IN THE UNITED STATES DISTRICT FOR DISTRICT OF KANSAS

RURAL WATER DISTRICT NO. 4 DOUGLAS COUNTY, KANSAS Plaintiff, vs. CITY OF EUDORA, KANSAS, Defendant.	)	Case No. 07-CV-2463-JAR-DJW **JURY TRIAL DEMANDED**

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER AND/OR CLARIFY ORDER ON DEFENDANT'S RULE 50(b) AND RULE 59 MOTIONS AND OBJECTION TO TIMELINESS OF DEFENDANT'S MOTIONS

COMES NOW the Plaintiff Rural Water District No. 4, Douglas County, Kansas (Douglas-4) and in support of Plaintiff's Motion to Reconsider and/or Clarify Order on Defendant's Rule 50(b) and Rule 59 Motions and Objection to the Timeliness of Defendant's Motions submits the following.

This motion is presented due to the concern that the dismissal "without prejudice", might be perceived as granting the City leave to file City's Rule 50(b) and Rule 59 Motions at a later time, essentially because of some uncertainty as to whether the trial Court may raise the timeliness of the City's Rule 50(b) and Rule 59 Motions on its own motion, or whether that issue must be raised by Douglas-4 as an affirmative defense, or is otherwise waived.

Douglas-4's concern lies primarily in how the Court dispensed with the City's recent and untimely Rule 50(b) and Rule 59 Motions. Case authority suggests that such motions can be filed late, and ripen into a timely filed motion if the opposing party does not object and assert the "affirmative defense" that the motion is untimely. *Willaims v. Gonterman*, 313 Fed.Appx. 144, 146, 2009 WL 418630 (10th Cir. 2009), citing *United States v. Garduño*, 506 F.3d 1287, 1290-91 (10th Cir. 2007). It appears Rule 50(b) and Rule 59 Motions, as well as the prohibition for

extending the time for such motions contained within Rule 6(b)(2), may fall under an "inflexible claim-processing rule" category rather than a jurisdictional rule category because these rules do not originate from a statute as does the time limit associated with a notice of appeal. *Kelly v. City of Albuquerque*, 542 F.3d 802, 817 n. 15 (10th Cir. 2008).

Cases have held that when a court extends (or a party seeks extension of) the Rule 50(b) and Rule 59 filing deadline [such extension of time is prohibited by Fed. Rules of Civil Procedure Rule 6(b)(2)] and the opposing party fails to object to the extension of time, the opposing party is deemed to have "forfeited" the timeliness defense and the Rule 50(b) and Rule 59 Motion is deemed timely. *Williams v. Gonterman*, 313 Fed.Appx. 144, 146 (10th Cir. 2009), citing: *U.S. v. Garduño*, 506 F.3d 1287, 1290-91 (10th Cir. 2007); *U.S. v. Mitchell,* 518 F.3d 740, 749 (10th Cir. 2008) and *Eberhart v. United States*, 546 U.S. 1219, 126 S.Ct. 403 (2005). In other words, the opposing party must raise the timeliness defense to a Rule 50(b) and Rule 59 Motion, as the Court may be precluded from raising these affirmative defenses on behalf of the party. See *United States v. Mitchell*, 518 F.3d 740, 749 (10th Cir. 2008), noting that "ours is an adversial system of justice" and "the presumption, therefore, is to hold the parties responsible for raising their own defenses", but discussing the "narrow" circumstances under which the court may sua sponte enforce the time bar of a claims processing rule. Correspondingly, the rule is that if the opposing party does timely object to the late Rule 50(b) or Rule 59 Motion, then it is mandatory that the Court strike/deny/dismiss the Motion:

> In other words, although we must enforce rules that relate to our jurisdiction-irrespective of whether they are invoked by the litigants – when the litigant who would benefit from the operation of an inflexible claims processing rule neglects to assert it in a timely fashion, then, under certain circumstances, the litigant may forfeit any rights it would otherwise have to the rule's enforcement. See e.g. *United States v. Garduño*, 506 F.3d 1287, 1290-91 (10th Cir. 2007) (noting that an inflexible claims

> processing rule, "unlike a jurisdictional rule, may be forfeited if not properly raised", **but that such rules "remain inflexible and 'thus assure relief to a party properly raising them**.'" Quoting *Eberhart*, 546 U.S. at 19, 126 S.Ct. 403)).

Williams v. Gonterman, 313 Fed.Appx. 144, 146, 2009 WL Y18630 (10th Cir.):

> These claim-processing rules thus assure relief to a party properly raising them, but do not compel the same result if the party forfeits them.

