

The Last Screen

News November 2, 2015

THE LAST SCREEN

By Judith K. Fitzgerald[1]

The United States Court of Appeals for the Second Circuit issued an opinion on October 30, 2015, that should be of interest to everyone who files pleadings electronically. In *Luther Franklin v. John McHugh*, Docket No. 14?4096?cv,[2] the Court of Appeals dismissed an appeal for lack of jurisdiction due to a failure to complete the filing under CM/ECF. The attorney did everything CM/ECF requires, including paying the \$505 filing fee, but then missed the last step, so the document was never actually submitted to the court.

When counsel learned, five days later, that the docket did not reflect the filing of the notice of appeal, someone in his office contacted the Clerk and was instructed to re-file the document with a new filing fee.[3] The second notice was filed and noted on the docket.[4] Unfortunately, for an appellate court to assert jurisdiction over an appeal, a timely filed notice is essential. As the court noted:

The timely filing of a notice of appeal in a civil case is a prerequisite to the appellate court's jurisdiction. See *Ray Haluch Gravel Co. v. Central Pension Fund*, 134 S. Ct. 773, 779 (2014); *Bowles v. Russell*, 551 U.S. 205, 214 (2007) ("*Bowles*"); *Perez v. AC Roosevelt Food Corp.*, 744 F.3d 39, 41 (2d Cir. 2013). As the Supreme Court observed in *Bowles* in 2007, "[T]ime limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century." 551 U.S. at 209 n.2. Like other jurisdictional requirements, the timely filing mandate is not subject to judicially created equitable exceptions, see *id.* at 214 (observing that the Supreme Court "has no authority to create equitable exceptions to jurisdictional requirements").

The court looked to the instructions posted on the trial court's website regarding the CM/ECF filing process. "The Eastern District publishes its instructions for electronic filing in that court's CM/ECF User's Guide, available on its website. As relevant here, it instructs: Upon completion of an electronic filing the last screen you see is a Notice [o]f Electronic Filing screen. This screen will tell you, among other things, the document number assigned to your document; will contain your electronic file stamp; and, at the bottom of the page, will notify you that a notice will be, or will not be, electronically mailed to counsel." (citation omitted).

The lesson to be learned is that THE LAST SCREEN, the notice of electronic filing, is the only screen confirming that the document was actually filed and docketed. The court recognized that the differences in processes utilized by the numerous courts that now have electronic filing systems in place may be confusing but refused to consider that as a sufficient excuse here. CM/ECF has been in use in Eastern District of New York for over a decade.

The court also addressed an alternative form of relief that counsel failed to seek. Pursuant to Fed. R. App. P. 4(a)(5)(A), there are circumstances in which counsel could seek an extension of time to file the notice of appeal, provided that the request is made no later than 30 days after the initial time to file expires and excusable neglect or good cause is shown. The court indicated that this may have been one occasion where excusable neglect or good cause was shown:

Thus, after Franklin's counsel learned on October 28 that his October 23 notice of appeal was not in fact "filed," he might have moved the District Court, within 30 days after the appeal deadline, see Fed. R. App. P. 4(a)(5)(A)(i), to extend the time for filing his notice of appeal. Absent an extension, however, the rule of *Bowles* means that our Court cannot accept Franklin's notice of appeal as timely. And the District Court no longer has authority to alter Franklin's time to appeal. See

Fed. R. App. P. 4(a)(5)(C) and 4(a)(6).

The opinion is a serious reminder to be sure you don't log off CM/ECF before you get a notice of electronic filing with the pleading's docket number as the receipt. That notice is your receipt and the proof that you've actually completed the filing and docketing process.

[1] Judith K. Fitzgerald (U.S. Bankruptcy Judge, Ret.) is a shareholder at Tucker Arensberg, P.C. in Pittsburgh, PA and a Professor of Practice at the University of Pittsburgh School of Law.

[2] The case is not yet reported for publication. Quotations are from the typescript version.

[3] The District Court refunded the first filing fee on counsel's request.

[4] The Court of Appeals refused to recognize a hearsay statement that there may have been a glitch with the CM/ECF system itself which was the root of the problem but pointed out that the federal rules provide a mechanism for relief in that situation.