

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-2525

(Summary Calendar)

JOE J. HERNANDEZ,

Plaintiff-Appellee,

versus

BRAZORIA COUNTY, TEXAS, ET AL.,

Defendants,

E.J. KING, Sheriff, Individually and in his
official capacity as Sheriff of Brazoria County,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-92-1645)

(April 26, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

In this civil rights action under 42 U.S.C. § 1983, Sheriff E. J. King moved for dismissal and summary judgment, arguing that he was entitled to qualified immunity. The district court denied

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

King's motions as untimely filed, and also denied King's motion to reconsider. We dismiss King's interlocutory appeal for want of jurisdiction. We also hold that King is not entitled to mandamus relief.

I

Joe J. Hernandez commenced this action against Brazoria County, its Sheriff's Department, and Sheriff E. J. King, in both his individual and official capacities. Hernandez alleged that one of King's deputies entered his home without a warrant, arrested him for no reason, used excessive force in effectuating the arrest, and transported him to a remote area, where a number of deputies severely beat him. Hernandez asserted claims under 42 U.S.C. §§ 1983, 1985, and pendent state law causes of action.

The district court entered a scheduling order which provided that all dispositive motions were "due by" May 3. Thereafter, King filed his motions to dismiss and for summary judgment, alleging qualified immunity. The certificates of service on both motions recite that they were forwarded to opposing counsel on May 3. The docket sheet indicates that the motions were filed with the court on May 5, 1993. Hernandez moved for denial of the motions as untimely, since they were filed after the May 3 deadline specified in the district court's scheduling order.

The district court denied King's motions as untimely and struck them from the record.¹ The district court "exercise[d] its

¹ The district court did not rule on the merits of King's claim of qualified immunity. The order stated:

discretion to decide th[e] issue [of qualified immunity] along with other dispositive issues during the trial of the case." King moved for reconsideration, arguing that under Fed. R. Civ. P. 5(d) the motions were timely because they were served on opposing counsel by the May 3 deadline and filed within a reasonable time thereafter. King moved in the alternative for an extension of the May 3 deadline under Fed. R. Civ. P. 6(b), on the grounds that (1) King's counsel had believed in good faith that the district court's May 3 deadline required service on opposing parties; (2) the declining health of counsel's grandmother had occupied counsel both physically and emotionally prior to May 3; and (3) prior to May 3 counsel had been occupied with litigation of ten other civil cases. The district court denied King's motion for reconsideration and for extension of the May 3 deadline.

King appeals, arguing that the district court erred by (1) denying his dispositive motions as untimely filed; (2) denying his motion for reconsideration or for extension of the May 3 deadline; (3) carrying the issue of qualified immunity with the case, to be decided at trial; and (4) denying his motions raising qualified immunity, even though the plaintiff did not "pierce"

On May 5, 1993, after the dispositive motion deadline of May 3, 1993, and more than 6 months after the order setting this case for trial in July 1993, the defendant, without permission of the Court filed an untimely dispositive motion. The motions are DENIED as [violative] of the Civil Justice Reform Act and the Plan that has been implemented for resolution of these disputes. . . . The defendant's motion is DENIED and the motions are STRICKEN as untimely filed.

King's qualified immunity. King cites *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), as the basis for appellate jurisdiction.

II

A

"This Court must examine the basis of its jurisdiction, on its own motion, if necessary." *Mosely v. Cozby*, 813 F.2d 659, 660 (5th Cir. 1987). Under *Mitchell v. Forsyth*, upon which King relies, "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291, notwithstanding the absence of a final judgment." *Mitchell*, 472 U.S. at 530, 105 S.Ct. at 2817. Moreover, "a district court's refusal to rule on a claim of immunity . . . is also immediately appealable under the collateral order doctrine." *Helton v. Clements*, 787 F.2d 1016, 1017 (5th Cir. 1986) (citing *Mitchell*).

However, where the district court refuses to rule on a claim of immunity because it has not been timely presented to the court, *Mitchell* does not provide for appellate jurisdiction. See *Edwards v. Cass County*, 919 F.2d 273 (5th Cir. 1990). In *Edwards*, the district court denied the defendants leave to file an out-of-time motion for summary judgment, and consequently did not rule on the issue of qualified immunity. See *id.* at 274. The defendants appealed, arguing that *Mitchell* provided for appellate jurisdiction. See *id.* We rejected that argument, stating that "the rationale of *Mitchell* makes sense only where the district

court has acted to deny qualified immunity or has the obligation to decide the issue and has failed or refused to do so." *Id.* at 275. We held that the district court's denial of leave to file an out-of-time motion for summary judgment was not appealable because "[t]o hold otherwise would be to open the floodgates to appeals by defendants seeking delay by asserting qualified immunity at the last minute." *Id.* at 276. "*Mitchell* is not designed as an automatic exemption from the orderly processes of docket control." *Id.*

This case is controlled by *Edwards*. As in *Edwards*, the district court did not rule on King's claim of qualified immunity))the order reflects that King's dispositive motions were denied as untimely, and not on their merits. As in *Edwards* King contends that the district court abused its discretion, by failing to rule on his motions because they were untimely. Under *Edwards* we lack jurisdiction over this appeal.

B

In *Edwards* we treated the notice of appeal as a petition for a writ of mandamus. *See id.* King is not entitled to mandamus relief, because the district court did not abuse its discretion by denying King's motions as untimely and declining to decide the merits of King's qualified immunity claim. *See id.* at 275-76 ("The district court has broad discretion in controlling its own docket. . . . [I]n the rare circumstance in which a district court has abused its discretion in disallowing a summary judgment on the eve of trial, . . . the defendant can . . . file a petition for writ of

mandamus.").

