IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DR. RACHEL TUDOR et al.,	§	
	§	
Plaintiff-Appellant.	§	
v.	§	
	§	
SOUTHEASTERN OKLAHOMA STATE UNIVERSITY	§	Case No. 18-6102
	§	
and	§	
	§	
REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA	§	
	§	
Defendants-Appellees.	§	
	§	

APPELLANT-PLAINTIFF DR. RACHEL TUDOR'S
OPPOSED MOTION TO VACATE ABATEMENT ORDER

Appellant-Plaintiff Dr. Rachel Tudor ("Tudor") respectfully moves to vacate the July 18, 2018 scheduling order ("July 18 Order") issued *sua sponte* by this Court which abated the July 30, 2018 deadlines for Tudor to file her opening brief and appendix in this Court. For the reasons elaborated more fully below, the July 18 Order is premature because the automatic tolling provisions of Fed. R. App. P. 4(a)(4)(B) were not triggered by motions filed in the District Court and thus Tudor's June 7, 2018 Notice of Appeal was itself not premature and her appeal should move forward forthwith as originally calendared. To cure this, Tudor requests that the July 18 Order be vacated and the original deadline for her opening brief and appendix be reinstated as July 30, 2018.

BACKGROUND

This case was tried to a jury and a verdict returned in Tudor's favor on three of four counts on November 20, 2017 (Doc. No. 262). At a hearing immediately after the verdict was returned, and at the request of both parties, the Court set a special briefing schedule for Tudor's motion for reinstatement and any motions seeking to challenge the verdict, with both sets of briefs due on December 11, 2017 (Doc. No. 262 at 873–74) (hearing transcript reflecting that counsel for Appellees-Defendants requested a date certain to file motions challenging the jury verdict in light of the District Court's decision to withhold issuing final judgment until post-verdict motions were finally resolved). Appellees-Defendants did not file a timely motion on December 11, 2017. In the proceeding months, the parties briefed all other post-verdict issues according to a special schedule set by the District Court so that all matters save for attorneys' fees and costs would be settled *before* judgment was entered.

The District Court entered final judgment in this matter on June 6, 2018 (Doc. No. 292). Hours later, Dr. Tudor filed a timely notice of appeal to this Court (Doc. No. 293).

On July 3, 2018, Dr. Tudor filed a motion intended to notify the District Court of her desire to move for tax off-set and post-judgment interest once her appeal was resolved by this Court (Doc. No. 311). Due to an error of counsel, the wrong draft of that motion was filed. Upon discovering that error, counsel redocketed the corrected motion on July 5, 2018 (Doc. No. 314) with a footnote requesting the earlier filed motion be struck, as was the practice for all parties throughout the proceedings below

where such errors occurred (*id.* at 1 n.1). In the July 5 motion, Tudor requested conditional relief from the District Court, clarifying that it should not act until after her appeal is finally resolved by this Court, since the relief Tudor sought was dependent upon the disposition of her appeal. *See* Doc. No. 314 at 1 ("Dr. Tudor respectfully moves this Court to, at an appropriate time, conform its judgment to include post-judgment interest and a tax offset upon resolution of Tudor's pending appeal to the U.S. Court of Appeals for the Tenth Circuit.").

Later in the day on July 5, 2018, Appellees-Defendants filed an untimely Rule 50(b) and 59 motion challenging the jury's verdict with the District Court (Doc. No. 316), 159 days past the special deadline set by the District Court. Inexplicably, Defendants-Appellees did not seek leave to file that untimely motion with the District Court let alone notify this Court of their plans.

On July 18, 2018, the parties participated in a mandatory mediation conference with this Court's Mediation Office. Unfortunately, that conference ended without settlement. Within minutes of that conference ending, Tudor filed a motion to strike Appellees-Defendants' untimely motion (Doc. No. 318) in the District Court, explaining in exhaustive detail that the Appellees-Defendants' motion is untimely given the District Court's original December 11, 2017 deadline. Later that same day, this Circuit issued a *sua sponte* order vacating the deadline for Tudor to file her opening brief and appendix on the premise that Tudor's erroneously filed July 3 motion (Doc. No. 311) should toll this matter or, alternatively, that Appellees-

Defendants' untimely motion (Doc. 316) challenging the verdict should toll the time for appeal.

