

DA 18-0349

IN THE SUPREME COURT OF THE STATE OF MONTANA

DANIEL K. O'CONNELL & VALERY A. O'CONNELL,
Plaintiffs/Appellants,

v.

GLASTONBURY LANDOWNERS ASSOCIATION, INC., AND
GLASTONBURY LANDOWNERS ASSOCIATION, INC. BOARD OF
DIRECTORS,
Defendants/Appellees.

DEFENDANTS/APPELLEES' MOTION TO DISMISS

On Appeal from the Montana Sixth Judicial District Court,
Park County
Honorable David Cybulski

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COMES NOW the Defendants/Appellees Glastonbury Landowners Association, Inc. (GLA) and moves to dismiss Plaintiffs/Appellants Daniel and Valery O'Connells' (O'Connells) appeal as it is untimely.

FACTUAL BACKGROUND

Plaintiffs/Appellants first filed an appeal in this case on September 13, 2016 appealing a September 8, 2014 Order granting a Motion to Quash Subpoenas, a September 17, 2015 Order granting the GLA's Motion for a Protective Order, and a June 2, 2016 Order granting summary judgment and dismissing the O'Connells' claims against the GLA. The GLA moved to dismiss that appeal as it was premature because the GLA's counterclaim to have the O'Connells declared vexatious litigants had yet to be resolved. This Court dismissed that appeal without prejudice on October 26, 2016 "Because judgment will not be final here until the District Court resolves the counterclaim and enters a final judgment, the O'Connells' notice of appeal is premature. Following the entry of the court's final judgment the O'Connells will have the opportunity to pursue an appeal." See Exhibit A.

The District Court held a hearing on the GLA's Motion for Summary Judgment on its counterclaim on February 7, 2017 which the O'Connells did not attend. The District Court issued Findings of Fact and Conclusions of Law on February 13, 2017 declaring the O'Connells and their children as vexatious litigants. The O'Connells filed Motions against the District Court's Findings under Mont. R.

Civ. P. Rules 52, 56, and 60, and they also tried to disqualify the District Court Judge which this Court denied on March 13, 2017. After resolution of those Motions, the District Court entered a final Judgment in this case on May 8, 2017. See Exhibit B. A Notice of Entry of Judgment was filed and served by the GLA on May 10, 2017. See Exhibit C. The time to appeal this final Judgment expired on June 9, 2017 pursuant to Mont. R. App. P. 4(5)(a)(i).

The O'Connells did not file an appeal of the final Judgment. Instead, the O'Connells filed a Motion under Mont. R. Civ. P. 60 on June 15, 2017. See Exhibit D. The District Court declined to rule on that Rule 60 Motion and so it was deemed denied on August 14, 2017 pursuant to Mont. R. Civ. P. 59(f) and 60(c)(1). The O'Connells then filed another Rule 60 Motion on February 20, 2018 in the names of their three children. See Exhibit E. That Motion was also deemed denied on April 23, 2018. Neither of those Rule 60 Motions were appealed within 30 days of the "deemed denied" date pursuant to Mont. R. App. P. 4(5)(a)(iv)(E).

Now the O'Connells have filed an "Amended Appeal" seeking to appeal the following Orders and Judgment:

- 1) September 9, 2014 Order Granting Defendants Motion to Quash Subpoenas for Depositions.
- 2) September 17, 2015 Order Granting Defendants Motion for Protective Order.

- 3) June 1, 2016 Decisions and Order Granting Defendants Motion for Summary Judgment and Resolving Other Pending Motions (Note: this Order dismissed the O'Connells claims against the GLA leaving only the GLA's counterclaim for vexatious litigation to resolve).
- 4) The "deemed denial" of the O'Connells' July 5, 2016 Rule 52, 59, & Rule 60 Motion in Opposition to Orders Sept. 2014 & 2015 & Orders Granting Summary Judgment Motion.
- 5) February 13, 2017 Findings of Fact, Conclusions of Law and Order on Motion to Have Plaintiffs and Their Children Declared as Vexatious Litigants.
- 6) May 8, 2017 Order Denying Plaintiffs Pending Motions.
- 7) May 8, 2017 Judgment (Note: Plaintiffs erroneously call this the "Notice of Entry of Judgment" but use the date of the "Judgment." Judgment was entered May 8, 2017 and Notice of Entry of Judgment was file May 10, 2017).
- 8) The "deemed denial" of the O'Connells' February 20, 2018 O'Connell Childrens' Rule 60 Motion against all Counterclaim. (Note: The "Notice of Amended Appeal" claims this was filed March 15, 2018, but Exhibit E shows it was filed February 20, 2018).

