IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CITY OF GREENSBORO, et al., Plaintiffs, v. GUILFORD COUNTY BOARD OF ELECTIONS, Defendant.	)	1:15-CV-559-CCE-JLW

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO EXTEND APPEAL DEADLINES

Plaintiffs The City of Greensboro ("the City") and Lewis A. Brandon III, Joyce Johnson, Reverend Nelson Johnson, Richard Alan Koritz, Sandra Self Koritz, Charli Mae Sykes, Maurice Warren II, and Georgeanna Butler Womack (collectively, the "Individual Plaintiffs") hereby respond to the June 12, 2017 Motion of Defendant Guilford County Board of Elections ("the Board") to extend the time in which the Board can notice an appeal from either this Court's April 2017 final judgment or any yet-to-be-entered order on any yet-to-be-filed motion for attorneys' fees. The Board's request should be denied.

PROCEDURAL HISTORY

The Court entered final judgment in this action on April 13, 2017. ECF No. 137. Pursuant to Federal Rule of Appellate Procedure 4(a)(1)(a), the Board was required to file a notice of appeal within 30 days after entry of judgment; notice of appeal therefore was

due on or before May 15, 2017. The Board filed no notice and did not otherwise indicate its intent to seek appellate review of the April 13 final judgment. This litigation has now come to an end, and the time for appeal from the Court's merits judgment has passed.

On June 2, 2017, within the time set by Federal Rule of Civil Procedure 54 and Local Civil Rule 54.1(a)(1)(i) for seeking attorneys' fees, the Individual Plaintiffs filed a Consent Motion for an Extension of Time to File Motions for Attorneys' Fees and Costs (ECF No. 138), noting their intent to seek recovery of fees and costs. By Order dated June 5, 2017, this Court extended the deadline for moving to recover fees and costs to July 14, 2017. ECF No. 139. Individual Plaintiffs have not yet filed their fee petition. During the trial of this matter, Individual Plaintiffs made clear to the Board that they would not waive their entitlement to attorneys' fees should they prevail. Counsel for Individual Plaintiffs and the Board met in person on May 23, 2107, as required by Local Rule 54.2, to determine if Individual Plaintiffs and the Board could come to an agreement on the issue of attorneys' fees.[1]

Nearly a full month after the deadline for noticing an appeal from this Court's final judgment had passed, the Board filed a Motion to Extend Appeal Deadlines (ECF No. 140), asking the Court to extend the deadline for noting an appeal pursuant to Fed. R. Civ. P. 58 and Fed. R. App. P. 4(a)(4)(A)(iii). For the reasons explained below, that Motion should be denied.

[1] The City has not sought, and does not intend to seek, attorneys' fees.

ARGUMENT

The Board's motion should be denied insofar as it seeks to reopen the time for appeal from the Court's April 13 final judgment. The Court should not exercise its discretion to allow additional time for noticing an appeal in light of the Individual Plaintiffs' yet-to-be-filed fee petition, and the Board has made no showing of good cause or excusable neglect that would excuse its failure to file a notice of appeal within the time prescribed by Rule 4(a)(1). To the contrary, a ruling allowing the Board belatedly to appeal the underlying judgment on the merits (along with any future ruling on any future fee petition) would come at a significant cost to the Individual Plaintiffs, effectively requiring them to choose between abandoning their fee petition or jeopardizing the final ruling they secured on the merits. Nothing in the Board's motion warrants that result.

First, as the Board concedes, Rule 4 of the Federal Rules of Appellate Procedure establishes the period within which parties must ordinarily file a notice of appeal. *See* Board's Mem. in Support of Motion to Extend Appeal Deadlines ("Board Mem.") (ECF No. 141) at 1. "The filing of a timely notice of appeal is both 'mandatory and jurisdictional.'" *Sack v. CIA*, No. 12-cv-00537(CRC), 2015 U.S. Dist. LEXIS 112916, at *5 (D.D.C. Aug. 26, 2015) (citing cases); *see also Shah v. Hutto*, 722 F.2d 1167, 1167 (4th Cir. 1983) (same) (quoting *Browder v. Director, Dept. of Corrections*, 434 U.S. 257, 264 (1978)). That period can be delayed, however, by the timely filing of certain specified post-judgment motions within the time periods established by the Rules of Civil Procedure, including motions "for attorney's fees under Rule 54 if the district court extends the time

to appeal under Rule 58." Fed. R. App. P. 4(a)(4)(A)(iii). The Board, pointing to Individual Plaintiffs' expressed intent to file a motion for attorneys' fees under Rule 54, invokes Rule 4(a)(4)(A)(iii) as a basis for extending its deadline to appeal. That argument is unavailing.

To begin with, the Board's argument for an enlargement of the appeal period is based on an erroneous premise: that the Individual Plaintiffs' "Motion for Attorney Fees is currently still pending pursuant to an Order entered on June 5, 2017, granting the Plaintiffs until July 14, 2017 to file said Motion." Board Mem. at 1. In fact, no motion for fees is "pending" because none has yet been filed; therefore, the motion that forms the predicate for any extension of time to appeal under Rule 4(a)(4)(A)(iii) has not yet been made. "[P]rior to the filing of a fee motion," an order under "the district court's authority to order that a timely Rule 54 motion have the same effect as a timely motion under Rule 59 . . . cannot properly be entered." *Mendes Junior Int'l Co. v. Banco de Brasil, S.A.*, 215 F.3d 306, 313 (2d Cir. 2000) (noting that such an order is commonly referred to as a "Rule 58/54/59 order"); *cf. Sack v. CIA*, No. 12-cv-00537(CRC), 2015 U.S. Dist. LEXIS 112916, at *1, *7 (D.D.C. Aug. 26, 2015) ("The parties agree that the technical requirements for extending the deadline to appeal were not met because Sack did not file her extension motion within the applicable deadline and did not file a fee petition, which could have tolled that deadline. . . . And neither her request for an extension nor the parties' settlement of attorneys' fees can be treated as a motion for attorneys' fees." (emphasis added)).

Moreover, a motion for attorneys' fees (assuming *arguendo* the Individual Plaintiffs' mere intent to file such a motion in the future would be sufficient to trigger the Rule) extends the deadline for noticing an appeal if, and only if, this Court "extends the time to appeal under Rule 58." Rule 58 vests this Court with discretion to grant an extension—one is not automatically given to the Board, even if a motion for attorneys' fees had actually been filed—but begins with the premise that parties are expected to file timely notices of appeal notwithstanding post-judgment motions to recover fees and costs: "Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees." Fed. R. Civ. P. 58(e). The Court "may"—that is, is permitted but not required to—relax that ordinary timing rule where "a timely motion for attorney's fees is made under Rule 54(d)(2)." *See Sack*, 2015 U.S. Dist. LEXIS 112916, at *6-7 ("For Rule 58 to have [a] tolling effect . . . two conditions must be met: (1) a timely motion for attorneys' fees must be made under Rule 54(d)(2), and (2) the court must exercise its discretion to order that the motion have a tolling effect before a notice of appeal has been filed and become effective.").

In the circumstances of this case, the Court should exercise that discretion not to extend the time for appeal under Rule 58. The public interest weighs heavily against still further delay and uncertainty as a result of this litigation, which has been pending for nearly two years. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988) ("Courts and litigants are best served by the bright-line rule, which accords with traditional understanding, that a decision on the merits is a 'final decision' for purposes

of § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case."). Moreover, reopening the possibility of an appeal on the merits would prejudice Plaintiffs, other voters, and potential city council candidates in Greensboro, where the candidate filing period for municipal elections in the fall of 2017 is scheduled to open in roughly a month. *See Mendes Junior*, 215 F.3d at 314 ("It is in the public interest, and it is the very purpose of limiting the period for appeal, to set a definite and ascertainable point of time when litigation shall be at an end unless within that time application for appeal has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands." (quoting *Hill v. Hawes*, 320 U.S. 520, 525 (1944) (Stone, C.J., dissenting)). Denying the Board the further extension it requests will promote finality, certainty, and stability in the organization of Greensboro's municipal government and the contours of its electoral districts. This Court's discretion should be exercised to promote that certainty, not to excuse the Board from its failure to timely notice an appeal.

To the extent the Board's motion seeks to preserve its right to appeal from any eventual ruling on any yet-to-be-filed motion for fees, or from any associated ruling such as an order on a motion to implead a third party for purposes of fee proceedings, the Board's motion does not explain why an extension of time to appeal from the Court's April 13 final judgment is necessary. No order ruling on the issue of fees has been entered, and there is no reason to believe that the Board will be unable to take a timely appeal from any such order entered in the future. A Rule 58/54/59 order should not be allowed in these

circumstances to discourage prevailing parties from seeking fees by putting them in the position of having to choose whether to abandon their fee request or jeopardize the final ruling they have won on the merits.