Eberhart v. United States, 546 U.S. 12, 19, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005).

The Court here ruled so quickly dismissing the City's Rule 50(b) and alternative Rule 59 Motions, Douglas-4 did not have time to file an objection based on timeliness[1].

The Court's ruling that it lacks jurisdiction would, by implication, mean the City's Rule 50(b) and Rule 59 Motions are untimely. This is true because a timely filed Rule 50(b) or Rule 59 Motion would suspend the effect of the Notice of Appeal on the Trial Court's jurisdiction. See Federal Rules of App. Proc., Rule 4(a)(4) and *Warren v. American Bankers Insurance of Florida*, 507 F.3d 1239, 1245 (10th Cir. 2007). However, Douglas-4 (seeking to avoid any argument that it waived its timeliness objection to said motions) requests the Court to reconsider and clarify its Order specifically finding that because the City failed to file its Rule 50(b) and Rule 59 Motions within the time allowed by Rule 50(b) and Rule 59(b)[2], said Motions are untimely and the notice of appeal has divested the Trial Court with jurisdiction and vested jurisdiction with the Tenth Circuit.

STATEMENT OF RELEVANT FACTS

[1] This Motion (objection to the timeliness of the City's Rule 50(b) and Rule 59 Motion) is timely filed because it is within the time allowed for Douglas-4 to respond to the City's Motion, and because it is filed before the Court has ruled on the merits of the City's Motion. *Dill v. American Life Insurance*, 525 F.3d 612 (8th Cir. 2008).

[2] Rule 50(b) and Rule 59(b) required Rule 50(b) and Rule 59 Motions to be filed within 10 days of entry of judgment until they were amended effective December 1, 2009, to extending the time to 28 days.

1. This case involves Douglas-4's claims that it has 7 U.S.C. § 1926(b) [§ 1926(b)] protection to certain properties in or near its territory, i.e., the Garber, Hospital, LLC and Grinnell properties within its state geographical boundaries and the Church Property, located outside Douglas-4's Territory. Douglas-4 sought a declaratory judgment of the parties rights in relation to these properties, as well as monetary and injunctive relief under 42 U.S.C. § 1983.

2. The District Court dismissed Douglas-4's claims relating to the Church Property, holding Douglas-4 did not have the legal right to serve that property because it was outside "Douglas-4's Territory".

3. Douglas-4's claims relating to the remaining four properties proceeded to a jury trial, wherein the jury returned a verdict in favor of Douglas-4 on all four properties.

4. On May 28, 2009, the Court Clerk entered the Jury Verdict of record pursuant to Rule 58. (Doc. 390)

5. On September 2, 2009, the District Court entered an injunction, precluding the City from serving or otherwise limiting or curtailing the service of Douglas-4 to the four properties. Doc. No. 409.

6. On September 30, 2009, the City filed its Notice of Appeal, asserting the September 2, 2009 Order was a final appealable judgment.

7. The City filed no Rule 50(b) or Rule 59 Motion within 10 days of the September 2, 2009 Order (final judgment), as required by Rule 50(b) and Rule 59(b). See Footnote 2.

8. Even if the September 2, 2009 Order does not constitute a "separate document" under Rule 58, the May 28, 2009 entry of the jury verdict and the September 2, 2009 Order resolved all claims against all parties and became final on January 31, 2010, pursuant to and in accordance with Rule 58(c)(2)(B), the "150 day rule".

9. The City did not file a Rule 50(b) or Rule 59 Motion within 28 days of the running of the "150 day rule", i.e., did not file such motions within 28 days of when the judgment became final under the "150 day rule" established by 58(c)(2)(B). See Footnote 2.

10. On August 31, 2010, the Court Clerk entered a Text Only Entry denying Doc. 380, Defendant's Motion for Directed Verdict per Court's ruling after verdict, granting Doc. 397 Plaintiff's Motion for Order Granting Injunction, granted per Doc. 409 and terminating Doc. 301, Plaintiff's Motion in Limine.

11. On September 10, 2010, the City filed a Rule 50(b) and alternative Rule 59 Motion (Doc. 449-450).

12. On September 13, 2010 (before Douglas-4 had an opportunity to respond to the City's Motions), the Court dismissed Defendant's Motions without prejudice for lack of jurisdiction (Doc. 453).

ARGUMENT

The Court should reconsider and/or clarify or amend its Order dismissing the City's Rule 50(b) and alternative Rule 59 Motions to clarify that the basis of lack of jurisdiction is twofold:

1. The Motions are untimely, and thus do not suspend or delay the effect of the Notice of Appeal on the jurisdiction of this Court; and
2. The Notice of Appeal without a timely Rule 50(b) and/or Rule 59 Motion, divests the Trial Court of jurisdiction.