ARGUMENT

The O'Connells' appeal is untimely. The Notice of Amended Appeal claims that the disposition of all pleadings and motions was not complete until the latest Rule 60 Motion was deemed denied on "May 18, 2018." First, the time to appeal began from the Notice of Entry of Judgment. Second, as the above facts and the attached Exhibits show, the O'Connells' last Rule 60 Motion was deemed denied on April 23, 2018 and not May 18, 2018 as they claim. Finally, Mont. R. App. P. 4(5)(a)(iii)(E) does not apply to extend the premature appeal filed on September 13, 2016.

1. O'Connells failed to timely appeal final judgment.

Final Judgment was entered on May 8, 2017. Notice of Entry of Judgment was sent on May 10, 2017 by the GLA. Under Mont. R. App. 4(5)(a)(i) a notice of appeal must be filed within 30 days of the notice of entry of judgment. The O'Connells did not file an appeal within the allotted time. If they had properly appealed, that would have been the opportunity to contest the Motion to Quash, the Protective Order, the Order granting the GLA summary judgment on all of the O'Connells' claims, the Order declaring the O'Connells vexatious litigants and the final Judgment.

The O'Connells' previous appeal filed on September 13, 2016 was dismissed without prejudice by this Court as premature and stated, "Following the entry of the

court's final judgment the O'Connells will have the opportunity to pursue an appeal." See Exhibit A. Despite this clear instruction, the Judgment, and the Notice of the entry of Judgment, the O'Connells did not file an appeal within 30 days which expired June 9, 2017. Clearly, this appeal is untimely and should be dismissed. The O'Connells provide no justification for a late appeal or why they waited nearly over a year to appeal the Entry of Judgment.

2. The O'Connells' appeal of their Rule 60 Motions is untimely.

The O'Connells are attempting to appeal three "Rule 60" Motions. The first was dated July 5, 2016 and titled "Plaintiffs' Rule 52, 59, & Rule 60 Motion in Opposition to Orders Sept. 2014 & 2015 & Orders Granting Summary Judgment Motion." That was deemed denied on September 3, 2016. The O'Connells attempted to appeal this deemed denial on September 13, 2016, and as discussed above, this Court dismissed the appeal as premature.

After the Entry of Judgment on May 8, 2017, the O'Connells filed another Motion under Mont. R. Civ. P. 60 on June 15, 2017. It was deemed denied on August 14, 2017, and the time to appeal ran on September 13, 2017. The O'Connells did not file an appeal within that time. Also, the O'Connells did not list that Rule 60 Motion in the list of Orders and Motions they are appealing, but it is notable simply because they were dilatory in filing an appeal on it.

The O'Connells filed a third Rule 60 Motion on February 20, 2018, and it was deemed denied on April 23, 2018. While the GLA does not admit this Rule 60 Motion was timely, the time for appeal ran May 23, 2018 without an appeal from the O'Connells.

Mont. R. App. P. 4(5)(a)(iv)(E) states:

If a timely motion pursuant to the Montana Rules of Civil Procedure is filed in the district court by any party:

(E) Under rule 60(b) for relief from a judgment or order, the time for appeal for all parties shall run from the entry of the order granting or denying any such motion or, if applicable, from the time such motion is deemed denied at the expiration of the 60-day period established by M. R. Civ. P. 59(f). No notice of entry of judgment or order is required when any of the foregoing motions are granted, denied, or deemed denied. A notice of appeal filed before the disposition of any of the above motions, whether by entry of an order or by deemed denial, shall be treated as filed on the date of such entry or deemed denial. The district court is not deprived of jurisdiction to enter its order on any such motion by the premature filing of a notice of appeal.

