UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JIN ZHU, *Plaintiff – Appellee,* v. NORTH CENTRAL EDUCATIONAL SERVICE DISTRICT NO. 171, *Defendant–Appellant*	C. A. No. 18-35160 D. Ct. No. 2:15-cv-183-JLQ MOTION TO DISMISS FOR LACK OF JURISDICTION

Pursuant to Ninth Circuit Rule 27 Plaintiff-Appellee, Jin Zhu, moves to dismiss Defendant-Appellant North Central Educational Service District No. 171's ("ESD 171") appeal for lack of jurisdiction.

I. INTRODUCTION & SUMMARY OF ARGUMENT

Mr. Zhu sued ESD 171, a prospective employer, claiming, in part, that ESD 171 did not hire him in retaliation for Mr. Zhu's race discrimination lawsuit against his former employer, the Waterville School District. *Zhu v. N. Cent. Educ. Serv. Dist.-ESD 171*, 189 Wn.2d 607, 609 – 611 (2017), *reconsideration denied* (Dec. 28, 2017). Following the District Court's denial of ESD 171's summary judgment motion, the case went to trial and, on September 16, 2016, a jury found that ESD 171's failure to hire Mr. Zhu violated the anti-retaliation statute of the Washington

Law Against Discrimination (WLAD), RCW 49.60.210, and awarded Mr. Zhu damages. *Id.* at 611. Thereafter, ESD 171 timely brought a motion for judgment as a matter of law and motion for a new trial. As part of this motion, ESD 171 also argued that the District Court erred in denying three jury instructions, and asked the District Court to certify to the Washington State Supreme Court the question of whether Mr. Zhu had a colorable retaliation claim under RCW 49.60.210.

On December 23, 2016, the District Court entered an order on this motion, reserving in part and denying in part. The Court *denied* ESD 171's (1) Fed. R. Civ. P. 50(b) motion, (2) Fed. R. Civ. P. 59 motion, and (3) motion for failure to instruct the jury, but reserved in part because it *granted* ESD 171's motion to certify the above-referenced issue of law.

The Rules of Appellate Procedure toll the thirty-day post-judgment appeal filing deadline upon the timely filing of six specific motions, including a motion for a directed verdict and new trial. FRAP 4(a)(4)(A) (i) & (v). Since FRAP 4(a)(4)(A) does not toll the appeal filing deadline upon the filing of a state supreme court certification motion, ESD 171 had thirty days from December 23, 2016, to appeal the District Court's order.

It was not until March 2, 2018, that ESD 171 filed its notice of appeal regarding the District Court's December 23, 2016, denial of the (1) Fed. R. Civ. P. 50(b) motion, (2) Fed. R. Civ. P. 59 motion, and (3) motion for failure to instruct the jury and the District Court's August 22, 2016, denial of ESD 171's Fed. R. Civ. P. 56 motion. ESD 171's entire appeal should be dismissed for lack of jurisdiction because it failed to file its notice of appeal 30 days after the District Court's December 23, 2016, denial of the above-referenced motions.

Regarding ESD 171's appeal of the District Court's August 22, 2016, Order denying ESD 171's Motion for Summary Judgment, this Court holds "that there is no need to review denials of summary judgement after there has been a trial on the merits." *Lum v. City & Cty. of Honolulu*, 963 F.2d 1167, 1170 (9th Cir. 1992), *as amended* (June 15, 1992). Thus, in the event that the entire appeal is not dismissed, ESD 171's appeal of the summary judgment order should still be dismissed.

II. FACTS

On August 22, 2016, the District Court denied ESD 171's summary judgment motion. *Zhu v. N. Cent. Educ. Serv. Dist.-ESD 171*, 2:15-CV-00183-JLQ, 2016 WL 4445758, at *1 (E.D. Wash. Aug. 22, 2016).

On September 21, 2016, the District Court entered judgment on a jury verdict in favor of Mr. Zhu. (Crotty Decl. Ex. A)

On October 5, 2016, ESD 171 filed a motion seeking (a) judgment as a matter of law under Fed. R. Civ. P. 50(b), (b) a new trial under Fed. R. Civ. P. 59, (c) a determination that the District Court erred in instructing the jury, and (d) certification of a state law issue to the Washington State Supreme Court. (Crotty Decl. Ex. B)

On December 23, 2016, ESD 171's Rule 50, Rule 59, jury instruction, and certification motion was denied in part and reserved in part. The District Court denied ESD 171's Rule 50, Rule 59, and jury instruction motions. *Zhu v. N. Cent. Educ. Serv. Dist. - ESD 171*, 2:15-CV-00183-JLQ, 2016 WL 7428204, at *16 (E.D. Wash. Dec. 23, 2016), *certified question answered sub nom. Zhu v. N. Cent. Educ. Serv. Dist.-ESD 171*, 189 Wn.2d 607, 404 P.3d 504 (2017), *reconsideration denied* (Dec. 28, 2017). The only reservation of ruling concerned the District Court's decision to certify to the Washington State Supreme Court the legal question of whether Washington's anti-retaliation statute, RCW 49.60.210, supported Mr. Zhu's retaliation claim.