The rules relating to Rule 50(b) and Rule 59 Motions require said motions to be filed within 10 days, now 28 days, of entry of judgment. See Footnote 2. Federal Rules of Civil Procedure, Rule 58(b) and Rule 59(b).

The rules also provide that if a timely Rule 50(b) or Rule 59 Motion is filed, the effect of a Notice of Appeal, filed before or after such motion, is suspended pending resolution of the timely filed Motion. Fed.R.App.P. Rule 4(a)(4)(A) and (B); *Warren v. American Bankers Insurance of Florida*, 507 F.3d 1239, 1244-1245 (10th Cir. 2007) and *Jones v. U.S.*, 335 Fed.Appx. 117, 2009 WL 4071835 (10th Cir.).

The result is that in order for the Trial Court to lack jurisdiction over a rule 50(b) or 59 Motion, even one filed after a Notice of Appeal has been filed, the Motion must be untimely, i.e., the Motion must have been filed more than 10 days, now 28 days, after the entry of judgment. See Footnote 2.[3]

I. THE CITY'S RULE 50(B) AND RULE 59 MOTIONS WERE DUE WITHIN 10 DAYS OF THE SEPTEMBER 2, 2009 ORDER

First and foremost, the September 2, 2009 Order was a final order and the City had the obligation to file its Rule 50(b) and Rule 59 Motions in a timely manner, i.e., within 10 days of that order. See Footnote 2.

The City has previously argued that the September 2, 2009 Order does not dispose of all claims by and against all parties. The City however, cannot specify any claim as to any party which was not been disposed of by the Trial Court. Additionally, the City failed to indicate in paragraph 1(A)(4) of its docketing statement filed with the Tenth Circuit "any statutory basis for determining that the judgment is appealable if some claim remained unresolved". The jury verdict entered in the case on June 3, 2009, disposed of all monetary claims. The Court's injunction order of September 2, 2009 disposed of all equitable claims. Neither party filed any post judgment motions. The real issue is whether the district court complied with the "separate document" requirement of Rule 58(a). Although the clerk of the court entered the jury verdict, a

[3] The Court is not allowed to extend the deadline for such motions. Fed. Rules of Civil Procedure, Rule 6(b)(2).

separate document was not also signed and entered by the clerk. However, the Court's order of September 2, 2009 is a "separate document." This September 2, 2009 order references specifically the jury verdict, the jury's answers to questions, and the fact that the jury granted damages (the Court recites the exact dollar sums awarded by the Jury as to each discrete property in controversy). The Court's September 2, 2009 Order satisfies the separate document requirement and procedures outlined in Fed.R.Civ.P. 58(a) and (b).

Indeed, this Court in dismissing the City's Rule 50(b) and alternative Rule 59 Motions recognized that both parties had deemed the September 2, 2009 Order a final appealable judgment [meeting the separate document rule provided by Rule 58(a)]:

> "The briefs filed by the parties in the appeal and cross-appeal indicate that the appeal is from a final judgment and not taken on an interlocutory basis, and that the Tenth Circuit had jurisdiction to hear the appeal pursuant to 28 U.S.C. § 1291."

September 13, 2010 Order, Doc. 453.

Thus, the City had the obligation to file its Rule 50(b) and Rule 59 Motions within 10 days after the September 2, 2009 Order. See Footnote 2. Instead, the City elected to file a "notice of appeal". The City's prior contention it elected to file the Notice of Appeal, but not a Rule 50(b) or Rule 59 Motion, out of an "abundance of caution" makes no sense. An abundance of caution would dictate filing a timely Rule 50(b) and/or Rule 59 motion, as well as a timely notice of appeal.

Rule 4(A) Rules of Appellate Procedure specifically provides that the time to file a Notice of Appeal is stayed until a timely filed Rule 50(b) or Rule 59 Motion is disposed of by the District Court.

Furthermore, Rule 4(B)(i) Rules of Appellate Procedure also contemplates that the City had the opportunity to do both, i.e., file its Rule 50(b) and/or Rule 59 Motions, as well as file a

notice of appeal, noting that in such circumstances the notice of appeal becomes effective when the Rule 50(b) and/or Rule 59 motion is disposed of by the Trial Court.

Thus, the City has no excuse for its failure to file a timely Rule 50(b) or Rule 59 Motion and its failure to do so precludes the City's late filed Motions.

