NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 19-1568

_____

ALSON ALSTON,
AND ALL OTHERS SIMILARLY SITUATED,
Appellant

v.

THE NATIONAL CONFERENCE OF BAR EXAMINERS;
THE PENNSYLVANIA BOARD OF LAW EXAMINERS;
THE NEW JERSEY BOARD OF BAR EXAMINERS;
HON. REBECCA WHITE BERCH, CHAIR OF THE NATIONAL CONFERENCE OF BAR EXAMINERS; MR. C. ROBERT KEENAN, III, ESQ., CHAIR OF THE PENNSYLVANIA BOARD OF LAW EXAMINERS;
MR. ELIZABETH WHEELER, ESQ. CHAIR OF THE NEW JERSEY BOARD OF BAR EXAMINERS

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On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 2-17-cv-04506)
District Judge: Honorable Gerald A. McHugh

_____

Submitted Pursuant to Third Circuit LAR 34.1(a)
October 21, 2019
Before: SHWARTZ, RESTREPO and RENDELL, Circuit Judges

(Opinion filed: October 23, 2019)

OPINION*

PER CURIAM

Pro se appellant Alson Alston appeals from the District Court's order denying his motion to reopen the time to file a notice of appeal. For the reasons discussed below, we will affirm.

I.

Because we write primarily for the parties, we will recite only the facts necessary for our discussion. Alston, a law school graduate, filed a civil rights complaint in the District Court in 2017. He raised claims that stemmed from his difficulty in passing the Pennsylvania and New Jersey bar exams. In November 2017, the District Court granted Alston's motion for authorization to use the CM/ECF[1] system. On June 8, 2018, the District Court entered an opinion and separate order dismissing the complaint with prejudice. The District Court's docket indicates that, on the same day, the parties, including Alston at his registered e-mail address, were electronically served with copies of the opinion and order.

On August 31, 2018, acknowledging that the time to file an appeal had expired, see Fed. R. App. P. 4(a)(1), Alston filed a motion to reopen the time to appeal pursuant to

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

[1] CM/ECF "is a computer case management system that allows courts to maintain electronic case files and attorneys to file (and serve) documents through the Internet." Ragguette v. Premier Wines & Spirits, 691 F.3d 315, 321 n.1 (3d Cir. 2012).

Federal Rule of Civil Procedure 4(a)(6). He alleged that he did not receive notice of the District Court's June 8, 2018 order, and that he learned his case had been dismissed when he reviewed the docket on August 24, 2018. Alston admitted that he had previously received electronic filings through CM/ECF. Alston further admitted that, when he spoke with a clerk for the District Court, he was informed that the District Court's records indicated that electronic notice was sent to Alston. Nonetheless, Alston maintained that he could not find a notice of the District Court's dismissal order in his email.

The District Court denied the Rule 4(a)(6) motion, determining that Alston had received electronic notice of the order on June 8, 2018, and, therefore, that reopening the time to appeal was not warranted. This appeal ensued.

II.

We have jurisdiction, under 28 U.S.C. § 1291, to review the District Court's order denying the Rule 4(a)(6) motion. See Baker v. United States, 670 F.3d 448, 456 (3d Cir. 2012); In re Diet Drugs Prods. Liab. Litig., 401 F.3d 143, 153 (3d Cir. 2005). We review the District Court's order for abuse of discretion. See United States v. Rinaldi, 447 F.3d 192, 195 (3d Cir. 2006); In re Diet Drugs, 401 F.3d at 153. "The district court abuses its discretion if its decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or the improper application of law to fact." Ragguette v. Premier Wines & Spirits, 691 F.3d 315, 322 (3d Cir. 2012). We may affirm on any basis supported by the record. See Murray v. Bledsoe, 650 F.3d 246, 247 (3d Cir. 2011) (per curiam).

III.

Under Federal Rule of Appellate Procedure 4(a)(6), a district court may reopen the time to file an appeal if the following conditions are met: "(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry; (B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and (C) the court finds that no party would be prejudiced." Under Federal Rule of Civil Procedure 77(d)(1), "after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party . . . [and] record the service on the docket." The order may be served under Rule 5(b) by "sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means that the person consented to in writing." Fed. R. Civ. P. 5(b)(2)(E). Service in that manner "is complete upon filing or sending, but is not effective if the filer or sender learns that it did not reach the person to be served." Id.

Here, the District Court properly exercised its discretion to deny the Rule 4(a)(6) motion based on its finding that Alston received notice of the dismissal order within 21 days after entry. The order was entered on June 8, 2018. On that same day, the District Court clerk served electronic notice of the entry and recorded the service on the docket pursuant to Federal Rule of Civil Procedure 77(d). Service was properly made under Federal Rule of Civil Procedure 5(b)(2)(E), as Alston was a registered user of the CM/ECF system. When he registered, Alston consented in writing to receive electronic

service of all documents—including any order or judgment entered by the District Court—pursuant to the Eastern District of Pennsylvania's Local Civil Rule 5.1.2. Thus, service was complete when the District Court clerk entered the order and served Alston electronically on June 8, 2018. See Fed. R. Civ. P. 5(b)(2)(E).[2]

The District Court did not abuse its discretion when it discredited Alston's allegation that he never received notice. See Am. Boat Co., Inc. v. Unknown Sunken Barge, 567 F.3d 348, 352–53 (8th Cir. 2009) (explaining that a factfinder may infer that a district court order sent electronically via CM/ECF was received and may discredit a party's denial of receipt). There was no evidence that the District Court learned that its electronic service "did not reach the person to be served." Fed. R. Civ. P. 5(b)(2)(E).[3] Alston admitted that he had previously received notices through CM/ECF, and Alston did not provide any evidence, other than his bare denial and his representation that he had searched his email, showing how or why he did not receive electronic notice of the dismissal order.

Thus, we cannot say that the District Court's finding that Alston received notice on June 8, 2018, was clearly erroneous. Because that date is within 21 days after entry of

[2] There was no requirement for Alston to also receive service by mail, as Rule 5(b) provides alternative means of service, and the electronic service here was "complete upon filing or sending." Fed. R. Civ. P. 5(b)(2)(E).

[3] In coming to its conclusions, the District Court did not violate Rule 52(a) of the Federal Rules of Civil Procedure, as Alston claims. For one, Rule 52(a), which applies to trials, is inapplicable. In any event, we note that Alston's own motion provided evidence that the clerk's office had determined that the CM/ECF system functioned properly, which was consistent with the District Court's findings after an independent review of court procedures.

the District Court's dismissal order, as the District Court concluded, Alston did not satisfy the requirements to reopen the time to appeal that order. See Fed. R. App. P. 4(a)(6)(A). Accordingly, we will affirm the District Court's order denying Alston's Rule 4(a)(6) motion. Alston's motion for oral argument is denied.