

Fed. R. Civ. P. 60(b)
Fed. R. Civ. P. 77(d)
Fed. R. App. P. 4(a)(6)
Local Rule 205-2
Appeals

Mitchell v. Burt & Gordon, Adv. No. 92-3112
In re Stein, Case No. 392-33885-dds7

6/3/98

Judge Frye

Unpublished

Following entry of judgment on August 6, 1997, in favor of plaintiff/trustee, defendants filed three post-judgment motions:

- motion for entry of judgment on plaintiff's breach of fiduciary duty claim and on the award of punitive damages or a new trial on these issues
- motion to amend findings and judgment under Fed. R. Civ. P. 52(b)
- motion for a new trial or for judgment as a matter of law

Judge Frye heard these motions on September 22, 1997, and on October 1, 1997, entered a separate order denying each of the motions. Although the orders were placed in the file and entered on the official docket on October 2, 1997, none of the parties ever received copies of the orders. Three letters were sent to the court in early February 1998 (including one from the plaintiff/trustee), advising the court pursuant to Local Rule 205-2(a) that the three motions had not been decided by the court.

In April 1998, defendants learned of the October 1, 1997, orders and filed motions to vacate and re-enter the judgment or to reopen the time for filing appeals. The motions were denied. Judge Frye stated that each of the October 1, 1997 orders "indicates that counsel was notified," that the orders were placed in the case files on or about October 2, 1997, and that the parties had full access to the case files and the court's docket. Judge Frye held that the April 1998 motions were made outside the time limits in Fed. R. Civ. P. 77(d) and Fed. R. App. P. 4(a)(6), and because those time limits are "mandatory and jurisdictional," she had no discretion to vacate the August 6, 1997 judgment.

P98-12(10)

See Summary re District Court action at P93-20(20).
See also P96-21(13), P97-25(18), P97-26(6), and P97-27(3).

FILED

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CLERK, U.S. DISTRICT COURT
DISTRICT OF OREGON
PORTLAND, OREGON

BY JN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In Re

ALEXANDER V. STEIN,

Debtor,

JOHN H. MITCHELL, Trustee,

Plaintiff,

v.

BURT & GORDON, P.C., an Oregon
Professional Corporation, ROBERT G.
BURT; MARK A. GORDON; BURT,
VETTERLEIN & BUSHNELL, P.C.,
an Oregon Professional Corporation;
ANDREA L. BUSHNELL; BURT &
VETTERLEIN, P.C., an Oregon
Professional Corporation,

Defendants.

BURT, VETTERLEIN & BUSHNELL,
P.C., an Oregon Professional Corporation,

Third-Party Plaintiff,

v.

GEORGE V. STEIN; MARK A.
GORDON; PREMIUM TECHNOLOGY,

Case No. 392-33885-S7

Adversary Proceedings
No. 92-3112-S

Civil No. 93-438-FR

OPINION

1 INC., a North Carolina corporation;)
2 PREMIUM ENTERTAINMENT)
3 NETWORK, INC., a California)
4 corporation; and PREMIUM T.V.)
5 INTERNATIONAL, INC., a California)
6 corporation; and ALEXANDER STEIN,)

7 Third-Party Defendants.)
8
9

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FRYE, Judge:

The matters before the court are 1) the motion of defendant Mark A. Gordon pursuant to FRCP 60(B) to vacate and re-enter judgment (#433); and 2) the motion of defendants Burt & Gordon, P.C. and Robert G. Burt under Fed. R. Civ. P. 60(b)(1) and

1 60(b)(6) to vacate judgment and re-enter it (#438-1) or, in the alternative under Fed. R.
2 App. P. 4(a), to reopen the time for filing an appeal (#438-2).

3 BACKGROUND

4 On August 6, 1997, this court entered judgment pursuant to Rule 54(b) of the
5 Federal Rules of Civil Procedure (Fed. R. Civ. P.) in favor of the plaintiff and against the
6 defendants following a jury trial and verdict in favor of the plaintiff on his second claim
7 for relief and after the verdict of the court on the plaintiff's remaining claims.

8 On August 18, 1997, defendants Burt & Gordon, P.C. and Robert G. Burt filed 1) a
9 motion for entry of judgment on plaintiff's breach of fiduciary duty claim and on the award
10 of punitive damages or a new trial on these issues; and 2) a motion to amend findings and
11 judgment under Fed. R. Civ. P. 52(b).

