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The Naming of 'Catz'

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For all the complexities inherent in federal appellate work, the start of an appeal is - usually - a simple matter. A federal notice of appeal must satisfy four requirements: It must be timely filed; it must designate the judgment or orders being appealed; it must name the appellate court; and it must name who is appealing. Federal Rule of Appellate Procedure 3(c).

This last requirement should be the simplest. After all, there should be no difficulty for an aspiring appellant to identify its own name. But what if the appellant's name in the notice of appeal does not match the name set forth in the judgment? And what if, to correct that discrepancy, the would-be appellant files a motion to correct the judgment to list the name properly? Does such a motion - really just a motion to correct a clerical mistake in a judgment - extend the time to file the notice of appeal? The 9th Circuit recently addressed this issue in *Catz v. Chalker*, 566 F.3d 839 (9th Cir. 2009). And, with apologies to T.S. Elliot, although the "naming in *Catz* is a difficult matter," we now have an answer.

First, some basics to set the stage for the naming in *Catz*. The key requirement for a valid notice of appeal is filing it within the prescribed time. The need for a timely filing cannot be over-emphasized in light of the jurisdictional nature of the filing. But as with so many aspects of litigation, there is more to the concept of "timely" than meets the eye. At first blush, filing on time sounds easy: Federal Rule of Appellate Procedure 4(a)(1) provides that a notice of appeal (in a case not involving the United States as

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a party) must be filed with the district court within 30 days of entry of the judgment or order being appealed. (If the United States is a party then Rule 4(a)(1)(B) extends that time for all parties to 60 days.) Certain provisions of the rules can save an inexperienced or unwitting appellant from an untimely filing. For example, under Rule 4(a)(2), if a party prematurely files a notice of appeal before the order or judgment is final, the appeal is considered filed as of the date of finality. Similarly, if the appellant mistakenly files the notice of appeal directly with the Court of Appeals, the clerk of that court must note the date of the filing and then forward the notice to the district court clerk, and the appeal is considered filed as of that date. Rule 4(d). Still other provisions allow for motions to extend the time to appeal. Rule 4(a)(5)(A)(i) & (ii).

One type of motion that may toll the time to appeal is a motion to amend the judgment. Rule 4(a)(4)(A) provides: "If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion: ... (vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered."

This take us to Catz, where the District of Arizona entered judgment against the Catzes, a father and his two sons, and awarded attorney fees of nearly $100,000 against them (for being vexatious litigants) on Oct. 30, 2007. For background into the Catz family soap opera, see *Catz v. Chalker*, 142 F.3d 279 (6th Cir. 1998), amended, 243 F.3d 234 (6th Cir. 2001). This judgment (and the order giving rise to the judgment) misspelled Catz as "Katz" in the caption. On Nov. 9, the Catzes, acting without counsel - though it is interesting to note that two of the Catzes are lawyers, and one of those a former law professor - filed a pro se motion titled "Motion to Alter or Amend the Final Judgment Entered In This Action On October 30, 2007, Pursuant to Rule 59(a) of the Federal Rules of Civil Procedure." The Catzes' three-sentence motion argued that the judgment had to be amended because it was erroneous and unenforceable by spelling their names incorrectly. The prevailing parties filed a response indicating that although the judgment was clear enough about who had to pay the award, and thus was not unenforceable, they had no objection to the judgment being amended to correct the spelling of Catz.

On Nov. 21 the district court signed an order acknowledging that the "K" in Katz should have been a "C" and that although there is no question against whom the judgment was entered, the court would correct the "typo" to avoid any "alleged confusion." Accordingly, on Nov. 27 the district court entered an amended judgment - with the notation "amended as to caption name only" - nunc pro tunc, amending the caption of the judgment.

The Catzes then filed their pro se notice of appeal on Dec. 21, 2007. The

appellees moved to strike the notice of appeal as tardy, but the district court claimed a lack of jurisdiction to resolve the issue. On appeal, the appellees renewed their argument that the notices of appeal were untimely. Appellees argued that the notices of appeal were untimely because they were filed after Nov. 29, i.e., the 30th day after entry of the judgment with the erroneous spelling. The Catzes argued that the filing of their motion to alter or amend the judgment tolled their time to appeal, giving them until Dec. 27 to file a notice of appeal.