While the GLA has always maintained that the O'Connells' multiple Rule 60 (and various other "rule" Motions) are meritless and simply serve to delay and financially harm the GLA and waste the Court's time, the merits of those Motions need not be addressed. Under the plain language of the above Rule, the O'Connells had 30 days from the "deemed denied" date to file an appeal. They did not do so, and therefore, this "Amended Appeal" should be dismissed.

3. Mont. R. App. P. 4(5)(a)(iv)(E) does not extend the appeal deadlines.

The O'Connells seem to argue Mont. R. App. P. 4(5)(a)(iv)(E) excuses their late appeal. It does not do so. That Rule must be read in conjunction with Mont. R.

App. P. 4(5)(a)(i) which requires an appeal be filed “within 30 days from the date of entry of the judgment or order from which the appeal is taken.” Clearly, Judgment was entered in this case on May 8, 2017. Notice of Entry of Judgment was sent on May 10, 2017. This Rule is a bright line requiring the O’Connells to have appealed by June 10, 2017. They did not do so.

Mont. R. App. P. 4(5)(a)(iv)(E) states in part: “A notice of appeal filed before the disposition of any of the above motions [referring to Rules 59 and 60], whether by entry of an order or by deemed denial, shall be treated as filed on the date of such entry or deemed denial.” Reading this Rule in conjunction with 4(5)(a)(i) shows that a party is still obligated to appeal a final judgment within 30 days, a motion under rule 59 or 60 simply changes the date of an *already pending appeal*. This makes sense because a motion under Mont. R. Civ. P. 50, 52, 59 or 60 could possibly alter an existing judgment and change the issues on appeal. However, there was no pending appeal here because the O’Connells failed to appeal the final Judgment.

The O’Connells’ premature appeal of 2016 was dismissed; it was no longer pending. See Exhibit A. The case was litigated for almost one more year and then final Judgment was entered. The O’Connells did not file a timely appeal of the final Judgment. There was no pending appeal to be stayed by Mont. R. App. P. 4(5)(a)(iv)(E). Further, interpreting that Rule so as to indefinitely extend the time to

file an appeal of a final judgment under Mont. R. App. P. 4(5)(a)(i) by continual Rule 60 motions is illogical and would render that time period and that Rule void.

The O'Connells also claim the disposition of all pleadings and motions was not complete in this case until the claimed March 15, 2018 filing of their last Rule 60 Motion. As seen by Exhibit E, that is not when that Motion was filed. That Motion was filed February 20, 2018, and no amount of creative math can make the O'Connells' June 18, 2018 appeal timely.

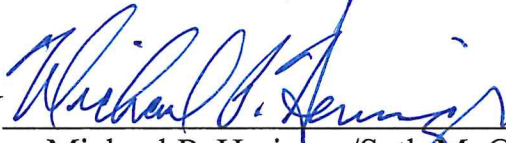
Further, an appeal under Mont. R. App. P. 4(5)(a)(iv)(E) should be limited to only an appeal of the motion the rule addresses, namely a motion under Mont. R. Civ. P. 50, 52, 59 and 60(b). The O'Connells are trying to appeal the entire case, but Mont. R. App. P. 4(5)(a)(iv)(E) is expressly limited to certain motions under the Montana Rules of Civil Procedure for relief or modification of an existing judgment. It does not allow them a do over to appeal issues they let expire. Again, it would be an absurdity to allow this Rule to modify the other time limits on appeal as it would render them moot simply by filing another motion in district court.

Finally, it should be noted that this litigation has been going on since 2011 with hundreds of filings mostly initiated by the O'Connells. This is litigation that needs to end and should not be extended by the O'Connells filing yet another motion or another appeal. They are simply wasting the time and resources of the Court, the

Court's support staff, and the GLA. Therefore, the GLA respectfully requests that the Court dismiss this appeal.

DATED this 6th day of July, 2018.

BROWN LAW FIRM, P.C.

BY 

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Attorneys for Defendants/Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 20 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced and the word count of the text of this Motion is 2011 words as calculated by Microsoft Word.

DATED this 6th day of July, 2018.

BROWN LAW FIRM, P.C.

BY




Michael P. Heringer
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Attorney for Defendants/Appellees

CERTIFICATE OF SERVICE

This does certify that a true and correct copy of the foregoing was duly served on counsel of record by U.S. mail, postage prepaid, and addressed as follows, this 6th day of July, 2018:

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