12 On August 20, 1997, this court entered an order setting the motion of defendants
13 Burt & Gordon, P.C. and Robert G. Burt for entry of judgment on plaintiff's breach of
14 fiduciary duty claim and on the award of punitive damages or new trial and the motion to
15 amend findings and judgment on the court's calendar of September 22, 1997 not for oral
16 argument.

17 On August 21, 1997, defendant Gordon filed a motion for a new trial or for judg-
18 ment as a matter of law.

19 On August 22, 1997, this court entered an order setting defendant Gordon's motion
20 for a new trial or for judgment as a matter of law on its not for oral argument calendar of
21 September 22, 1997.

22 On October 1, 1997, the court entered three separate orders denying 1) the motion
23 of defendants Burt & Gordon, P.C. and Robert G. Burt for entry of judgment on plaintiff's
24 breach of fiduciary duty claim and on the award of punitive damages or new trial; 2) the
25 motion of defendant Burt & Gordon, P.C. and Robert G. Burt to amend findings and judg-
26 ment; and 3) the motion of defendant Gordon for a new trial or for judgment as a matter of

1 law. On October 2, 1997, these orders were placed in the file and entered on the official
2 court record in docket numbers 419, 420 and 421. Each order reflects that counsel was
3 notified.

4 The Clerk's Office closed for business in the old federal courthouse on October 17,
5 1997 at 2:00 p.m. and reopened for business in the new federal courthouse on October 20,
6 1997.

7 On February 6, 1998, counsel for the plaintiff wrote the court pursuant to Local
8 Rule 205-2(a) of the United States District Court for the District of Oregon stating that
9 the post-trial motions by defendant Gordon and defendants Burt & Gordon, P.C. and Burt
10 "have not been determined."

11 On February 9, 1998, counsel for defendant Gordon wrote the court pursuant to
12 Local Rule 205-2(a) of the United States District Court for the District of Oregon stating
13 that the defendant Gordon had not received a decision on his motion for a new trial.

14 On February 10, 1998, counsel for defendants Burt & Gordon, P.C. and Burt
15 wrote the court pursuant to Local Rule 205-2(a) of the United States District Court for
16 the District of Oregon stating that the defendants post-trial motions remained under
17 advisement.

18 On April 9, 1997, counsel for defendant Gordon received a telephone call from
19 counsel for defendant Andrea Bushnell. During the telephone conversation, counsel for
20 Bushnell stated that she had called this court's clerk, and that she had been informed that
21 the action had been concluded; that the defendant's post-trial motions had been decided
22 in October, 1997; and that the rulings of the court were reflected in district court docket
23 numbers 419, 420 and 421.

24 Counsel for defendant Gordon reviewed his case pleadings and confirmed that he
25 had not received copies of any orders from this court bearing docket numbers 419, 420

26 ///

1 and 421. Counsel for defendant Burt did not receive copies of any orders from this court
2 bearing docket numbers 419, 420 and 421.

3 On April 20, 1998, defendant Gordon filed the motion of defendant Mark A. Gordon
4 pursuant to FRCP 60(B) to vacate and re-enter judgment.

5 On April 24, 1998, defendants Burt & Gordon, P.C. and Burt filed the motions by
6 defendants Burt & Gordon, P.C. and Robert G. Burt under Fed. R. Civ. P. 60(b)(1) and
7 60(b)(6) to vacate judgment and re-enter it or, in the alternative under Fed. R. App. P. 4(a),
8 to reopen the time for filing an appeal.

9 CONTENTIONS OF THE PARTIES

10 The defendants contend that this court should exercise its discretion to vacate the
11 judgment entered on August 6, 1997 and to re-enter the judgment in order to allow defen-
12 dants to file a timely appeal. The defendants contend that notice of the court's October 1,
13 1997 rulings was not provided to any party; that plaintiff will not be prejudiced by granting
14 the relief sought; and that the defendants promptly moved the court for relief following
15 discovery of the court's rulings. In addition, the defendants contend that the rulings were
16 made about the time that the federal court was moving to its new building, and that the
17 court failed to respond to the letters submitted to the court pursuant to Local Rule 205-2 in
18 early February of 1998 informing the court that the motions were under advisement. The
19 defendants contend that had the court responded to their letters, they would have learned
20 of the rulings of October 1, 1997, within 180 days of the rulings, and would have secured
21 relief under Fed. R. App. P. 4(a)(6).