On February 28, 2017, the District Court formally certified the question to the Washington State Supreme Court, stating:

> If the Washington Supreme Court finds RCW 49.60.210(1) provides a cause of action to a prospective employee against a prospective employer not involved in the underlying discrimination claim the jury verdict in this case will be upheld. If the Washington Supreme Court finds RCW 49.60.210(1) does not provide such a cause of action, the jury verdict in this case will be vacated. (Crotty Decl. Ex. C)

On November 9, 2017, the Washington State Supreme Court unanimously held that Mr. Zhu's retaliation claim was viable under RCW 49.60.210. *See Zhu*, 189 Wn.2d at 609.

On February 15, 2018, the District Court issued its ruling on Mr. Zhu's timely post-trial motion for attorneys' fees, costs, prejudgment interest, and adverse tax consequences, affirmed the judgment and denied ESD 171's motions in full, based on the Supreme Court's decision. (Crotty Decl. at Ex. D)

On March 2, 2018, ESD 171 filed its appeal.

III. ARGUMENT

As a starting point, "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles v. Russell*, 551 U.S. 205, 214 (2007). For "courts of appeals routinely and uniformly dismiss untimely appeals for lack of

jurisdiction." *Bowles*, 551 U.S. at 210. For the reasons stated below, this Court should do the same.

A. No jurisdiction exists over ESD 171's appeal regarding the District Court's denial of ESD 171's post-trial Rule 50, Rule 59, and Jury Instruction motions.

The thirty-day deadline to file a post-trial notice of appeal is extended "if a party files one of the motions listed in Federal Rule of Appellate Procedure (FRAP) 4(a)(4)(A)." *United States ex rel. Hoggett v. Univ. of Phoenix*, 863 F.3d 1105, 1107 (9th Cir. 2017). The "motions listed" in FRAP 4(a)(4)(A), include motions under Rule 50 and Rule 59. FRAP 4(a)(4)(A)(i)&(v). Only those motions enumerated in FRAP 4(a)(4)(A), "will toll the time for filing a notice of appeal." *Hawley v. Clackamas Cty. Circuit Court*, 16-35985, 2017 WL 5952156, at *1 (9th Cir. Jan. 30, 2017), *cert. denied*, 137 S. Ct. 2308, 198 L. Ed. 2d 737 (2017).

On December 23, 2016, the District Court entered an order disposing of ESD 171's motions for judgment as a matter of law under Rule 50(b) and for a new trial under Rule 59. While the Order certified a question to the Supreme Court, it made clear that the motions under Rule 50 and 59 were denied:

> The scope of RCW 49.60.210(1) is not clear. Whether Plaintiff's retaliation claim is encompassed by the statute and within the broad policy statements of WLAD is an open question. Plaintiff submitted sufficient evidence to uphold the jury's verdict if the statute is

> interpreted in his favor. The court declines to order a new trial in this matter as the verdict was not against the clear weight of the evidence. **For these reasons, the court Denies ESD 171's Motion, but will certify the question of law to the Washington Supreme Court.** *Zhu v. N. Cent. Educ. Serv. Dist. - ESD 171*, 2:15-CV-00183-JLQ, 2016 WL 7428204, at *16 (E.D. Wash. Dec. 23, 2016)(emphasis added).

Thus, ESD 171 had thirty days "from the entry of the order disposing of the last such remaining motion: (i) for judgment under Rule 50 [or] (v) for new trial under Rule 59" to appeal. FRAP 4(a)(4)(A)(i)&(vi). *Classic Concepts, Inc. v. Linen Source, Inc.*, 716 F.3d 1282, 1284 (9th Cir. 2013). ESD 171 did not file its notice of appeal until March 2, 2018. Because ESD 171 did not file its notice of appeal until after the thirty-day deadline passed, this Court lacks jurisdiction to consider the appeal. *Pac. Employers Ins. Co. v. Domino's Pizza, Inc.*, 144 F.3d 1270, 1277-78 (9th Cir. 1998).

Against this authority, ESD 171 will likely argue that the District Court's December 23, 2016, Order certifying the issue of law to the Washington State Supreme Court tolled the appeal filing deadline. This argument fails for the following reasons.