ARGUMENT

I. Tudor's Motion Does Not Toll This Appeal

Dr. Tudor respectfully points out that she asked the District Court to strike her July 3, 2018 motion (Doc. No. 311), as it was filed in error, vis-à-vis her corrected motion filed on July 5, 2018 (Doc. No. 314 at 1 n.1). Because Tudor withdrew the July 3 motion by filing a corrected motion on July 5, the July 3 motion does not trigger the automatic tolling provision of Fed. R. App. P. 4(a)(4)(B). *See Copar Pumice Co., Inc. v. Morris*, 639 F.3d 1025, 1030 (10th Cir. 2011) (A "withdrawn motion is treated 'as though the motion had never been made' for the purposes of Rule 4 [rendering] Rule 4(a)(4)(B) inapplicable.").

Tudor's corrected July 5, 2018 motion (Doc. 314) on the docket below also does not trigger the automatic tolling provision of 4(a)(4)(B), albeit for a different reason. Tudor's July 5 motion seeks conditional relief from the District Court that may only be adjudicated *after* this Court hears her appeal. Thus, the automatic tolling provision of 4(a)(4)(B) is not triggered because, until this Court acts on Tudor's appeal, there is no issue before the District Court to decide. To rule otherwise would place Tudor in an intractable procedural loop.

II. Appellees-Defendants' Motion Does Not Toll This Appeal

Appellees-Defendants did not file their motion challenging the jury verdict (Doc. No. 316) until July 5, 2018, 159 days past the special deadline set by the District Court. In this situation, the automatic tolling provision of Rule 4(a)(4)(B) is not and cannot be triggered.

Here, it is beyond dispute that Appellees-Defendants expressly asked the District Court to set a special deadline for filing any motion challenging the jury's verdict. The District Court granted that request and set a special deadline for December 11, 2017 (Doc. No. 262 at 873–74). Pursuant to that special deadline, Appellees-Defendants' motion (if any) under Rule 50(b) and/or 59 was due on December 11, 2017 rather than the default deadline for such motions.

Appellees-Defendants' filing of their motion without leave of the District Court on July 5, 2018—165 days *after* the special deadline—renders it untimely. That untimeliness has particular consequence for the purposes of Rule 4(a)(4)(B)—an untimely precursor motion cannot trigger automatic tolling. *Longstreth v. City of Tulsa*, 948 F.2d 1193, 1195 (10th Cir. 1991) (noting that "to toll the appeal time under [Rule 4(a)(4)] a pleading must (1) be a motion, (2) be timely, and (3) be one of the […] motion[s] specified in the tolling rule"). *See also Browder v. Director, Dep't of Corrections of Ill.*, 434 U.S. 257, 264 (1978) (untimely motion for reconsideration does not toll time for appeal); *Allen v. Chapter 7 Trustee*, 223 Fed.Appx. 770, 772 (10th Cir. 2007) (unpublished) (untimely Rule 59 motion does not toll time for appeal);

Searles v. Dechant, 393 F.3d 1126, 1130 (10th Cir. 2004) ("motion for reconsideration could not have such a tolling effect, because it was itself untimely").

To the extent Appellees-Defendants may argue that their motion in the District Court is timely because it was filed within 28 days of entry of judgment, which is the default deadline established by the Fed. R. Civ. P., and thus should be timely for the purposes of triggering Rule 4(a)(4)(B)'s automatic tolling provision, that position wholly lacks merit.

It conflicts with the spirit of the Federal Rules of Civil and Appellate Procedure to deem Rule 4(a)(4)(B)'s automatic tolling provision triggered where the District Court, totally within its inherent authority,[1] adjusts the default deadline for precursor motions, that deadline is missed, and an untimely motion is later filed. Rule 4(a)(4)(B) is intended to provide clarity for parties and order the relations between trial and appellate courts. Timeliness and transparency as between the parties and the courts are necessary to make the system work.

