

1 UNITED STATES COURT OF APPEALS  
2  
3 FOR THE SECOND CIRCUIT  
4

5  
6  
7 August Term, 2010  
8

9 (Argued: March 15, 2011 Decided: April 19, 2011)  
10

11 Docket Nos. 10-2258-cv(L); 10-2267-cv (con)  
12

13  
14 KEITH JOHNSON, M.D., bringing this action on behalf of the  
15 United States of America,  
16

17 *Plaintiff-Appellant,*  
18

19 LAURA SCHMIDT, R.N., bringing this action on behalf of the  
20 United States of America,  
21

22 *Plaintiff,*  
23

24 - v. -  
25

26 THE UNIVERSITY OF ROCHESTER MEDICAL CENTER, STRONG MEMORIAL HOSPITAL,  
27

28 *Defendants-Appellees.\**  
29  
30

31 Before:

32 WESLEY, CHIN, and LOHIER, *Circuit Judges.*  
33

34 Appeal from a judgment and orders of the United States  
35 District Court for the Western District of New York  
36 (Larimer, J.) that: (1) dismissed Appellant's complaint and  
37 denied leave to amend; (2) denied relief pursuant to Federal

---

\* We direct the Clerk of the Court to amend the official caption in accordance with this opinion.

1 Rule of Civil Procedure 60(b)(1); and (3) sanctioned  
2 Appellant's counsel pursuant to Federal Rule of Civil  
3 Procedure 11 or, alternatively, 28 U.S.C. § 1927.  
4

5 We **DISMISS** the appeal from the district court's  
6 judgment and order that dismissed Appellant's complaint and  
7 denied leave to amend. We **AFFIRM** the orders that denied  
8 relief pursuant to Federal Rule of Civil Procedure 60(b)(1)  
9 and sanctioned Appellant's attorney pursuant to § 1927.

10  
11  
12  
13 \_\_\_\_\_  
14 CHRISTINA A. AGOLA, Christina A. Agola, PLLC,  
15 Rochester, NY, for Plaintiff-Appellant.

16 THOMAS S. D'ANTONIO, (Christin M. Murphy, on the  
17 brief), Ward Greenberg Heller & Reidy LLP,  
18 Rochester, NY, for Defendants-Appellees.  
19  
20 \_\_\_\_\_  
21  
22  
23

24 PER CURIAM:

25 Appellant Keith Johnson, M.D.<sup>1</sup> appeals from a judgment  
26 and three orders of the United States District Court for the  
27 Western District of New York (Larimer, J.) that: (1)  
28 dismissed his complaint and denied leave to amend; (2)  
29 denied relief under Federal Rule of Civil Procedure  
30 60(b)(1); and (3) sanctioned his attorney.

\_\_\_\_\_

<sup>1</sup> Laura Schmidt, R.N. brought the *qui tam* action in conjunction with Johnson. This appeal, however, is brought solely on Johnson's behalf. Accordingly, we refer solely to Johnson throughout.

1 For the reasons stated below, we **DISMISS** the appeal  
2 from the judgment and order that dismissed his complaint and  
3 denied leave to amend for lack of appellate jurisdiction.  
4 We **AFFIRM** the orders that denied Rule 60(b)(1) relief and  
5 imposed § 1927 sanctions.

### 6 I. Background

7 Johnson filed a *qui tam* action pursuant to 31 U.S.C.  
8 § 3729, alleging that the University of Rochester Medical  
9 Center and Strong Memorial Hospital (the "University")  
10 fraudulently billed Medicare/Medicaid for medical procedures  
11 performed by unsupervised residents. The United States  
12 declined to intervene, the district court unsealed the  
13 complaint, and Johnson served the University.

14 The University then moved to dismiss Johnson's  
15 complaint for failure to state a claim. In response,  
16 Johnson moved for leave to amend, arguing that leave should  
17 be "freely given" in the absence of "bad faith," "repeated  
18 failures to cure deficiencies," or "futility of the  
19 amendment."<sup>2</sup> Johnson did not assert that he was entitled to

---

<sup>2</sup> Johnson moved for leave to amend on December 31, 2008. Thus, former Rule 15 governed the amendment. Former Rule 15 stated:

"A party may amend the party's pleading once

1 amend as of right. In the University's opposition to  
2 Johnson's motion, it moved for sanctions pursuant to Federal  
3 Rule of Civil Procedure 11.

