



October 17, 2008, Judgment, the court had jurisdiction over this matter and that Barnett's Notice of Appeal is premature.

Under the "mailbox rule," a prisoner's legal document is deemed filed on the date the prisoner delivers it to prison officials for mailing. See *Houston v. Lack*, 487 U.S. 266 (1988). On November 3, 2008, the court received a Motion for Relief from Judgment from Barnett pursuant to Rule 60 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."). (Doc. No. 131.) Under the "mailbox rule," Barnett filed said Motion on October 27, 2008, the day he purportedly delivered the document to prison officials for mailing. Pursuant to Rule 4(a)(4) of the Fed. R. App. P., the timely filing of a motion for relief from judgment under Rule 60 of the Fed. R. Civ. P., tolls the time for filing an appeal from the judgment or order. A notice of appeal filed prior to the disposition by the district court of a timely tolling motion is ineffective until the motion is decided by the district court. See Fed. R. App. P. 4(a)(4); *Miller v. Marriot Intl'l., Inc.*, 300 F.3d 1061, 1063-64 (9<sup>th</sup> Cir. 2002).

Barnett's Notice of Appeal, filed October 28, 2008, the day he admittedly handed it to prison officials for mailing, was ineffective until the court decided on his Motion for Relief from Judgment filed October 27, 2008. Before the court had an opportunity to rule on the Motion for Relief from Judgment, however, the court vacated the October 17, 2008, Judgment as

premature.

As the court vacated the October 17, 2008, Judgment, Barnett's Notice of Appeal is premature. Federal Rules of Appellate Procedure ("Fed. R. App. P.") Rule 4(a)(2) provides an exception for premature appeals. Rule 4(a)(2) states that, "[a] notice of appeal filed after the court announces a decision or order but before the entry of judgment or order is treated as filed on the date of and after the entry." A notice of appeal of a non-final decision "operates as a notice of appeal from the final judgment only when a district court announces a decision that *would be* appealable if immediately followed by the entry of judgment." *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1482-83 (9<sup>th</sup> Cir. 1996). When a notice of appeal is premature and the prematurity is not cured by Rule 4(a)(2), the appellate court lacks jurisdiction over the appeal. *Id.* at 1479.

Here, the court vacated the October 17, 2008 Judgment, which Barnett now seeks to appeal. The order vacating the Judgment was filed while the court had jurisdiction over this case, the Notice of Appeal having been premature. Since the court vacated the October 17, 2008, Judgment, that Judgment is not an order "that would be appealable if immediately followed by the entry of judgment," and the prematurity of the Notice of Appeal is not cured by Rule 4(a)(2). Accordingly, Barnett's request for a certificate of appealability is DENIED.

Barnett is free to file a new Notice of Appeal. Indeed, although this court is not the final arbiter of appealability, it appears to this court that Barnett must file a new Notice of Appeal to have any appeal properly pending.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, November 17, 2008.



/s/ Susan Oki Mollway  
Susan Oki Mollway  
United States District Judge

*Barnett v. Thomas*, Civ. No. 07-00491 SOM; ORDER DENYING  
CERTIFICATE OF APPEALABILITY REGARDING NOTICE OF APPEAL FILED ON  
NOVEMBER 10, 2008; prose attorneys\COA Orders\hmg\2008\Barnett  
07-491 SOM (dny COA draft 3)