 (3d Cir. 1970) (holding that unless a party's notice of appeal is timely, the Court of Appeals lacks jurisdiction to hear the appeal); *see also* 16A Charles Alan Wright et al., Federal Practice and Procedure § 3950.1 (3d

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<sup>1</sup> In order to put this matter in perspective, one should understand the tortured history of this litigation. That history is set forth in our Memorandum and Order dated September 22, 2004. (Doc. No. 52.)

ed. 1999) (“Unless the notice of appeal is filed with the clerk of the district court within the time fixed for the particular type of appeal by Rule 4, the appeal will fail and the court of appeals will find that its jurisdiction to review the merits has never attached to the case. No excuses for a late filing are tolerated.”). Here, Plaintiff had thirty days from September 23, 2004, the date of the Order’s entry on the docket, to file a notice of appeal from the Order dismissing his complaint with prejudice.<sup>2</sup> Plaintiff’s Motion and Notice of Appeal was filed on October 26, 2004 (Doc. No. 53), thirty-three (33) days after the date of entry of the Order, and three (3) days beyond the required time period listed in Rule 4(a)(1). Therefore, Plaintiff’s appeal is untimely.

Plaintiff argues that his Notice is timely because Federal Rule of Appellate Procedure 26(c) adds three (3) calendar days to the requisite time period, and his notice of appeal falls within this three-day extension. (Doc. No. 53 ¶ 26.) We reject this argument. Federal Rule of Civil Procedure 6(e), which is the District Court’s equivalent of Federal Rule of Appellate Procedure 26(c),<sup>3</sup> applies only to actions that must be undertaken “within a prescribed period after the *service* of a notice or other paper upon the party.” Fed. R. Civ. P. 6(e) (emphasis added). This does not include notices of appeal, which must be filed within thirty days of *entry* in the docket of the relevant judgment or order. Fed. R. App. P. 4(a)(1)(A). Rule 6(e) is not applicable. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Kurtenbach*, 525 F.2d 1179, 1181 (8th Cir. 1975) (“Rule 6(e) has no application when computing time for a notice of appeal.”); *Lashley v. Ford Motor Co.*, 518 F.2d 749 (5th Cir. 1975) (per curiam) (“The 30-day

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<sup>2</sup> According to the Federal Rules of Appellate Procedure, the date of entry for a judgment order is the date it is entered into the docket by the Clerk. Fed. R. App. P. 4(a)(7).

<sup>3</sup> *See* Fed. R. App. P. 26(c) advisory committee’s note (1967) (“The provisions of this rule are based upon FRCP 6(a), (b) and (e).”).

requirement of Fed. R. App. P. 4(a) is not affected by Fed. R. Civ. P. 6(e); since the appeal time starts from the entry of the judgment and not from service of the notice, Rule 6(e) does not apply so as to enlarge the time allowed for filing the notice of appeal.”); *Sonnenblick-Goldman Corp.*, 420 F.2d at 860-61 (holding that Rule 6(e) does not apply to a motion which tolls the time to file a notice of appeal).

Plaintiff also argues that his Notice of Appeal is timely because the Federal Rules of Appellate Procedure do not count intermediate Saturdays and Sundays in calculating the thirty-day period. (Doc. No. 53 ¶ 28.) This argument is clearly incorrect. According to the plain text of Federal Rule of Appellate Procedure 26(a), “intermediate Saturday, Sundays, and legal holidays” are not counted only when the required filing period “is less than 11 days.” Fed. R. App. P. 26(a)(2).

Finally, Plaintiff requests that we extend the time for him to file a notice of appeal for “good cause” under Federal Rule of Appellate Procedure 4(a)(5). (Doc. No. 53 ¶ 27.) The Third Circuit has held that the standard for determining whether “good cause” exists is the same as the standard for “excusable neglect” under Rule 4(a)(6). *Amatengelo v. Borough of Donora*, 212 F.3d 776, 780 (3d Cir. 2000). This standard is “a strict one,” and applies “only to extraordinary cases where injustice would otherwise result.” *Consol. Freightways Corp. v. Larson*, 827 F.2d 916, 918 (3d Cir. 1987). Among the factors that are relevant to determining whether good cause exists are: “(1) the danger of prejudice to the nonmovant; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; (4) whether the movant acted in good faith; (5) whether the inadvertence reflected professional incompetence such as ignorance of the rules of

procedure; (6) whether an asserted inadvertence reflects an easily manufactured excuse incapable of verification by the court; and (7) whether the neglect resulted from complete lack of diligence.” *Adefumi v. City of Philadelphia*, No. 01-5565, 2003 WL 22797460, at \*1 (E.D. Pa. Nov. 13, 2003) (citing *Consol. Freightways Corp.*, 827 F.2d at 919).

Plaintiff alleges several reasons why “good cause” exists here, including that the federal rules of civil and appellate procedure are confusing and “in conflict” with themselves, and his belief that our Order to Dismiss had the intent to “mislead, hinder, [and] distract” him, causing him to file out of time. (Doc. No. 53 ¶¶ 26-30.) We conclude that these reasons do not qualify as “good cause” to grant a late appeal. First, we reject Plaintiff’s rationale that the federal rules are confusing with respect to the required time for filing an appeal. The thirty-day appeal period contained in the Federal Rules of Appellate Procedure “is neither obscure nor difficult to understand.” *Amatengelo*, 212 F.3d at 779. Rule 4(a) clearly states that “[i]n any civil case, . . . the notice of appeal required . . . must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.” Fed. R. App. P. 4(a)(1)(A). We find that Plaintiff’s assertion that he could not understand this rule is not credible, especially in light of the fact that Plaintiff has previously filed numerous interlocutory appeals to the Third Circuit in this matter (Docs. No. 16, 31, 33, 37), including one other motion in which he specifically petitioned for permission to file an appeal one (1) day after the thirty-day deadline. (Doc. No. 49.) We also find that Plaintiff’s failure to file his Notice within thirty days is the result of lack of diligence and that his Motion is not made in good faith. Based on his repeated interlocutory appeals, Plaintiff quite obviously knows the procedures for filing an appeal, and he has offered no plausible justification for his inability to do so here. These factors outweigh any that may be in

Plaintiff's favor, such as his relatively short delay in filing a motion to appeal. Accordingly, we conclude that Plaintiff has not met the Third Circuit's strict standard for granting a late appeal, and Plaintiff's Motion will be denied.

An appropriate Order follows.

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ALTEGRA CREDIT CO. and :  
LOUIS P. VITTI :

**ORDER**

AND NOW, this 5<sup>th</sup> day of November, 2004, upon consideration of Plaintiff's Motion For Leave To File This Notice Of Appeal One Day Out Of Time & Reinstate The Appeal And Objection To The Pretrial Conferences Of August 25, 2004 And the Notice Of Removal Filed August 24th, 2004 (Doc. No. 53), it is ORDERED that Plaintiff's Motion is DENIED.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge