IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7595
Summary Calendar

LEO SCANLON, M.D.,

Plaintiff-Appellant,

VERSUS

MISSISSIPPI STATE DEPARTMENT
OF MENTAL HEALTH, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
(J92-0710(L)(N))

(April 5, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Leo Scanlon appeals the district court's denial of his second motion to alter or amend judgment under FED. R. CIV. P. 59(e). Because that motion was successive, it did not toll the running of the thirty-day time for appeal under FED. R. APP. P. 4(a)(4).

---

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 Pursuant to that rule, the court has determined that this opinion should not be published.

Therefore, the notice of appeal was untimely, and the appeal must be dismissed.

I.

The district court dismissed Scanlon's federal claims, and final judgment was entered on July 2, 1993. Scanlon moved under rule 59(e) to alter judgment to clarify that his state claims were dismissed without prejudice. Upon closer examination of the complaint, the district court discovered that Scanlon had not pled any state law claims. Accordingly, the court issued an order on August 9, 1993, denying Scanlon's motion.

On August 23, 1993, Scanlon again moved to alter judgment, asking the court to reconsider its prior conclusion that no state law claims were pled. In the alternative, Scanlon asked the court to vacate its judgment to allow him to amend his complaint to allege a state law claim, and enter judgment dismissing that claim without prejudice. That motion was denied on September 22, 1993.

On September 23, 1993, Scanlon filed a notice of appeal of the order dismissing his suit, the final judgment, and both denials of his rule 59(e) motions. In a December 9, 1993, order, a motions panel of this court dismissed Scanlon's appeal for lack of appellate jurisdiction, except as to his second rule 59(e) motion.

II.

Since a motions panel decision is not binding precedent, Northshore Dev., Inc. v. Lee, 835 F.2d 580, 583 (5th Cir. 1988), we

may properly review the final judgment and the denial of the first 59(e) motion if the notice of appeal was timely as to these orders. As we have said in Brown v. United Ins. Co. of Am., 807 F.2d 1239, 1242 (5th Cir. 1987) (per curiam) (emphasis and footnotes omitted),

> A motion to alter or amend a judgment under Rule 59(e) that is served not later than 10 days after entry of judgment destroys the finality of the judgment for purposes of appeal. If the motion is denied, the finality of the judgment is reestablished; and the policy underlying finality precludes the court from entertaining a motion to reconsider that denial, where the reconsideration motion is served later than 10 days after entry of [the original] judgment.

Scanlon claims, however, that the first motion to alter judgment was not, in fact, denied because the district court noted for the first time that no state law claims were pled. This alteration in the judgment by the August 9, 1993, order effectively allowed Scanlon to file a successive rule 59(e) motion to alter or amend that order.

We cannot agree with this interpretation of the August 9 order. Where a district court denies the motion to alter judgment, but amends its judgment to rest upon only one of the two grounds relied upon in the original judgment, the filing of a second motion to alter judgment does not toll the time for appeal. Dixie Sand & Gravel Co. v. Tennessee Valley Auth., 631 F.2d 73, 75 (5th Cir. 1980); see also Harrell v. Dixon Bay Transp. Co., 718 F.2d 123, 128 n.4 (5th Cir. 1983) ("In Dixie Sand the `amendment' of the judgment made no change in what the judgment did)) the original summary judgment denied plaintiff all relief, and so also did the amended judgment.").

There is no tolling where an order denies timely postjudgment motions under rule 59(e) and leaves the original judgment in effect and unchanged. Brown, 807 F.2d at 1242. Moreover, where the court specifically denies the motion to alter judgment but explains that an alternative analysis supports the identical judgment, the district court cannot be said to have granted the motion to reconsider or effectively to have amended the judgment. Charles L.M. v. Northeast Indep. Sch. Dist., 884 F.2d 869, 871 (5th Cir. 1989).

In the case sub judice, the district court's August 9 order denying Scanlon's rule 59(e) motion did not amend the judgment. The August 9 order made no change in what the judgment did: All claims of the plaintiff were dismissed. As a result, the second motion was a successive motion to alter judgment, condemned by well-established authority in this and other circuits. As the filing of the second motion did not toll the running of the thirty-day time for appeal, the notice of appeal was untimely, and we are without jurisdiction. Thus, the appeal is DISMISSED.