Appellees-Defendants' ploy in this case threatens to throw a wrench into the works. If this Court deems Appellees-Defendants' untimely motion as triggering 4(a)(4)(B)'s automatic tolling, the consequence is to gift a free pass to a litigant seeking to both to halt an otherwise timely appeal and extend a special deadline that

[1] *See Link v. Wabash R. Co.*, 370 U.S. 626, 630–31 (1962) (Harlan, J.) (district courts possess inherent powers that are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases"); *Hartsel Springs Ranch of Col. Inc. v. Bluegreen Corp.*, 296 F.3d 982, 985 (10th Cir. 2002) (district court has inherent authority to manage its docket to promote judicial efficiency and the "comprehensive disposition of cases").

same litigant itself requested and belatedly decided it would rather not adhere to. That is simply not a result that Rule 4(a)(4)(B) intended.

Moreover, treating an untimely motion, like Appellees-Defendants', as automatically tolling the time for appeal pursuant to Rule 4(a)(4)(B) would have other absurd and deleterious consequences. First and foremost, it would unnecessarily undermine the inherent power of district courts to set scheduling deadlines, which are absolutely necessary so as to ensure the expeditious resolution of cases, because virtually any scheduling decisions that alter default deadlines would be a nullity if ignored by a litigant. Second, it would create perverse incentives for parties to game scheduling between trial courts and this Court, disrupting the capacity of both to manage and control their respective dockets.

To the extent that Appellees-Defendants' argue that this Court should wait on the District Court to rule on Tudor's motion to strike (Doc. No. 318) their untimely motion below, that argument also lacks merit. Tudor's request to this Court is a narrow one—vacate the scheduling abatement for her appeal. This Court may grant that relief, and should do so, because regardless of how the District Court disposes of Appellees-Defendants' motion, Rule 4(a)(4)(B)'s tolling provision cannot be triggered. Even if a district court entertains an untimely precursor motion on the merits and rules on it, the resulting order does retroactively satisfy the timeliness requirement of Rule 4(a)(4)(B). *See, e.g.*, *In re Harth*, 619 Fed.Appx. 719, 721 (10th Cir. 2015) (unpublished) ("lower court's discretionary election to deny an untimely post-judgment motion on the merits (an equitable action without jurisdictional import in

that court) does not re-invest that motion with a tolling effect for purposes of appellate jurisdiction"). There is thus no need to wait on the District Court to act.

III. Appellant-Plaintiff Wishes to Proceed with Her Appeal With All Deliberate Speed

In addition to the foregoing, Dr. Tudor emphasizes to this Court that she sincerely desires to move forward with her merits appeal with all deliberate speed. Dr. Tudor took great pains to meet all deadlines for her merits case in the District Court and to promptly and expediently pursue her appeal with this Court. Conversely, Appellees-Defendants have, repeatedly, sought to delay the resolution of this case, the latest example of which is their 159-day late motion with the District Court, which prejudices Tudor given her long wait for final resolution. "Justice delayed is justice denied." *Johnson v. Rogers*, 917 F.2d 1283, 1285 (10th Cir. 1990).

RELIEF REQUESTED

For all of the foregoing reasons, Dr. Tudor prays that the Court grant her motion to vacate the July 18, 2018 scheduling abatement order, and thereby restore the deadline for Tudor's opening brief and appendix to July 30, 2018.

CERTIFICATION OF COMPLIANCE WITH TENTH CIRCUIT RULE 27.1

Counsel for Tudor reached out to counsel for Appellees-Defendants via email on July 19, 2018 to inquire as to their position on this motion. Counsel for Appellees-Defendants indicate that they oppose this Motion.

Dated: July 19, 2018

Respectfully submitted,

/s/ Ezra Young
Ezra Ishmael Young
Law Office of Ezra Young
30 Devoe Street #1A
Brooklyn, NY 11211
(949) 291-3185
F: (917) 398-1849
ezra@ezrayoung.com

Attorney for Rachel Tudor

CERTIFICATE OF SERVICE

I, Ezra Young, hereby certify that on July 19, 2018, I electronically filed a copy of the foregoing with the Clerk of Court using the CM/ECF system, which will automatically serve all counsel of record.

/s/ Ezra Young
Ezra Ishmael Young
Law Office of Ezra Young
30 Devoe Street #1A
Brooklyn, NY 11211
(949) 291-3185
F: (917) 398-1849
ezra@ezrayoung.com

Attorney for Rachel Tudor