II. THE CITY FAILED TO TIMELY FILE A RULE 50(B) OR RULE 59 MOTION AFTER THE SEPTEMBER 2, 2009 ORDER BECAME FINAL

To the extent the September 2, 2009 Order was not a final judgment, due to the separate document rule, the Order became a final judgment herein after the passage of one hundred fifty (150) days. Rule 58(c)(2)(B). The Judgment thus became final at the latest on or about January 31, 2010, making the City's Rule 50(b) and Rule 59 Motions due on or about February 28, 2010. Rule 50(b) and Rule 59(b). See Footnote 2. The City filed no such motion within the time allowed.

To the extent, the City may argue that it could not file a Rule 50(b) or Rule 59 Motion after the September 2, 2009 Order became final under the 150 day rule, the City is wrong. The City has previously argued to the Tenth Circuit that the Trial Court lacked jurisdiction to hear such a Motion because the notice of appeal became effective immediately upon the running of the 150 days.

First, if the September 2, 2009 Order was not final, the notice of appeal did not deprive the District Court of jurisdiction, and the City could have filed its Motions at any time during the 150 days or within 28 days of the running of the 150 days. See Footnote 2. Indeed, the case cited by the City to the Tenth Circuit makes this clear noting that a notice of appeal relating to an "unappealable order" does not divest the District Court of jurisdiction. *U.S. v. 397.51 Acres*, 292 F.2d 688, 693 (10th Cir. 1982) citing *Arthur Andersen & Co. v. Finesilve*r, 546 F.2d 338, 340 (10th Cir. 1977).

The City should have filed its Rule 50(b) and Rule 59 Motions and asked the Court of Appeals at the time its motions were filed, to suspend the deadlines for filing briefs, so that the District Court could hear the motions. In fact, prior to January 31, 2010, if the City thought the September order was not a final order, the City could have filed a motion with the Tenth Circuit between September 2009 and January 31, 2010, to remand the case back to the District Court so that it could file its Rule 50(b) and/or Rule 59 motions after January 31 but before the time for filing such motions ended. Such procedure is certainly contemplated in *397.51 Acres*.

Logic dictates that if a Rule 50 (b) or Rule 59 Motion does not become due until the judgment becomes final under the 150 day rule, the effectiveness of a Notice of Appeal filed before the 150 days has run would not deprive the District Court of jurisdiction to hear a timely filed Rule 50(b) or Rule 59 Motion. This is true because the time to file a Rule 50(b) and/or Rule 59 Motion relating to a judgment which becomes final under the 150 day rule, does not begin to run until the judgment is final, i.e., until the 150 days has run:

> The Advisory Committee Notes confirm that Rule 58's formalities are intended to clarify the time periods for motions Fed.R.Civ.P. 58, 2002 advisory committee's note ("[I]n the cases in which the court and clerk fail to comply with this simple requirement [of a separate document], the motion time periods set by Rules 50, 52, 54, 59 and 60 begin to run after expiration of 150 days from entry of the judgment in the civil docket as required by Rule 79(a).")

Jones v. U.S., 335 Fed.Appx. 117, 2009 WL 4071835 (10th Cir.).

Federal Rules of Appellate Procedure, Rule 4(a)(2) provides that "a notice of appeal filed after the court announces a decision or order, but before the entry of the judgment or order is treated as filed on the date of and after entry."

Thus, the question becomes if a Notice of Appeal is filed (or is deemed filed) after entry of judgment, but before a Rule 50(b) and/or Rule 59 Motion is filed, does the District Court have jurisdiction to hear the Rule 50(b) or Rule 59 Motion.

The Tenth Circuit addressed this issue in *Jones v. U.S.*, 335 Fed.Appx 117, 2009 WL 4071835 (10th Cir.), a situation where the losing party had filed a Notice of Appeal, followed by an untimely Motion to Reconsider (beyond the time set for the filing of such motion), noting:

> Generally speaking, a timely notice of appeal divests the district court of jurisdiction. Warren v. American Bankers Ins. of Florida, 507 F.3d 1239, 1242 (10th Cir. 2007). But a motion for reconsideration of the district court's judgment filed within ten days of the judgment's entry, postpones the notice of appeal's effect until the motion is resolved. Fed.R.App. P. 4(a)(4). Here, the judgment was entered on March 10, and Mr. Jones filed the motion on March 30 – six days late. See Fed.R.Civ.P. 6(a)(2) (excluding week-ends and holidays when the prescribed period is less that eleven days).

Jones v. U.S., 335 Fed.Appx 117, 2009 WL 4071835 (10th Cir.) (Emphasis Added).

Thus, if the party in *Jones* had filed his Notice of Appeal followed by a timely Motion to Reconsider, the effect of the Notice of Appeal would be postponed until the motion was resolved.