King contends that the district court abused its discretion, because his motions were timely. King points out that his motions were served on opposing counsel by the May 3 deadline, and argues that "the relevant date for timeliness is the date of service on opposing counsel." King further contends that his motions were timely filed under Fed. R. Civ. P. 5(d), which provides that "[a]ll papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service." King argues that his motions were filed within a reasonable time))two days))after service.

King's argument fails because neither the record, nor any authority which he cites, supports his assertion that the relevant date for timeliness of his motions was the date of service on opposing counsel. The district court's scheduling order does not state that dispositive motions were required to be served on opposing counsel by May 3. It merely states that dispositive motions were "due by" that date. Furthermore, the district court apparently did not regard the May 3 deadline as one which could be satisfied by service on opposing counsel: the district court denied the motions as untimely, even though the certificate of service was dated May 3, and denied King's motion to reconsider, in which King urged that the motions were timely because served on opposing counsel by May 3.

King broadly asserts that "[w]ith a few exceptions not here

pertinent, the relevant date for timeliness is the date of service on opposing counsel," but King fails to explain how that proposition affects the district court's ruling. King does not expressly contend that the district court's May 3 deadline referred to service on opposing counsel. As we have already explained, the record does not support such an assertion.

To the extent King means to argue that the district court was without authority to premise the timeliness of dispositive motions on filing, rather than on service, King is incorrect. None of the cases cited by King requires a district court, when entering a scheduling order, to premise timeliness of motions on service.² Neither do the Federal Rules of Civil Procedure include such a requirement. As King points out, Fed. R. Civ. P. 5(d) requires that filing be completed "within a reasonable time after service."

² The cases King cites are distinguishable. See *Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.*, 746 F.2d 278, 289 (5th Cir. 1984) (where motion was timely because served within ten days of entry of judgment, as expressly required by Fed. R. Civ. P. 59(e)), *on rehearing en banc*, 784 F.2d 665, and *cert. denied*, 479 U.S. 930, 107 S. Ct. 398, 93 L. Ed. 2d 351 (1986); *Allen v. Ault*, 564 F.2d 1198, 1199 (5th Cir. 1977) (where motion was timely because served within ten days of judgment, as prescribed by Fed. R. Civ. P. 59(b)); *Sadowski v. Bombardier, Ltd.*, 527 F.2d 1132, 1134-35 (7th Cir. 1975) (motion timely under Rule 59(b)); *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Kurtenbach*, 525 F.2d 1179, 1180 n.1 (8th Cir. 1975) (motion timely under Rule 59(e)); *Dorfmeier Co. v. M.J. Sales & Distrib. Co.*, 461 F.2d 40 (7th Cir. 1972) (reversing denial of motion to vacate default judgment because "philosophy of modern federal procedure favors trials on the merits"); *Claybrook Drilling Co. v. Divanco, Inc.*, 336 F.2d 697, 700 (10th Cir. 1964) (motion timely under Rule 59(b)); *Keohane v. Swarco, Inc.*, 320 F.2d 429, 431 (6th Cir. 1963) (construing Fed. R. Civ. P. 52(b), which required that motions be "made" within ten days of entry of judgment); *Davis v. Parkhill-Goodloe Co., Inc.*, 302 F.2d 489, 495 (5th Cir. 1962) (holding that district court had power to allow late filing of answer).

However, Rule 5(d) does not preclude a district court from including a filing deadline for motions in a scheduling order. See *id.* Fed. R. Civ. P. 16(b) provides that the district court "shall . . . enter a scheduling order that limits the time . . . to file motions," and the Civil Justice Reform Act recommends "setting . . . deadlines for filing motions" as a means of avoiding expense and delay in civil litigation. See 28 U.S.C. § 473 (1988).

Neither the record nor any authority cited by King supports his argument that his motions were timely because served on opposing counsel by the May 3 deadline. Consequently, we are not persuaded that the district court abused its discretion by denying King's motions as untimely filed.

King also contends, however, that the district court abused its discretion by denying his motion for reconsideration, or in the alternative for an extension of the May 3 deadline under Fed. R. Civ. P. 6(b).³ See *Farias v. Bexar County Bd. of Trustees for Mental Health Mental Retardation Serv.*, 925 F.2d 866, 873 (5th Cir.) (reviewing denial of motion for enlargement of time under

³ Rule 6(b) provides:

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect

Fed. R. Civ. P. 6(b).

Fed. R. Civ. P. 6(b) for abuse of discretion), *cert. denied*, ___ U.S. ___, 112 S. Ct. 193, 116 L. Ed. 2d 153 (1991); *Slaughter v. Southern Talc Co.*, 919 F.2d 304, 307-08 (5th Cir. 1990) (same). King argued that he was entitled to an extension because (1) his counsel had believed in good faith that the district court's May 3 deadline was the deadline for service on opposing counsel; (2) the declining health of counsel's grandmother had occupied counsel both physically and emotionally prior to May 3; and (3) prior to May 3 counsel had been occupied with litigation of ten other civil cases. We find no abuse of discretion.

King had over six months from the date the district court entered its pretrial scheduling order to prepare his motions. Any confusion or uncertainty as to what the court meant by the phrase "due by" could have been resolved by counsel within that period, well in advance of the deadline. Furthermore, the weight to be given counsel's personal and professional hardships is a matter within the discretion of the district court, and one which the district court is best equipped to decide. We are not persuaded that the district court abused its discretion by denying King's motion for reconsideration, or alternatively for an extension of the deadline. Consequently, mandamus relief would be inappropriate.

III

For the foregoing reasons, we **DISMISS** King's appeal.