

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-2158

U.S.C.A.—7th Circuit
RECEIVED
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GINO J. AGNELLO
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DOROTHY GAUTREAUX, et al.	)	
	)	
Plaintiffs,	)	Appeal from the United
	)	States District Court for the
v.	)	Northern District of Illinois,
	)	Eastern Division
CHICAGO HOUSING AUTHORITY,	)	
a corporation, and PHILIP JACKSON,	)	No. 66 C 1459
Executive Director, in his official	)	
capacity.	)	Chief Judge Marvin E. Aspen
	)	
Defendants.	)	

**RECEIVER'S RESPONSE TO LAKEFRONT COMMUNITY
ORGANIZATION'S MOTION TO EXTEND TIME FOR
RESPONDING TO THE RECEIVER'S MOTION TO DISMISS APPEAL**

Daniel E. Levin and The Habitat Company, the Court-appointed Receiver for the Chicago Housing Authority's new, non-elderly public housing development ("Receiver"), respectfully submit the following response to the Motion to Extend Time filed by the Lakefront Community Organization ("LCO") on June 7, 1999 ("Motion to Extend") in response to the Motion to Dismiss the appeal filed by the Receiver on June 1, 1999.

The Motion to Extend is premised on the fact that LCO filed a post-judgment motion in the District Court on May 20, 1999, and that motion, according to LCO, "suspended" this appeal "until the District Court rules on the post-judgment motion." Motion to Extend at 1. This legal premise is incorrect under Fed. R. App. P. 4 and this Court's precedents. In addition, this appeal should ultimately be dismissed regardless of the District Court's ruling on the May 20 LCO motion.

The relevant chronology is set forth in the Receiver's Docketing Statement and its Motion to Dismiss. In sum:

- December 10, 1998. District Court denies LCO's first motion to intervene.
- January 11, 1999. LCO fails to appeal from December 10 order, and time to appeal expires.
- February 12, 1999. LCO files second motion to intervene, which is substantially equivalent to first motion.
- April 7, 1999. District Court denies LCO's second motion to intervene.
- April 29, 1999. LCO files a motion for "clarification" of the April 7, 1999 order. Though purporting to be brought alternatively under Fed. R. Civ. P. 59(e) or 60(b), the motion is untimely under the ten-day requirement of Rule 59(e).
- May 6, 1999. District Court "grants" LCO's motion for clarification by stating reasons for its April 7, 1999 Order.^{1/}
- May 10, 1999. LCO files a timely Notice of Appeal from the April 7 Order.
- May 20, 1999. LCO files a "Rule 59(e)" motion with respect to the May 6, 1999 Order.
- June 1, 1999. The Receiver files in this Court its Docketing Statement and Motion to Dismiss.

^{1/} That Order noted that the contract that LCO claims gives it the right to sue the Receiver via intervention was not signed by the Receiver, but was executed by CHA without authority. Motion to Extend, Ex.C at 2. The Order relied on an earlier, August 12, 1998 Order, in which Chief Judge Aspen ruled that the CHA had no unilateral authority to negotiate or execute contracts respecting development of new, non-elderly public housing.

The CHA's appeal of the August 12, 1998 Order was recently dismissed by this Court for lack of jurisdiction. Gautreaux v. CHA, Nos. 98-1807, 98-2311 & 98-3145, Slip Op. at 13 (7th Cir. May 29, 1999). Though its holding that the August 12 Order was not appealable was jurisdictional, this Court based its jurisdictional ruling on the finding that the August 12 Order did "nothing more than reassert the [district] court's prior orders," which plainly vested authority in the Receiver to negotiate and enter into agreements regarding public housing development by CHA. Id. Those prior orders are as applicable to the contract on which LCO relies as they were to the contract at issue in the recent appeal.