The issue presented, therefore, was whether a motion to correct a clerical mistake in a judgment tolled the time for filing a notice of appeal under Rule 4(a)(4)(A)(vi). An initial issue to resolve was how to interpret the Catzes' motion to alter or amend the judgment. As noted, motions under Rule 60 may toll the time to appeal, but the Catzes' brought their motion expressly under Rule 59(a) - concerning amending a judgment after a new trial - not Rule 60 - regarding relief from a judgment. The 9th Circuit had no difficulty in construing the Catzes motion as one under Rule 60 rather than Rule 59. Under 9th Circuit precedent, "[t]he nomenclature the movant uses is not controlling." Hasbrouck v. Texaco, Inc., 879 F.2d 632 (9th Cir. 1989). This makes sense, especially since the Catzes were acting in propria persona.

More specifically, Rule 60 has two subsections outlining different reasons why relief from a judgment might be needed. Rule 60(a) concerns clerical mistakes, and Rule 60(b) concerns mistakes, inadvertence, excusable neglect, newly discovered evidence, fraud and the like. The Catzes' motion plainly was a Rule 60(a) motion to correct a clerical mistake.

Next, the court turned to the precise wording of Rule 4, which allows tolling if a party timely seeks "*relief* under Rule 60." Thus, the question became whether the Catzes' request to correct a typo was really a form of seeking "relief" from the judgment or not. Arguably, fixing a misspelled word - or making any other sort of clerical correction - does not change the judgment substantively, and thus affords no relief. In other words, a motion to correct a clerical error under Rule 60(a) does not actually "relieve" a party from anything, because all it does is allow a party to ask the district court to make a "correction" to a clerical mistake or other oversight or omission. In contrast, Rule 60(b) specifically allows a party to seek relief from a final judgment or order based on substantive or legal errors. If the court read Rule 4(a)(4)(A) narrowly, the tolling provided by that rule would only apply to Rule 60(b) motions seeking substantive relief.

The court reasoned that such a narrow reading of Rule 4 would improperly and unnecessarily limit the rule's scope. The court noted that if Rule 4 "were intended to be limited to motions under Rule 60(b), it would have been clearer and simpler for it to refer to 'Rule 60(b).'" The court further concluded that it was "unlikely that the drafters of Appellate Rule 4 decided to rely upon subtle indirection by use of the words 'for relief' to indicate that

only motions under Rule 60(b) are covered." This interpretation accorded with rulings from the 2nd Circuit and a district court, both holding that a Rule 60(a) motion does qualify for tolling. *Dudley ex rel. Estate of Patton v. Penn-Am. Ins. Co.*, 313 F.3d 662 (2d Cir. 2002); *Internet Financial Services., LLC v. Law Firm of Larson-Jackson, P.C.*, 394 F.Supp.2d 1 (D.D.C. 2005).

In reaching this result, however, the 9th Circuit had to work around the Advisory Committee notes regarding the 1993 amendment to the Federal Rules of Civil Procedure. The notes indicated that the amendment intended solely to clarify confusion whether substantive attacks on a judgment under Rule 59(e) were to be considered "motions" for purposes of tolling the time to appeal. The committee explained that the amendment eliminated this confusion. The *Catz* court suggested that the notes thus indicated that there was no intention to expand the scope of Rule 4 to encompass motions under Rule 60(a).

Nevertheless, the court concluded that this background should be balanced against the public policy interest in a broader interpretation of Rule 4. The court noted that, "[b]ecause failure to timely file an appeal is jurisdictional, a narrow reading of the Rule will deprive some parties with valid claims of appellate review." In particular the court expressed concern that "unwitting or unsophisticated litigants" might assume that the filing of any Rule 60 motion with the district court tolls the time to appeal. On the merits, by the way, the court remanded for additional proceedings to reduce the attorney fees award. Thus, the Catzes' appeal was successful.

Worth noting is that the 9th Circuit was only able to find authority from one other circuit, the 2nd, addressing this issue. There is no guarantee that other circuits will follow this approach. As always, a prudent, conservative tack is safest. Here, for instance, note that based on the Oct. 30, 2007, entry date of the original judgment, a notice of appeal could have been timely filed by Nov. 29 - i.e., two days after the order correcting the judgment's caption. Thus, had the Catzes carefully monitored the docket (much easier now that federal dockets are electronic), they could have filed within the original 30-day time period, and thus accomplished their goal of appealing from a correctly captioned judgment, yet avoid any complications about tolling.

A final observation: The Catzes' motion was effective as a tolling motion because it was timely filed within ten days of the judgment. But changes to the rules coming this December are anticipated to extend that 10-day window to 28 days. From a practitioners' perspective, that extra time may be the cat's meow.

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