UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2920
Summary Calendar

CROSSLAND SAVINGS, FSB,
Plaintiff-Appellee,

versus

SAM FENTIE, ET AL.,
Defendants,

SAM FENTIE and EVA JOHNSON,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Texas
(CA-H-88-3675)

June 29, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Sam Fentie and Eva Johnson appeal from the denial of their Fed. R. Civ. P. 60 motion for relief from a summary judgment in favor of Crossland Savings, FSB. We **AFFIRM**.

I.

In October 1988, Crossland sued Fentie and Johnson, as well as Charter Bank/Westheimer, AME Oil and Gas, Inc., and Prudential Bache Securities, Inc., to collect promissory notes. In June 1990,

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[1] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.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 district court granted Crossland summary judgment against Fentie and Johnson. That same day, on motion by Crossland, it entered an order dismissing Prudential and AME without prejudice.

Fentie and Johnson's appeal was dismissed in December 1990, on the ground that the judgment was not final, because the record did not reflect either disposition of Crossland's claims against Charter Bank/Westheimer or Fed. R. Civ. P. 54(b) certification. After remand to the district court, Crossland moved to dismiss its claims against Charter; and in February 1991, an order of dismissal was entered.

The docket sheet reflects no further activity in the case until March 1992, when the court entered an order directing the parties to appear for a conference on April 9. The district court's opinion dated April 10 reflects that, during the conference, the court and counsel discussed the December 1990 dismissal of the appeal. The district judge stated that Charter had filed a motion to dismiss on February 20, 1990, which was orally granted six days later; however, no formal order was signed until January 28, 1991. Accordingly, the court stated that the May 1990 summary judgment[2] against Fentie and Johnson did not become final until the formal order of dismissal was signed on January 28, 1991.[3] The opinion reflects that counsel for Fentie and Johnson

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[2] Although the summary judgment was signed on May 30, it was not entered on the docket until June 7, 1990.

[3] Although the order was signed on January 28, it was not entered until February 1, 1991. Finality, for the purposes of the time for filing a notice of appeal, is based on the date of *entry* of the judgment or order appealed from, not on the date it was

informed the court that he had not received a copy of the order of dismissal; however, the court stated that, "[e]ven though Mr. Adams failed to receive a copy of the Order of Dismissal, this Court must conclude that this matter is closed."

Over four months later, on August 31, Fentie and Johnson moved for relief from the summary judgment, relying on Fed. R. Civ. P. 60(a) and (b). The district court denied their motion on October 7, and they filed a notice of appeal on November 4.

II.

The appellants contend that the district court erred by denying their motion for relief, because their counsel did not receive notice from the court clerk of entry of the order dismissing Charter, and did not learn that the summary judgment was final and appealable until April 1992, long after the time for filing a notice of appeal had expired. Crossland asserts that the district court correctly denied relief, because the appellants' Rule 60 motion was untimely.[4]

We review the denial of a motion for Rule 60 relief only for abuse of discretion. *E.g.*, ***Matter of Jones***, 970 F.2d 36, 37-38 (5th Cir. 1992). "It is not enough that the granting of relief might have been permissible, or even warranted--denial must have

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signed. Fed. R. App. P. 4(a)(1).

[4] Crossland asserts that we have no jurisdiction because this is an appeal from the summary judgment which became final when the order dismissing Charter was entered on February 1, 1991. This assertion is incorrect. Fentie and Johnson are appealing instead from the denial of their Rule 60 motion, and their notice of appeal was timely. We have jurisdiction to review the denial of Rule 60 relief.

been so unwarranted as to constitute an abuse of discretion." ***Id***. (quoting ***Crutcher v. Aetna Life Ins. Co.***, 746 F.2d 1076, 1082 (5th Cir. 1984)).

Johnson and Fentie sought relief from the summary judgment on the basis of three of the grounds enumerated in Rule 60: subparts (a), (b)(1), and (b)(2). Rule 60(a) provides:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party....

Rule 60(b) provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial....

Motions under Rule 60(b) "shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken." Fed. R. Civ. P. 60(b). Inasmuch as the Rule 60 motion was not filed until August 1992, more than one year after entry of the final judgment in February 1991, the request for relief under Rule 60(b)(1) and (2) was untimely. Accordingly, the district court did not abuse its discretion by denying relief on those grounds.

Although motions for relief under Rule 60(a) may be filed "at any time", the granting of such relief does not extend the time for filing a notice of appeal. "The entry of [an] order correcting a mistake in the judgment pursuant to Rule 60(a) [does] not start the

time for appeal running again." ***Lieberman v. Gulf Oil Corp.***, 315 F.2d 403, 404 (2d Cir.), *cert. denied*, 375 U.S. 823 (1963); *see also* ***Scola v. Boat Frances R., Inc.***, 618 F.2d 147, 152 n.1 (1st Cir. 1980) (Rule 60(a) "deals with mechanical corrections that do not alter the operative significance of the judgment, that could not affect a party's interest in taking an appeal, and that, therefore, can reasonably be made at any time."). *Accord* ***International Controls Corp. v. Vesco***, 556 F.2d 665, 670 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978). The relief sought under Rule 60(a) is, in effect, a request for re-entry of the final judgment so that a notice of appeal from it may be timely filed. The motion is premised upon counsel's failure to receive notice of entry of the final judgment in 1991, apparently because the clerk mailed it to an incorrect address. Correction of that error, by vacating and re-entering the final judgment, would be meaningless, because it would have no effect on the time for filing a notice of appeal, which has long since expired.

Moreover, the relief sought would circumvent Fed. R. Civ. P. 77(d). *See* ***Faysound Ltd. v. Falcon Jet Corp.***, 940 F.2d 339, 344-45 (8th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1175 (1992). Rule 77(d) requires the clerk to notify parties of the entry of an order or judgment. But, "[l]ack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal

Rules of Appellate Procedure." ***Id***. Rule 4(a) provides, in relevant part:

> The district court, if it finds (a) that a party entitled to notice of entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

Fed. R. App. 4(a)(6).[5]

The final judgment was entered on February 1, 1991. In their reply to Crossland's response to the Rule 60 motion, the appellants stated that they first received notice of entry of the final judgment on April 18, 1992. Rule 4(a)(6) provides that a motion to reopen the time for appeal must be filed either (1) within 180 days of entry of the judgment, or (2) within 7 days of receipt of notice of such entry, *whichever is earlier*. Fed. R. Civ. P. 77(d) (emphasis added). Accordingly, the appellants had 180 days after February 1, 1991 within which to file a motion, but did not do so until August 1992. Because the relief sought by the appellants

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[5] The last phrase of Rule 77(d), referring to Fed. R. App. P. 4(a), was added in an amendment effective December 1, 1991. Rule 4(a) was also amended, effective December 1, 1991, to add subdivision (6), quoted in the text. The amended versions of both rules are applicable to pending cases "insofar as just and practicable". ***Matter of Jones***, 970 F.2d at 38. Although the final judgment in this case was entered before the effective date of the amendments, the appellants filed their Rule 60 motion in August 1992, and the notice of appeal which commenced the instant appellate case was also filed after the effective date of the amendments. It is neither unjust nor impracticable to apply the amended versions of these rules in this case, because, as in ***Jones***, the appellants cannot prevail under either the old or the new versions. ***Id***.

would have circumvented the requirements of Fed. R. Civ. P. 77(d) and Fed. R. App. P. 4(a)(6), the district court did not abuse its discretion in denying relief under Fed. R. Civ. P. 60(a).

III.

For the foregoing reasons, the order denying the appellants' Rule 60 motion is

AFFIRMED.