Two legal consequences flow from this chronology. One (as discussed in the Receiver's Motion to Dismiss) is that this appeal should be dismissed under B.H. by Pierce v. Murphy, 984 F.2d 196, 199 (7th Cir. 1993), as an untimely attempt to revive appeal rights that expired with LCO's failure to appeal the December 10, 1998 Order within 30 days. Dismissal is warranted regardless of how the District Court disposes of the pending "Rule 59(e)" Motion. If the District Court denies the motion, B.H. requires dismissal of the pending appeal and any subsequent appeal concerning the intervention issue, whether the appeal is from the order denying the "Rule 59(e)" motion or otherwise. If the District Court were to grant the Rule 59(e) motion, thereby permitting LCO to intervene (which seems unlikely given two previous orders denying intervention), then this appeal would be moot. Either way, the appeal would ultimately have to be dismissed. Thus, it is not necessary that the briefing or disposition of the pending Motion to Dismiss hinge upon or wait for the Court's ruling below.

The second consequence of the above chronology is that the pending May 20, 1999 "Rule 59(e)" motion did not "suspend" the time for appealing the April 7, 1999 Order denying intervention. Only a timely Rule 59(e) motion suspends the time for appeal. Fed. R. App. P. 4(a)(4)(A)(iv). The May 20 motion was clearly too late under Rule 59(e) to alter the April 7, 1999 Order directly or to suspend the time for appeal of that Order. And LCO's earlier, April 29, 1999 "clarification" motion, was also brought too late under Rule 59(e), and was accordingly a Rule 60(b) motion that did not toll the time for appealing the April 7 Order.^{2/} See, e.g., Mares v. Busby, 34 F.3d 533, 535 (7th Cir. 1994) (motions to reconsider filed more than ten days after final order are treated under

^{2/} Since the April 7 Order was docketed on April 9, a Rule 59(e) motion had to be filed no later than April 23 to be timely. See Fed. R. Civ. P. 59(e) (must file within 10 days); Fed. R. Civ. P. 6(a) (to count 10 days, exclude intermediate weekend days and holidays from the count).

Rule 60(b)).^{3/} At most, the pending “Rule 59(e)” motion suspends the time for appealing the May 6 clarification order, which itself disposed of what must be deemed a Rule 60(b) motion.

Because of LCO’s history of untimeliness, Charles v. Daley, 799 F.2d 343 (7th Cir. 1986), cited in Motion to Extend at 3, does not support LCO’s argument that the time to appeal the April 7 Order has been suspended. The first of the successive Rule 59(e) motions in Charles was timely, 799 F.2d at 344; in contrast, LCO’s April 29 motion was not timely with respect to the April 7 Order, and its second intervention motion, filed on February 12, was itself an untimely effort to seek reconsideration of the December 10 denial of the first intervention motion. Moreover, there was a substantive alteration of the judgment in Charles, which had the effect of triggering the right to bring a new Rule 59(e) motion within ten days, 799 F.2d at 348. This substantive alteration warranted an exception to the normal rule that successive, timely Rule 59(e) motions do not suspend the finality of a judgment. Id. at 347. Here, in contrast, the District Court’s “clarification” of May 6 simply stated reasons for the April 7 Order, leaving that order intact and substantively unchanged. Merely adding reasons for the original denial is not resolution of “a genuine ambiguity” under Charles. 799 F.2d at 348.

In light of the foregoing, the Court should treat the pending appeal of the April 7 Order as “unsuspended,” and it should decide the Receiver’s Motion to Dismiss once LCO files a response. The Receiver has no objection to delaying LCO’s response until after the District Court decides the

^{3/} The alleged fact that LCO’s counsel did not receive notice of the April 7 Order until April 28, Motion to Extend at 2 ¶6, is of no legal consequence. The time periods of Rule 59(e) cannot be extended, and counsel’s failure to receive notice of an appealable order, whether excusable or not, does not render the motion timely under that Rule. See Marane, Inc. v. McDonald’s Corp., 755 F.2d 106, 111 (7th Cir. 1985).

pending "Rule 59(e) Motion," but such a delay is not required by the Rules or this Court's precedents.

Respectfully submitted;

Date: June 9, 1998

A handwritten signature in cursive script, reading "Edward W. Feldman".

One of the Counsel for Daniel E. Levin and
The Habitat Company, as Receiver Pursuant
to the Court's Order of August 14, 1987

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on June 9, 1999 he served copies of the *Receiver's Response to Lakefront Community Organization's Motion to Extend Time for Responding to the Receiver's Motion to Dismiss Appeal* on the parties listed below by causing true and correct copies thereof to be delivered to them via messenger delivery at their respective addresses.

Dated: June 9, 1999

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