4 In a judgment entered February 19, 2010, the district  
5 court dismissed the action and denied Johnson leave to  
6 amend, holding that Johnson's request to amend his complaint  
7 would prove futile because he repeated the original  
8 complaint's insufficient allegations and added two new, but  
9 ultimately defective, causes of action. The court also  
10 denied, without prejudice, the University's sanctions motion  
11 because the University failed to file the motion separately,  
12 as required by Federal Rule of Civil Procedure 11(c)(2).

13 On March 22, 2010, Johnson moved for reconsideration  
14 pursuant to Federal Rule of Civil Procedure 60(b)(1).  
15 Johnson argued that the district court should have granted  
16 leave to amend because former Federal Rule of Civil  
17 Procedure 15(a) allowed one amendment as of right. The

---

as a matter of course at any time before a  
responsive pleading is served . . . .  
Otherwise a party may amend the party's  
pleading only by leave of court or by written  
consent of the adverse party; and leave shall  
be freely given when justice so requires."

Fed. R. Civ. P. 15(a) (1998).

1 district court denied reconsideration, reasoning that it  
2 made no mistake since Johnson committed the decision asking  
3 whether to allow amendment to the court's discretion by  
4 asking for permission to amend.

5 The University subsequently filed a separate sanctions  
6 motion pursuant to Federal Rule of Civil Procedure 11 or,  
7 alternatively, 28 U.S.C. § 1927, alleging that Johnson's  
8 attorney knowingly included a false accusation in the  
9 amended complaint. The district court granted the sanctions  
10 motion, holding that Johnson's attorney relentlessly pursued  
11 claims without basis in law or fact and knowingly included a  
12 false statement in the proposed amended complaint.

## 13 **II. Discussion**

### 14 **A. Jurisdiction to Review the District Court's Judgment**

15 This Court lacks appellate jurisdiction over Johnson's  
16 appeal from the district court's February 19, 2010 judgment  
17 and order dismissing his complaint and denying leave to  
18 amend. Pursuant to Federal Rule of Appellate Procedure 4, a  
19 party must file a notice of appeal within thirty days from  
20 the date judgment is entered. Fed. R. App. P. 4(a)(1)(a).  
21 A party tolls its filing deadline, however, by filing a Rule  
22 60(b) motion within twenty-eight days of the judgment's

1 entry. Fed. R. App. P. 4(a)(4)(A)(vi). Filing deadlines  
2 are mandatory and jurisdictional. *Silivanch v. Celebrity*  
3 *Cruises, Inc.*, 333 F.3d 355, 363 (2d Cir. 2003).  
4 Accordingly, failure to comply with Rule 4 warrants  
5 dismissal. *Glinka v. Maytag Corp.*, 90 F.3d 72, 74 (2d Cir.  
6 1996) (citation omitted).

7 Johnson filed his Rule 60(b) motion on March 22, 2010,  
8 three days after the twenty-eight day tolling deadline  
9 expired. Because Johnson's Rule 60(b) motion failed to toll  
10 his deadline to file a notice of appeal, his June 4, 2010  
11 notice of appeal was untimely.<sup>3</sup> Accordingly, this Court  
12 lacks appellate jurisdiction over the judgment and order  
13 dismissing Johnson's complaint and denying leave to amend.

---

<sup>3</sup> Johnson also argues that the district court's order denying the University's sanctions motion without prejudice rendered the February 19th judgment and order non-final. Although Johnson is correct that some sanctions orders (*e.g.*, discovery sanctions) are "inextricably intertwined" with the merits of a case when the order appealed from is a sanctions order, *see Cunningham v. Hamilton Cnty.*, 527 U.S. 198, 205-06 (1999), there was no reasonable possibility in this case that resolving the University's sanction motion would require further analysis of the merits. The pendency of the sanctions motion therefore did not extend the time to appeal the merits judgment. *Cf. Salovaara v. Eckert*, 222 F.3d 19, 27 n.4 (2d Cir. 2000) ("Salovaara's time to appeal from the District Court's decision on the merits began to run in July 1998, notwithstanding the fact that Eckert was granted leave to file a motion for attorney's fees and/or sanctions.")

