

**IN THE UNITED STATES DISTRICT FOR  
DISTRICT OF KANSAS**

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

**PLAINTIFF’S RESPONSE TO THE DEFENDANT’S MOTION TO STRIKE (DOC. 456)**

COMES NOW the Plaintiff Rural Water District No. 4, Douglas County, Kansas, and for its response and objection to Defendant’s Motion to Strike (Doc. 456) submits the following.

The Defendant City of Eudora’s (The City’s) Motion to Strike emphasizes the need for the Court to clarify and amend its order dismissing the City’s Rule 50(b) and alternative Rule 59 Motions.

The City acknowledges that the Court has held that it lacks jurisdiction due to the filing of a notice of appeal, as the Court ruled in dismissing the City’s Rule 50(b) and Rule 59 Motions.

However, as pointed out in Douglas-4’s Motion to Reconsider (Doc. 454), the notice of appeal only divests this Court of jurisdiction if there is no timely Rule 50(b) or Rule 59 Motion filed, i.e., a notice of appeal filed before or after a timely filed Rule 50(b) or 59 Motion does not divest the Trial Court of jurisdiction. Fed.R.App.P. Rule 4(a)(4)(A) and (B); *Warren v. American Bankers insurance of Florida*, 507 F.3d 1239, 1244-1245 (10<sup>th</sup> Cir. 2007) and *Jones v. U.S.*, 335 Fed.Appx. 117, 2009 WL 4071835 (10<sup>th</sup> Cir.).

Furthermore, Douglas-4’s Motion to Reconsider/Amend (Doc. 454) raises the argument that the City’s Rule 50(b) and Rule 59 Motions are untimely, thus avoiding the possibility that it might *later* be *claimed* that Douglas-4 waived the timeliness objection. See *Williams v.*

*Gonterman*, 313 Fed.Appx. 144, 146 (10<sup>th</sup> Cir. 2009), citing: *U.S. v. Garduño*, 506 F.3d 1287, 1290-91 (10<sup>th</sup> Cir. 2007); *U.S. v. Mitchell*, 518 F.3d 740, 749 (10<sup>th</sup> Cir. 2008) and *Eberhart v. United States*, 546 U.S. 1219, 126 S.Ct. 403 (2005) holding that a party can waive the timeliness objection to Rule 50(b) and Rule 59 motions. 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 (10<sup>th</sup> Cir. 2008), noting that “ours is an adversarial 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, in fact, 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 (10<sup>th</sup> 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 418630 (10<sup>th</sup> 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 the opportunity to file its objection based on untimeliness, prior to the Court ruling.

However, Douglas-4's Motion to Reconsider (Doc. 454) timely raises the objection to the untimeliness of the City's Rule 50(b) and Rule 59 Motion because it was filed within the time allowed for Douglas-4 to respond to the City's Motion, and because it was filed before the Court has ruled on the merits of the City's Motion. *Dill v. American Life Insurance*, 525 F.3d 612 (8<sup>th</sup> Cir. 2008). (There was no ruling on the merits of the City's motion because that motion was dismissed on jurisdictional grounds.)

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 (10<sup>th</sup> Cir. 2007).

With all due respect, even against Rule 50(b) and Rule 59 motions that are filed nearly a year out of time, the opposing party must be allowed the opportunity to assert non-timeliness as a defense. The opposing party is then entitled to the Court's denial of such untimely motions, as a matter of right. The opposing party should only have to be required to assert non-timeliness once; so the Court's denial of such untimely motions should be with prejudice. Accordingly, Douglas-4 (seeking to avoid any argument that it waived its timeliness objection to said motions) requests the Court to deny the City's Motion to Strike and to reconsider and clarify its previous Order. The Court should specifically find 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)<sup>1</sup>, said Motions are denied with prejudice as being out of time, and the notice of appeal has divested the Trial Court of jurisdiction and vested jurisdiction with the Tenth Circuit.

**PRAYER**

Based upon the above, Douglas-4 prays the Court will deny Defendant's Motion to Strike (Doc. 456).

Respectfully submitted,

/s/ John W. Nitcher

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<sup>1</sup> 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, extending the time to 28 days.

**CERTIFICATE OF SERVICE**

I do hereby certify that on the 29<sup>th</sup> 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:

|                   |   |
|-------------------|---|
| John Nitcher      | <a href="mailto:jnitcher@rilinglaw.com">jnitcher@rilinglaw.com</a>  |
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I do hereby certify that on the 29<sup>th</sup> 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