IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 92-2464
Summary Calendar

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KALYANA RAMASWAMI,

Plaintiff-Appellant,

versus

TEXAS DEPARTMENT OF
HUMAN SERVICES, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court for the
Southern District of Texas
(CA-H-89-2163)

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(August 9, 1993)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.*

PER CURIAM:

Plaintiff-appellant Kalyana Ramaswami (Ramaswami) filed this action for employment discrimination against defendants-appellees Texas Department of Human Services and several officials thereof. Defendants-appellees ultimately moved for summary judgment (record

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

instrument #11), and this motion came before the magistrate judge for report and recommendation.

The magistrate judge found that the defendants were "entitled to judgment as a matter of law because of the deemed admissions and the lack of sufficient response to Defendants' Motion." The magistrate judge entered his recommendation on November 27, 1991, and Ramaswami filed objections on December 10, 1991. On March 17, 1992, the district court entered its order adopting the memorandum and recommendation of the magistrate judge and ordering "that Defendants' Motions [sic] for Summary Judgment (Instrument #11) is hereby GRANTED." The preamble in this order erroneously referred to the motion for summary judgment as "Defendant Time Insurance Company's" motion. The district court also entered as a separate document a final judgment dismissing the suit on that same date; this "final judgment" did not contain the erroneous reference to Time Insurance Company that was contained in the mentioned order adopting the magistrate's memorandum and recommendation.

On April 14, 1992, Ramaswami filed a motion for reconsideration of the March 17, 1992, order adopting the magistrate judge's memorandum and recommendation. This motion made no mention of the reference to "Time Insurance Company" in the order. On May 13, 1992, the district court entered an amended order adopting the magistrate judge's memorandum and recommendation with the only change from the similar order of March 17 being the deletion of the reference to "Time Insurance Company." No new or different final judgment was entered, and no change was made in the

"final judgment" entered March 17. On May 15, 1992, defendants filed a motion for dismissal under Fed. R. Civ. P. 12(b)(6). On June 5, 1992, Ramaswami filed a notice of appeal from the amended order entered on May 13, 1992. On that same date, Ramaswami filed a motion for appointment of counsel on appeal. On July 31, 1992, the district court entered an order denying the motion for reconsideration, denying defendants' motion for dismissal and Ramaswami's motion for appointment of counsel.

On August 13, 1992, Ramaswami filed a motion to reconsider the denial of appointment of counsel in the district court. This Court treated it as a motion for appointment of counsel on appeal and denied it on November 4, 1992.

This Court must examine the basis for its jurisdiction, on its own motion, if necessary. *Mosley v. Cozby*, 813 F.2d 659, 660 (5th Cir. 1987). A timely notice of appeal is a mandatory precondition to the exercise of appellate jurisdiction. *United States v. Merrifield*, 764 F.2d 436, 437 (5th Cir. 1985).

The district court entered its final judgment under Fed. R. Civ. P. 58 dismissing Ramaswami's action on March 17, 1992. Ramaswami did not file a notice of appeal within thirty days of the entry of this judgment. *See* Fed. R. App. P. 4(a)(1). Ramaswami filed a motion for reconsideration on April 14, 1992. This motion cannot be construed as being brought under Fed. R. Civ. P. 59(e), because it was served more than ten days after the dismissal. *See Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 667 (5th Cir.) (en banc), *cert. denied*, 479 U.S. 930 (1986). The

motion must be construed as being brought pursuant to Fed. R. Civ. P. 60. Such a motion does not suspend the running of the time for appeal. *See* Fed. R. Civ. P. 60(b); Fed. R. App. P. 4(a)(4).

On May 13, 1992, the district court issued an amended order adopting the magistrate judge's memorandum and recommendation. The district court did not, however, amend its judgment or enter a new judgment. On June 5, Ramaswami filed a notice of appeal from this amended order of May 13, 1992. This Court has held that "[t]he mere fact that a court reenters a judgment or revises a judgment in an immaterial way does not affect the time within which litigants must pursue an appeal. Rather, the test is 'whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.'" *Offshore Production Contractors, Inc. v. Republic Underwriters Ins. Co.*, 910 F.2d 224, 229 (5th Cir. 1990) (citations omitted). In this case, the amended order did not disturb or revise any of the rights of the parties. The amended order is substantively identical to the original order except that the incorrect reference to the Time Insurance Company was removed. Moreover, there has never been *any* change in (or replacement of) the March 17, 1992, Rule 58 judgment. In *Offshore Production Contractors*, the rule was invoked to find jurisdiction; however, the rule itself is not outcome-dependent. The amended order entered on May 13, 1992, did not in any way alter or replace the March 17 judgment, which was final and appealable on March 17, 1992. Therefore, Ramaswami's notice of appeal filed on June 5 was

not timely as to the judgment dismissing his case, and this Court has no jurisdiction to hear an appeal of that judgment.

With respect to Ramaswami's April 14, 1992, Rule 60(b) motion, the amended order of May 13, 1992, did not mention it, much less rule on it. The Rule 60(b) motion was denied by order of July 31, 1992. This order also denied Ramaswami's motion for appointment of counsel on appeal. Ramaswami's June 5, 1992, notice of appeal cannot be construed to appeal the denial of his Rule 60(b) motion because it specifically referenced the May 1992, amended order, not the July 31, 1992, order (which had not then been entered).

"If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal." *Smith v. Barry*, 112 S.Ct. 678, 682 (1992). Ramaswami's August 13, 1992, motion for reconsideration of the denial of appellate counsel does not comply with Rule 3 because it does not clearly evince an intent to appeal the denial of the Rule 60(b) motion, nor has it been served on the defendants. Therefore, this Court is also without jurisdiction to hear an appeal from the denial of the Rule 60(b) motion.

This Court is without appellate jurisdiction; accordingly, the appeal is

DISMISSED.