

IN THE UTAH COURT OF APPEALS

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Michael Gray,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellant,	)	
	)	Case No. 20050975-CA
v.	)	
	)	F I L E D
Sleep Inn,	)	(December 15, 2005)
	)	
Defendant and Appellee.	)	2005 UT App 542

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Third District, Salt Lake Department, 040914981  
The Honorable Paul G. Maughan

Attorneys: Michael Gray, Salt Lake City, Appellant Pro Se  
Lowell V. Smith and Trent D. Holgate, Salt Lake City,  
for Appellee

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Before Judges Davis, Orme, and Thorne.

PER CURIAM:

Michael Gray appeals the dismissal of his complaint without prejudice for failure to timely serve the summons and complaint. This case is before the court on a sua sponte motion for summary dismissal for lack of jurisdiction.

The district court entered a signed minute entry dismissing the case on December 9, 2004. Gray filed a notice of appeal on October 19, 2005, over ten months later. A notice of appeal must "be filed with the clerk of the trial court within thirty days after the date of entry of the judgment or order appealed." Utah R. App. P. 4(a). "If an appeal is not timely filed, this court lacks jurisdiction to hear the appeal." Serrato v. Utah Transit Auth., 2000 UT App 299, ¶7, 13 P.3d 616.

Gray suggests that his difficulties with former counsel are a basis for considering his untimely appeal. However, the only means to extend the time for appeal is a timely motion filed in the district court under rule 4(e) of the Utah Rules of Appellate Procedure. Although an appellate court may review the trial court's determination of a timely rule 4(e) motion, it cannot consider a claim of good cause or excusable neglect in the first instance as a basis upon which to exercise jurisdiction over an

untimely appeal. See Utah R. App. P. 2 (precluding appellate courts from suspending or modifying rule 4(e)); see generally Reisbeck v. HCA Health Serv., 2000 UT 48, 2 P.3d 447 (reviewing decision on rule 4(e) motion). We also note that the time for making a motion under rule 4(e) in district court has long since expired. See Utah R. App. P. 4(e).

Gray also contends that because the dismissal was "without prejudice," he may file an untimely appeal. Although the dismissal without prejudice would not preclude refileing of a complaint in district court, assuming that the relevant statute of limitations has not expired, it does not allow Gray to pursue an untimely appeal from the final order that dismissed the complaint.

Once a court determines that it lacks jurisdiction, it "retains only the authority to dismiss the action." Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah Ct. App. 1989). Accordingly, we dismiss the appeal for lack of jurisdiction.

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James Z. Davis, Judge

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Gregory K. Orme, Judge

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William A. Thorne Jr., Judge