Indeed, several courts have concluded that Rule 58 does not empower a court to excuse a party's failure to timely notice an appeal. *See, e.g.*, *Robinson v. City of Harvey*, 489 F.3d 864, 869 (7th Cir. 2007) (reasoning that "the language in [Rule 58(e)] that 'the court may act before a notice of appeal has been filed and has become effective,' strongly suggests that the rule's drafters intended a court's authority to enter a Rule 58/54/59 order to depend on the possibility that a notice of appeal may yet become effective—something that is impossible once the time for appeal prescribed by FRAP Rule 4(a)(1)(A) has expired."); *Mendes Junior*, 215 F.3d at 314 ("[I]f a Rule 58/54/59 order could revive the losing party's expired right to appeal, the work of the courts could only be increased rather than expedited."); *Burnley v. City of San Antonio*, 470 F.3d 189, 199-200 (5th Cir. 2006) (reasoning that Rule 58(e) authorizes courts to enter orders "only for the purpose of allowing appeals from both the merits judgment and the fee judgment to be taken at the same time," not to revive an expired right to appeal); *Nasser v. WhitePages, Inc.*, No. 5:12-cv-00097, 2014 U.S. Dist. LEXIS 90960, at *14 (W.D. Va. April 30, 2014) ("[N]othing in the rules suggests that a district court may use a Rule 58(e) order to give a second chance to a party who missed the time to appeal under Appellate Rule 4(a)(1)." (citing cases)); *Del Amo v. Baccash*, No. CV 07-663 PSG (JWJx), 2008 U.S. Dist. LEXIS 102438, at *6 ("while Rule 58(e) authorizes a court to delay the clock for filing a notice of appeal, a court

can only delay the clock when there is time left on it"). The Board's "clock" expired in May, several weeks before its belated Motion. That Motion should be denied.

Second, Appellate Rule 4(a)(5) does, to be sure, allow this Court to enter an order extending the time to appeal upon a motion made within 30 days after the time for appeal expires. *See* Fed. R. App. P. 4(a)(5) (appeal deadline may be modified only if "a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires").[2] But the Board does not invoke Rule 4(a)(5), and its motion makes no argument for its application. In all events, Rule 4(a)(5) vests the Court with discretion extend the time to appeal **only upon a showing by the party seeking relief of good cause or excusable neglect**.

In the Fourth Circuit, "'[g]ood cause' contemplates circumstances where fault is not an issue, and the need for an extension is caused by something beyond the appellant's control." *Dalenko v. News & Observer Publishing Co.*, 447 Fed. App'x 490, 491 (4th Cir. 2011). In *Nasser*, a district court within the Fourth Circuit found the good cause standard inapplicable where the movant "ha[d] not indicated that he was prevented from timely noticing an appeal by circumstances outside his control." *Nasser*, 2014 U.S. Dist. LEXIS 90960, at *17. The good cause standard is similarly inapplicable here, where the Board has not indicated that any circumstances outside its control prevented it from filing this motion before the time to appeal from the final judgment had expired.

[2] Any extended appeal period would be limited to ten days, beginning with entry of the Court's order granting the extension. *See Mendes Junior*, 215 F.3d at 312 ("[N]o extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion [for extension of time] is entered, whichever is later." (alteration in original)).

In fact, the Board's motion and memorandum offer no explanation at all for its failure to file a notice of appeal within the 30-day window established by Appellate Rule 4(a)(1). Other courts have declined to grant relief under Appellate Rule 4(a)(5) where a party belatedly requests an extension of time during the 30-day "grace period" following the initial 30-day deadline to appeal but makes no showing in support of that extraordinary relief. *See, e.g.*, *Nasser*, 2014 U.S. Dist. LEXIS 90960, at *13 ("Entering a Rule 58(e) order to extend the time to appeal based on a request made during the grace period but without a finding of good cause or excusable neglect would effectively subvert the requirements of Appellate Rule 4(a)(5)."); *Del Amo*, 2008 U.S. Dist. LEXIS 102438, at *6-7 (denying relief under Rule 4(a)(5) "because Defendants have not introduced any evidence to support their argument that good cause or excusable neglect exist"). *Cf. Thompson v. E.I. DuPont de Nemours & Co.*, 76 F.3d 530, 535 (4th Cir. 1996) (denying relief under Rule 4(a)(5) where notice sent by mail arrived after the deadline and was not "an exceptional circumstance"). The Board's failure to make the necessary showing—indeed, its failure even to invoke the Rule—warrants the denial of its motion as well.

CONCLUSION

For the foregoing reasons, the Board's Motion to Extend Appeal Deadlines should be denied.

This the 19th day of June, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically served copies of the foregoing document on all parties who have entered an electronic appearance in this action through the ECF filing system.

This the 19th day of June, 2017.

/s/ Julia C. Ambrose
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