IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7078
Summary Calendar

DANIEL LEE,

Plaintiff-Appellant,

VERSUS

PAN AMERICAN UNIVERSITY, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
CA M 88 028

June 17, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Daniel Lee appeals an adverse directed verdict. Finding that we have no jurisdiction, we dismiss the appeal.

Lee sued Pan American University and several of its officials ("Pan American"), alleging at least two causes of action. At the conclusion of Lee's evidence, Pan American moved for a directed verdict, encompassing all of Lee's causes of action against it. On

[*] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

January 23, 1992, Lee filed a notice of appeal.[1] On February 12, the district court entered a final judgment that included the following sentence:

> Defendants['] motion for directed verdict, regarding Plaintiff's due process claims directed against Defendants, George McLemore, Phillip Field and Susan Hancock, is well taken and it is the order of this court to grant in part Defendants['] motion for directed verdict as to Defendants McLemore, Field and Hancock.

On February 21, explicitly pursuant to Fed. R. Civ. P. 59(e), Lee served a motion to alter final judgment on Pan American's attorney.[2] Lee then filed a second notice of appeal on March 13. His motion to alter final judgment asserts that the judgment granted a directed verdict to Pan American only as to its due process claims but failed to direct a verdict as to his cause of action regarding a recommendation to terminate him. Lee requested that the court amend its judgment to encompass both sets of claims.

The district court has not ruled on the motion to amend. Pan American argues that we may take jurisdiction of the appeal since the error Lee's motion seeks to correct is simply a clerical one. We disagree.

An examination of the final judgment shows that the district court granted only Pan American's "motion for directed verdict, regarding Plaintiff's due process claims . . . ." The final

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[1] This notice of appeal was premature because the district court had entered neither an announcement of a decision nor a formal final judgment. See Fed. R. App. P. 4(a)(1).

[2] Rule 59(e) reads, "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." Pan American's attorneys state that they are unable to confirm that they were served with this motion but "will assume that they were."

judgment did not specifically resolve Lee's claim concerning the recommendation to discharge him. While we noted in Harcon Barge Co., Inc. v. D & G Boat Rentals, 784 F.2d 665, 668 (5th Cir.) (en banc), cert. denied, 479 U.S. 930 (1986), that "a motion seeking to correct purely clerical errors and mistakes is a Rule 60(a) motion and therefore does not void a previously filed notice of appeal under Fed. R. App. Pro. 4(a)(4)," we determined that a timely motion falling within the scope of rule 59(e), regardless of how it is styled, shall be considered as a rule 59(e) motion for the purposes of rule 4(a)(4).

We do not find that Lee's motion to amend the final judgment seeks to correct a purely clerical error. Rather, it is a proper rule 59(e) motion, filed as such. The final judgment directed a verdict for Pan American on only one of Lee's claims but not the other. This is not simply a clerical error but a substantive failure to rule on part of Pan American's motion for a directed verdict.

Rule 4(a)(4) provides in relevant part,

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party . . . under Rule 59 to alter or amend the judgment . . . the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. . . .

In Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61 (1982) (per curiam), the Court, stressing the plain language of rule 4(a)(4), held that "a subsequent notice of appeal is . . .

ineffective if it is filed while a timely Rule 59 motion is still pending." The notice of appeal becomes a "nullity." Id.

Since Lee's March 13 notice of appeal was filed while his motion to alter final judgment was still pending, the notice of appeal has no effect. Because it is as if no notice of appeal was filed, we lack jurisdiction. The appeal, accordingly, is DISMISSED.