The case cited within *Jones* is even more on point, holding that a timely filed Rule 59 Motion suspends the effect of an earlier filed Notice of Appeal, leaving the Trial Court jurisdiction to resolve the Rule 59 Motion:

> In sum, Plaintiff's notice of appeal had no effect on the district court's jurisdiction to address his "motion to reconsider" because the district court never entered a separate judgment and 150 days had not elapsed since entry of the court's dismissal order. See Fed.R.App. P. 4(a)(7)(A)(ii). Plaintiff timely filed his "motion to reconsider", or more appropriately his Rule 59(e) Motion, albeit thirty-five days after the court entered its dismissal order. See *Hilst*, 874 F.2d at 726. In hindsight, the district court should have entered a separate Rule 58 judgment promptly after it entered its

> order dismissing Plaintiff's action. Because the court failed to do so, a procedural quagmire arose. Awaiting entry of judgment, Plaintiff filed a premature notice of appeal and then a "motion to reconsider". Plaintiff's premature notice of appeal was further suspended when Plaintiff filed his "motion to reconsider". Because Plaintiff's notice of appeal was suspended, the district court retained jurisdiction to rule upon the merits of Plaintiff's "motion to reconsider." See *Ross*, 426 F.3d at 751-52; *Silvers*, 90 F.3d at 98.

Warren v. American Bankers Insurance of Florida, 507 F.3d 1239, 1245 (10th Cir. 2007).

The same rule is applicable here. Once the judgment became final, even though the premature notice of appeal is deemed filed on that same day, the City had the opportunity to file a timely Rule 50(b) and/or Rule 59 motion, and such motion would have "postpone[d] the notice of appeal's effect" on the District Court's jurisdiction until the motion is resolved.

Therefore, the City had an opportunity and obligation to file its Rule 50(b) and alternative Rule 59 motions before or within 28 days (see Footnote 2) after the September 2, 2009 Order became final under the 150 day rule, and failed to file such motion thereby waiving any right to file Rule 50(b) or Rule 59 motions.

III. BECAUSE THE CITY'S MOTIONS WERE UNTIMELY, THE COURT LACKS JURISDICTION AND/OR MUST DENY SAID MOTIONS

Because Douglas-4 has raised the argument that the City's Rule 50(b) and alternative Rule 59 Motions are not timely (and because such motions are not timely as outlined above) such untimeliness is an absolute barr to such motions. See *United States v. Garduño*, 506 F.3d 1287, 1290-1291 (10th Cir. 2007), noting that an inflexible claim processing rule, unlike a jurisdictional rule, may be forfeited if not properly raised, but that such rules remain inflexible and thus assure relief to a party properly raising them.

In this case, the inflexible claim processing rules are Rule 58(b) and Rule 59(b), which require Rule 50(b) and Rule 59 Motions to be filed within 28 days of entry of judgment (10 days

before amended, effective December 1, 2009, see Footnote 2), as well as Rule 6(b)(2), which precludes the Court from extending those deadlines.

Douglas-4 has properly raised the timeliness defense to the City's Motions, therefore said motions must be denied.

CONCLUSION

Based upon the above and foregoing arguments and authorities, Douglas-4 prays the Court will reconsider and/or clarify its Order (Doc. 453) and will make specific findings that:

1. The City's Rule 50(b) and alternative Rule 59 Motions are untimely because they were not filed within 10 days of the September 2, 2009 Order/Judgment and/or within 28 days of the entry of judgment pursuant to the "150 day rule" [Rule 58(c)(2)(B)];
2. Because the City's Rule 50(b) and alternative Rule 59 Motions are untimely and thus cannot suspend the effect of the notice of appeal that has been filed, this Court lacks further jurisdiction over the matters appealed, but retains jurisdiction to decide certain collateral matters, such as a motion for attorney's fees, and the Court has denied plaintiff's Motion for attorney's fees without prejudice to renew that motion after the Tenth Circuit rules on the merits of the pending appeal (Doc. 446); and
3. The City's Rule 50(b) and alternative Rule 59 Motions are therefore denied and dismissed with prejudice as untimely and for lack of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on the 21st day of September, 2010, this document was electronically filed with the Clerk of the Court using the ECF system for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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I do hereby further certify that on the 21st day of September, 2010, I caused to be mailed a true and correct copy of the above and foregoing instrument to the following non CM/ECF participant with proper postage fully prepaid thereon.

Douglas County Rural Water District No. 4
Scott D. Schultz
1768 North 700 Road
BALDWIN CITY Kansas 66006

/s/ John W. Nitcher

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