First, a motion to certify a question of law to a state supreme court is not a FRAP 4(a)(4)(A) tolling motion. Mr. Zhu is unaware of any authority that makes a

certification motion a tolling motion for the purpose of FRAP 4(a)(4)(A). FRAP 4(a)(4)(A) contains no "catch all" or other language indicating that a certification motion tolls the appeal filing deadline. Lastly, since the Ninth Circuit narrowly construes FRAP 4(a)(2) it follows that that same narrow construction also applies to FRAP 4(a)(4). *Hajro v. U.S. Citizenship & Immigration Servs.*, 811 F.3d 1086, 1096 (9th Cir. 2016).

Second, nothing prevented ESD 171 from filing a notice of appeal within thirty days of December 23, 2016, notwithstanding the pendency of the certified question. Upon filing a timely notice of appeal ESD 171 could have asked this Court to stay the appeal pending the Washington State Supreme Court's decision, if appropriate. Indeed, this Court, in dismissing an appeal of a FRAP 4(a)(4) motion as untimely, held "after the district court entered its order and judgment, [appellant] could have filed a timely notice of appeal and then filed a motion in this court to stay the appeal pending" the outcome of a related matter. *Univ. of Phoenix*, 863 F.3d at 1109–10. Such is the case here.

Third, a district court's decision is final if it (1) is a full adjudication of the issues, and (2) clearly evidences the judge's intention that it be the court's final act in the matter. *Resh v. China Agritech, Inc.*, 857 F.3d 994, 1000 (9th Cir. 2017),

cert. granted, 138 S. Ct. 543, 199 L. Ed. 2d 423 (2017). "A final decision is one that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *United States v. Lummi Indian Tribe*, 235 F.3d 443, 448 (9th Cir. 2000). This Court applies a "practical rather than a technical construction" to the finality rule and "requires some evaluation of the competing considerations underlying all finality—'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" *Stone v. Heckler*, 722 F.2d 464, 467 (9th Cir. 1983).

Here, the District Court made clear on its December 23, 2016, Order that its role in adjudicating the case's merits was over. All that was left to do was wait until the Washington State Supreme Court ruled on the certified question in order to determine whether the judgment, which it had already entered, would be final, and to award attorney fees. *See Lummi Indian Tribe*, 235 F.3d at 448. No issue of piecemeal review existed, as nothing precluded ESD 171 from appealing the December 23, 2016, Order within 30 days and, in necessary, asking the Ninth Circuit to stay the appeal pending the Washington State Supreme Court's decision. *See Univ. of Phoenix*, 863 F.3d at 1109–10.

Moreover, the "danger of denying justice by delay" is great. *Heckler*, 722 F.2d at 467. A jury awarded Mr. Zhu damages in September 2016. The certified question has delayed the satisfaction of judgment by more than a year. The instant appeal would delay it by another 18-24 months. While ESD 171 has a right to appeal and a right to move the District Court to certify a question to the Washington State Supreme Court, it does not have a right to manipulate the system and delay its appeal so as to deny Mr. Zhu payment for as long as possible. It is to avoid delays such as these that FRAP 4 provides only a few exceptions to the 30-day deadline. This rule should be enforced in this case to prevent an unjust delay.

The Court should also reject ESD 171's anticipated argument that the time to file the appeal did not begin to run until the District Court decided Mr. Zhu's post-trial motion for attorneys' fees, costs, prejudgment interest, and adverse tax consequences, because a post-trial attorney fee motion is not a decision on the merits that tolls other post-trial motions. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988). Indeed, "a losing party cannot extend his time for appeal by claiming that the time did not begin to run until the trial court had disposed of all post judgment motions." *Manufacturers Cas. Ins. Co. v. Arapahoe Drilling Co.*, 267 F.2d 5, 7 (10th Cir. 1959).

As a result, ESD 171's Rule 50, Rule 59, and Jury Instruction appeals should be dismissed for lack of jurisdiction.

B. No jurisdiction exists over ESD 171's Rule 56 motion appeal.

ESD 171's appeal of the District Court's August 22, 2016, Order denying ESD 171's Motion for Summary Judgment also fails because it is both untimely and moot. This Court has made clear that "there is no need to review denials of summary judgement after there has been a trial on the merits." *Lum*, 963 F.2d at 1170 (9th Cir. 1992). A trial on the merits occurred, a judgment on the jury verdict was entered, and ESD 171 raised Rule 50 and Rule 59 motions that re-argued much of what it argued on summary judgment. Accordingly, ESD 171 is not entitled to argue its failed summary judgment motion yet another time, especially after a jury has already decided the case on its merits.

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IV. CONCLUSION

Since ESD 171 did not file its appeal within thirty days of the trial court's order disposing of the above-referenced issues, and cannot appeal the denial of summary judgment, its appeal should be dismissed.

Dated this March 6, 2018.

Respectfully Submitted

/s/ MATTHEW Z. CROTTY

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 6, 2018 which will automatically serve all parties as reflected in this case's service list.

Dated this 6th day of March 2018.

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