UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-2615
Summary Calendar

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER FOR HOUSTON COMMERCE BANK,

Plaintiff-Appellee,

VERSUS

ROBERT V. HOLLAND, JR. AND
DONA G. HOLLAND,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
CA H 90 0698

June 3, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[1]

We dismiss this appeal for lack of jurisdiction.

I.

The Federal Deposit Insurance Company (FDIC), as receiver for the former Houston Commerce Bank (Houston), filed suit to collect on a promissory note executed by Dona and Robert V. Holland, Jr.

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[1]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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

The Hollands filed a response to the complaint, contending that they were entitled to a credit for additional security pledged to secure the loan. The Hollands annexed to their response the referenced collateral, an agreement by a Marlowe Dimmitt to purchase stock from the Hollands for $50,000.

The Hollands subsequently filed a third-party action against Dimmitt, alleging that he was a necessary party to the action, because he was the guarantor of the collateral securing the note. Service of the third-party complaint was not made personally on Dimmitt or at his domicile, but was made on an attorney, who allegedly had previously represented Dimmitt.

The Hollands filed a motion for default judgment seeking a judgment against Dimmitt in the amount of $50,000, plus interest; the Hollands also sought to have the judgment amount applied as an offset against any judgment against them in favor of the FDIC. The district court entered a default, but did not enter a judgment of default.

The district court granted the motion of the FDIC for summary judgment, finding that the FDIC was entitled to recover from the Hollands the amount due under the note, plus interest. The district court entered a judgment on April 1, 1992, in favor of the FDIC, which the district court characterized as "final," and stated that there were no outstanding issues in the case. The district court also stated that the defendants had received a default judgment in the amount of $50,000 against Dimmitt.

The Hollands filed a motion to alter or amend the judgment

which was served on the defendant on April 15, 1992. The magistrate judge denied the motion to alter or amend the judgment. The Hollands filed a notice of appeal from the final judgment entered on April 1, 1992, and from the magistrate judge's order denying the motion to alter or amend the judgment entered on July 2, 1992.

II.

The appellants argue that this Court is without jurisdiction over the appeal because the district court did not enter a judgment on their third party claim.

This Court must be satisfied that it has appellate jurisdiction prior to reviewing the merits of the case. **Matter of England**, 975 F.2d 1168, 1171 (5th Cir. 1992).

The record raises several questions with respect to the jurisdiction of this Court. The Hollands filed a notice of appeal from the order of the magistrate judge, denying their motion to alter or amend the judgment. The district court did not adopt the magistrate judge's disposition of the motion. Orders of the magistrate judge are not appealable to this Court. **Trufant v. Autocon, Inc.**, 729 F.2d 308, 309 (5th Cir. 1984).

If the motion to amend is characterized as a Fed. R. Civ. P. Rule 59(e) motion, the Holland's notice of appeal has been nullified because there has been no entry of a final order disposing of the motion. Fed. R. App. P. 4(a)(4). A Rule 59(e) motion must be served within ten days after the entry of judgment to be timely. If the motion is not timely, then it is characterized

as a Rule 60(b) motion and it has no effect on the notice of appeal. **Harcon Barge Co. v. D & G Boat Rentals, Inc.**, 784 F.2d 665, 667 (5th Cir.) (en banc), **cert. denied**, 479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986).

In computing any period prescribed by the Federal Rules of Civil Procedure, the day of the act from which the designated period begins to run is not included in the computation. Fed. R. Civ. P. 6(a). "When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." **Id**.

The record reflects that judgment was entered by the district court on April 1, 1992, and that the motion to amend the judgment was served on April 15, 1992. Excluding the date of entry and the intermediate weekends, the motion to amend was served on the tenth day after entry of judgment and, thus, was a Rule 59(e) motion. The notice of appeal was nullified by the pending motion, depriving this Court of appellate jurisdiction.

Further, the district court has not entered a judgment of default against Dimmitt. "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default." Fed. R. Civ. P. 55(a).

The Hollands did not present evidence by affidavit, or otherwise, that Dimmitt was properly served and failed to answer the third party complaint. The Hollands merely stated in their

motion for a default judgment that service was made on an attorney, who had previously represented Dimmitt in "prior negotiations in this matter." The district court should consider whether this unsworn statement is sufficient to support the entry of a default under Rule 55(a). Further, although it may have intended to do so, the district court did not enter a Fed. R. Civ. P. 55(b) judgment of default in the amount requested by the Hollands. Thus no judgment has been entered on the third party claim.

Section 1291 of Title 28 prohibits parties from appealing "until there has been a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." **Bader v. Atlantic Intern., Ltd.**, 986 F.2d 912, 914 (5th Cir. 1993)(citing **Firestone Tire and Rubber Co. v. Risjord**, 449 U.S. 368, 373, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981)) (internal quotations and citations omitted). In a lawsuit involving multiple claims and/or parties, there is no final judgment until all claims, rights, and liabilities of all parties have been adjudicated or the district court certifies that no just reason exists for delaying the entry of final judgment and expressly orders the entry of judgment pursuant to Federal Rule of Civil Procedure 54(b). **Bader**, 986 F.2d at 915 (citing **Jetco Electronic Industries, Inc. v. Gardiner**, 473 F.2d 1228, 1231 (5th Cir. 1973)). There has been no entry of a Rule 54(b) judgment in favor of the FDIC. Because no default judgment has been entered against Dimmitt, there is an outstanding claim against a party that has not been fully adjudicated.

Because this court is without jurisdiction, the appeal is dismissed.

Appeal dismissed.