1     **B.     Johnson's Request for Reconsideration**

2             Johnson contends that the district court abused its  
3     discretion by declining to reconsider its order that denied  
4     his request for leave to amend. Federal Rule of Civil  
5     Procedure 60(b)(1) permits a district court to grant relief  
6     from a judgment based on "mistake, inadvertence, surprise,  
7     or excusable neglect." Fed. R. Civ. P. 60(b)(1) (2010). We  
8     review a district court's decision on a Rule 60(b) motion  
9     for abuse of discretion. *Ins. Co. of N. Am. v. Pub. Serv.*  
10    *Mut. Ins. Co.*, 609 F.3d 122, 127 (2d Cir. 2010). A court  
11    abuses its discretion when (1) its decision rests on an error  
12    of law or a clearly erroneous factual finding; or (2) cannot  
13    be found within the range of permissible decisions. *Zervos*  
14    *v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir. 2010).

15            Here, the district court denied reconsideration after  
16    concluding that Johnson had not requested permission to  
17    amend as of right, and that it made no mistake in not  
18    divining that Johnson actually intended to do so. The court  
19    held that because Johnson sought leave to amend, it was  
20    within the court's discretion to deny his request.<sup>4</sup> We

---

<sup>4</sup> Johnson cites *Kassner v. 2nd Avenue Delicatessen, Inc.*,  
496 F.3d 229 (2d Cir. 2007), to support his contention that a

1 agree; the district court properly exercised its discretion  
2 when it denied Johnson's Rule 60(b) motion.

3 **C. The District Court's Order Granting Sanctions**

4 Johnson also appeals from the district court's order  
5 imposing sanctions under Rule 11 or, alternatively, 28  
6 U.S.C. § 1927. We review a district court's sanctions order  
7 for abuse of discretion. *Gollomp v. Spitzer*, 568 F.3d 355,  
8 368 (2d Cir. 2009).

9 Johnson's attorney contends that the court abused its  
10 discretion because the University failed to serve the  
11 sanctions motion twenty-one days before filing it, in  
12 violation of Rule 11(c)(2)'s safe-harbor provision. The  
13 University argues that it substantially complied with the  
14 safe-harbor provision by delineating Appellant-counsel's  
15 sanctionable conduct in its opposition to Johnson's motion  
16 for leave to amend. Because we hold that the district court  
17 properly exercised its discretion to sanction pursuant to  
18 § 1927, we need not reach the court's alternate Rule 11

---

district court must grant a motion for leave to amend when the  
plaintiff can also amend as of right. *Kassner* does not stand for  
the broad proposition that Johnson asserts. Rather, *Kassner*  
states that a plaintiff's right to amend as a matter of course  
"is subject to the district court's discretion to limit the time  
[to amend] the pleadings in a scheduling order issued under Rule  
16(b)." *Id.* at 244.



1 sanctions ruling.

2 A court may award § 1927 sanctions only "when the  
3 attorney's actions are so completely without merit as to  
4 require the conclusion that they must have been undertaken  
5 for some improper purpose." *Gollomp*, 568 F.3d at 368. In  
6 addition, the court must find bad faith and must provide the  
7 attorney notice and an opportunity to be heard. *Id.*

8 Here, after a hearing on the University's sanctions  
9 motion, the district court found that Johnson's attorney  
10 pursued claims she knew had no basis in law or fact. The  
11 court focused on counsel's repeated allegations that the  
12 University made an unsolicited, libelous statement about  
13 Johnson to the Delaware State Medical Board when, in fact,  
14 Johnson's attorney requested and authorized the release of  
15 the allegedly libelous statement. We hold that the district  
16 court's decision was reasonable and not an abuse of  
17 discretion.

### 18 **III. Conclusion**

19 For the above stated reasons, we **DISMISS** the appeal  
20 from the judgment and order dismissing the complaint and  
21 denying leave to amend. We **AFFIRM** the orders denying Rule

1 60(b)(1) relief and sanctioning Johnson's attorney pursuant  
2 to § 1927.