22 The plaintiff contends that this court is without discretion to grant a motion to
23 vacate and re-enter judgment under Fed. R. Civ. P. 60 in order to permit an appeal after
24 the expiration of 180 days from the entry of judgment. The plaintiff contends that the
25 1991 amendments to the Federal Rules of Civil Procedure specifically address the issue of
26 lack of notice in Fed. R. Civ. P. 77(d) and Fed. R. App. P. 4(a)(d). The plaintiff explains

1 that Fed. R. Civ. P. 77(d) and Fed. R. App. P. 4(a)(d) limit the court's discretion to cure
2 problems of lack of notice under Fed. R. Civ. P. 60(b).

3 APPLICABLE LAW

4 Rule 60 of the Federal Rules of Civil Procedure states, in relevant part:

5 (a) **Clerical Mistakes.** Clerical mistakes in judgments, orders
6 or other parts of the record and errors therein arising from oversight or
7 omission may be corrected by the court at any time of its own initiative
8 or on the motion of any party and after such notice, if any, as the court
9 orders. During the pendency of an appeal, such mistakes may be so cor-
rected before the appeal is docketed in the appellate court, and thereafter
while the appeal is pending may be so corrected with leave of the appel-
late court.

10 (b) **Mistakes; Inadvertence; Excusable Neglect; Newly**
11 **Discovered Evidence; Fraud, Etc.** On motion and upon such terms as
12 are just, the court may relieve a party or a party's legal representative from
13 a final judgment, order, or proceeding for the following reasons: (1) mis-
14 take, inadvertence, surprise, or excusable neglect; . . . (6) any other reason
15 justifying relief from the operation of the judgment. The motion shall be
16 made within a reasonable time, and for reasons (1), (2), and (3) not more
17 than one year after the judgment, order, or proceeding was entered or taken.
18 A motion under this subdivision (b) does not affect the finality of a judg-
ment or suspend its operation. This rule does not limit the power of a court
19 to entertain an independent action to relieve a party from a judgment, order,
20 or proceeding, or to grant relief to a defendant not actually personally noti-
fied as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for
21 fraud upon the court. Writs of coram nobis, coram vobis, audita querela,
22 and bills of review and bills in the nature of a bill of review, are abolished,
23 and the procedure for obtaining any relief from a judgment shall be by
24 motion as prescribed in these rules or by an independent action.

25 Rule 77(d) of the Federal Rules of Civil Procedure states:

26 (d) **Notice of Orders or Judgments.** Immediately upon the entry
of an order or judgment the clerk shall serve a notice of the entry by mail in
the manner provided for in Rule 5 upon each party who is not in default for
failure to appear, and shall make a note in the docket of the mailing. Any
party may in addition serve a notice of such entry in the manner provided
in Rule 5 for the service of papers. Lack of notice of the entry by the clerk
does not affect the time to appeal or relieve or authorize the court to relieve
a party for failure to appeal within the time allowed, except as permitted in
Rule 4(a) of the Federal Rules of Appellate Procedure. (Emphasis added.)

Rule 4(a)(6) of the Federal Rules of Appellate Procedure provides that:

The district court, if it finds (a) that a party entitled to notice of the
entry of a judgment or order did not receive such notice from the clerk or

1 any party within 21 days of its entry and (b) that no party would be preju-
2 diced, may, upon motion filed within 180 days of entry of the judgment
3 or order or within 7 days of receipt of such notice, whichever is earlier,
reopen the time for appeal for a period of 14 days from the date of entry
of the order reopening the time for appeal. (Emphasis added.)

4 See 28 U.S.C. § 2107.

5 The Advisory Committee Notes for the 1991 Amendment which enacted subdivi-
6 sion (a)(6) states, in relevant part:

7 Reopening may be ordered only upon a motion filed within 180 days
8 of the entry of a judgment or order or within 7 days of receipt of notice of
9 such entry, whichever is earlier. This provision establishes an outer time
10 limit of 180 days for a party who fails to receive timely notice of entry of a
judgment to seek additional time to appeal and enables any winning party to
shorten the 180-day period by sending (and establishing proof of receipt of)
its own notice of entry of a judgment, as authorized by Fed.R.Civ.P. 77(d).

