

IN THE UTAH COURT OF APPEALS

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Bill Martin and Mary Martin,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiffs and Appellants,)	
)	Case No. 20080655-CA
v.)	
)	
<u>Lawrence D. Gardner, as</u>)	F I L E D
<u>trustee of the L.D. Gardner</u>)	(October 23, 2008)
<u>Trust</u> ; and Greater Park City)	
Company,)	2008 UT App 383
)	
Defendants and Appellee.)	

Third District, Silver Summit Department, 030500638
The Honorable Bruce C. Lubeck

Attorneys: Joseph E. Tesch and Shawn W. Potter, Park City, for Appellants
Joseph E. Wrona, Bastiaan K. Coebergh, and Jared C. Bowman, Park City, for Appellee

Before Judges Greenwood, Davis, and McHugh.

PER CURIAM:

This case is before the court on a sua sponte motion for summary disposition for lack of jurisdiction based upon an untimely notice of appeal.

On appeal, Plaintiffs characterize their motion for reconsideration as a postjudgment motion to alter or amend the judgment under rule 59(e) of the Utah Rules of Civil Procedure that tolled the time for appeal under rule 4(b) of the Utah Rules of Appellate Procedure. The motion sought reconsideration of the March 31, 2008 memorandum decision. That decision specifically directed counsel for Gardner to prepare a final judgment in accordance with rule 7(f) of the Utah Rules of Civil Procedure and stated that the memorandum decision would be "part of any final order of the court." It is inescapable that the March 31, 2008 memorandum decision was not a final judgment. This fact would have been readily apparent to Plaintiffs when they filed a motion for reconsideration, purportedly under rules 59(e) and 60(b)(6) of the Utah Rules of Civil Procedure. However, each of

those rules is directed to relief from final judgments. Plaintiffs' April 25, 2008 motion for reconsideration, although styled in the alternative as a motion to alter or amend the judgment, was a prejudgment motion to reconsider.

The Utah Supreme Court addressed postjudgment motions for reconsideration in Gillett v. Price, 2006 UT 24, 135 P.3d 861, distinguishing such motions from prejudgment motions for reconsideration. The supreme court held that "regardless of the motion's substance, postjudgment motions to reconsider and other similarly titled motions will not toll the time for appeal because they are not recognized by our rules." Id. ¶ 7. As Plaintiffs do in the present case, the appellants in Gillett argued that their motion to reconsider should be construed as a motion to alter or amend the judgment under rule 59, which is a motion that tolls the time for appeal under rule 4(b) of the Utah Rules of Appellate Procedure. The supreme court stated that "a motion to reconsider filed . . . before a final judgment was not a post-judgment motion, but rather a reargument that the district court was free to consider any time before entering the final judgment." Id. ¶ 7 n.2. Accordingly, "such a prejudgment motion to reconsider would not toll the time for appeal once a final judgment was entered." Id. The supreme court clarified in Gillett that its holding that postjudgment motions to reconsider do not toll the time for appeal "applies to post-final-judgment motions to reconsider; it does not affect motions to or decisions by the district courts to reconsider or revise nonfinal judgments, which have no impact on the time to appeal." Id. ¶ 10.

Plaintiffs filed their motion for reconsideration before entry of the final judgment. Regardless of its caption in the alternative, the motion was a prejudgment motion to reconsider that the district court considered and rejected before the entry of the final judgment. The final judgment was signed by the court, filed with the clerk, and docketed on May 1, 2008. Failure to give notice of the entry of a judgment does not excuse the failure to file a timely notice of appeal. See Utah R. Civ. P. 58A.

Plaintiffs' arguments are premised upon a claim that their motion for reconsideration was, alternatively, a postjudgment motion to alter or amend the judgment that tolled the time for appeal under rule 4(b) of the Utah Rules of Appellate Procedure. It was not. The motion for reconsideration specifically challenged the March 31, 2008 memorandum decision, which decision stated that it was not the final order of the court but would be only a part of any final order. The motion for reconsideration, which was filed prior to entry of the final judgment, could be considered only as a prejudgment motion to reconsider until entry

of a final judgment and did not toll the time for appeal. Plaintiffs' notice of appeal was not filed within thirty days of the final judgment entered on May 1, 2008, and we lack jurisdiction to consider the appeal. See Serrato v. Utah Transit Auth., 2000 UT App 299, ¶ 7, 13 P.3d 616 ("If an appeal is not timely filed, this court lacks jurisdiction to hear the appeal."). Accordingly, we dismiss the appeal.

Pamela T. Greenwood,
Presiding Judge

James Z. Davis, Judge

Carolyn B. McHugh, Judge