11 In Zimmer St. Louis, Inc. v. Zimmer Co., 32 F.3d 357, 359 (8th Cir. 1994), the
12 defendant had not learned of the order of the court filed on February 1, 1993 denying its
13 post-trial motions until August 19, 1993 "when one of Zimmer's lawyers talked with 'the
14 judge's clerk' and was told about the order." The order in Zimmer, had been recorded
15 on the official civil docket sheet but had not been placed in the individual case file in the
16 clerk's office. Counsel had checked the case file but not the civil docket sheet. The trial
17 court granted a motion by Zimmer to vacate the judgment based upon Fed. R. Civ. P. 60
18 (b)(6), which allows a trial court to "relieve a party . . . from a final judgment," upon
19 motion, for "any reason [other than those specified in another section of the rule] justify-
20 ing relief from the operation of the judgment." Id.

21 The United States Court of Appeals for the Eighth Circuit dismissed the subsequent
22 appeal in Zimmer for lack of jurisdiction. The Court explained:

23 It is our view that the 1991 amendment was designed to respond to
24 the circumstances that had prompted courts to use Fed.R.Civ.P. 60(b)(6) to
25 circumvent the deadlines specified by Fed.R.App.P. 4(a)(5). Other courts
and commentators have so concluded as well. . . .

26 It therefore appears that the plain language of both Fed.R.App.P.
4(a)(6) and Fed.R.Civ.P. 77(d) addresses specifically the problem of lack

1 of notice of a final judgment. That specificity, in our view, precludes the
2 use of Fed.R.Civ.P. 60(b)(6) to cure problems of lack of notice. Since that
3 language also delineates a specific period during which the period for appeal
4 may be reopened, moreover, we conclude that the district courts no longer
have the discretion to grant motions to reopen the period for appeal that are
filed outside that specific period, even if the appellant does not receive
notice until that period has expired.

5 32 F.3d at 360-61.

6 **RULING OF THE COURT**

7 The orders of this court signed on October 1, 1997 which denied the defendants'
8 post-trial motion were entered on the court's docket sheet on October 2, 1997 in docket
9 numbers 419, 420 and 421. Each order indicates that counsel was notified. The orders
10 were placed in the individual case files on or about October 2, 1997. The parties had full
11 access to the individual case files and the court's docket, including electronic access in
12 their law offices through PACER.


13 Under the plain language of Fed. R. App. P. 4(a)(6) and Fed. R. Civ. P. 77(d), the
14 outer time limit for filing a motion to extend the time for filing a notice of appeal is 180
15 days from October 2, 1998. See Zimmer, 32 F.2d at 360; Benavides v. Bureau of Prisons,
16 79 F.3d 1211, 1214 (D.C. Cir. 1996). The time limits provided by Fed. R. App. P. 4(a)(6)
17 and Fed. R. Civ. P. 77(d) are "mandatory and jurisdictional." Marcangelo v. Boardwalk
18 Regency, 47 F.3d 88, 91 (3rd Cir. 1995) (quoting Browder v. Director, Ill. Dep't of Correc-
19 tions, 434 U.S. 257, 264 (1978)). The motions at issue were filed on April 20, 1998 and
20 April 24, 1998, outside of the 180-day period. The fact that the court did not recognize the
21 mistake after the parties wrote to the court pursuant to the Local Rules, while regrettable,
22 cannot create jurisdiction where the federal rules do not provide for it. The court concludes
23 under the facts of this case that it has no discretion to vacate the judgment entered on
24 August 6, 1997 and to re-enter the judgment.

25 **CONCLUSION**

26 The motion of defendant Mark A. Gordon pursuant to FRCP 60(B) to vacate and

1 re-enter judgment (#433) is denied. The motion of defendants Burt & Gordon, P.C. and
2 Robert G. Burt under Fed. R. Civ. P. 60(b)(1) and 60(b)(6) to vacate judgment and re-enter
3 it (#438-1) or, in the alternative under Fed. R. App. P. 4(a), to reopen the time for filing an
4 appeal (#438-2) is denied.

5 DATED this 3 day of June, 1998.

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7 HELEN J. FRYE
8 United States District Judge
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