

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-441

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

MAY TERM, 2009

MAY 29 2009

Harold J. Coughlin	}	APPEALED FROM:
	}	
v.	}	Rutland Superior Court
	}	
James B. Reynolds, individually, O'Brien,	}	DOCKET NO. 562-8-07 Rdcv
Shortle, Reynolds & Sabotka, P.C. and	}	
Charles Coughlin	}	

Trial Judge: Mary Miles Teachout

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals from superior court decision granting summary judgment in favor of defendants based on the six-year statute of limitations. Plaintiff contends that genuine issues of material fact remain in dispute as to whether the statute was tolled. We conclude, however, that the notice of appeal was untimely, and dismiss on that basis.

The underlying facts may be briefly summarized. Plaintiff and his brother, defendant Charles Coughlin, started a business in 1991, each taking fifty shares of stock in the company. In November 1996, the two agreed that the company would buy back all but one-tenth of one share of stock from Charles, at a price that plaintiff maintains he agreed to upon the advice of the company's accountant, defendant James B. Reynolds. Plaintiff alleges that, following an independent valuation of the company in September 2001, he discovered that the stock he purchased from his brother was seriously overvalued. In August 2007, he filed suit against his brother, Reynolds, and Reynolds' firm alleging breaches of fiduciary duties and negligence. Defendants moved for summary judgment, asserting that the claims accrued in November 1996, when the stock was valued and sold, and that the complaint was therefore untimely under the applicable six-year statute of limitations. The trial court agreed, and granted the motion.

The trial court entered judgment in favor of defendants on July 1, 2008. On July 17, 2008, plaintiff moved to reconsider. The Vermont Rules of Civil Procedure do not include provisions for a motion "to reconsider," but it appears that plaintiff's motion was construed as a Rule 59 motion for a new trial or amendment of judgment. This rule requires motions to "be served not later than ten days after the entry of the judgment." V.R.C.P. 59(b), (e). Defendants opposed the motion as untimely, and on several other grounds. Plaintiff does not actually dispute that, according to the computational rules of Rule 6(a) (not counting the date of entry of judgment or the Fourth of July holiday and two weekends following entry of judgment), the outside date for filing the motion was July 16, 2008, and that the July 17 filing was therefore untimely. On July 18, 2008, the trial court—apparently on its own motion—issued a "corrected judgment," explaining that it was solely to correct an incorrect docket number in the judgment caption and made "no other changes." Thereafter, on September 30, 2008, the trial court issued a brief entry order denying the motion to reconsider, stating that "[d]espite the late filing, the court has reviewed the motion on its merits and declines to amend the decision or judgment." Plaintiff


filed his notice of appeal on October 24, 2008. Defendants subsequently moved to dismiss the appeal as untimely.

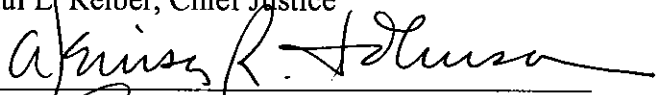
Under Vermont Rule of Appellate Procedure 4(b), the running of the usual thirty-day period for filing an appeal is tolled “by a timely motion filed in the superior court” under certain provisions of the rules of procedure, including a motion to alter or amend the judgment. It is well settled, however, that an untimely motion to amend will not toll the appeal period, and therefore will not save an otherwise untimely appeal from dismissal. See Turner v. Turner, 160 Vt. 646, 646 (1993) (mem.) (holding that “[t]he time for filing the notice of appeal was not tolled by defendant’s untimely motion to amend” and dismissing for lack of jurisdiction). Plaintiff attempts to avoid this result by arguing that the time period for filing the motion to reconsider was restarted with the issuance of the “corrected judgment” on July 18, 2008, so that the motion—filed one day earlier—was timely. This and other courts have uniformly held, however, that the issuance of a corrected or amended judgment to correct a technical or clerical error does not restart the time for taking an appeal, which continues to run from the original judgment. State v. Champlain Cable Corp., 147 Vt. 436, 439 (1986) (“[T]he correction of a clerical error under Rule 60(a) does not extend the time for taking an appeal of the underlying judgment.”). See also, e.g., In re Am. Safety Indem. Corp., 502 F.3d 70, 72 (2d Cir. 2007) (“[I]t is well-established that where a judgment is reentered, and the subsequent judgment does not alter the substantive rights affected by the first judgment, the time for appeal runs from the first judgment.”) (quotation omitted); Rezzonico v. H & R Block, Inc., 182 F.3d 144, 150 (2d Cir. 1999) (“[O]nly when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken begin to run anew.”) (quotation omitted); CC-Cal. Plaza Assocs. v. Paller & Goldstein, 59 Cal. Rptr. 2d 382, 385 (Cal. Ct. App. 1997) (where an amendment of judgment merely corrects a clerical error “the original judgment remains effective as the only appealable final judgment”); State v. Christopherson, 978 P.2d 1039, 1040 (Or. Ct. App. 1999) (amendment of a final judgment to correct a clerical error which does not “materially alter[] rights or obligations determined by the prior judgment” will not postpone the time for filing an appeal) (quotation omitted). As the trial court here explained, the corrected judgment was solely to correct a docket number and made no substantive changes to the judgment. Accordingly, it had no effect on the time for filing an appeal or motion.

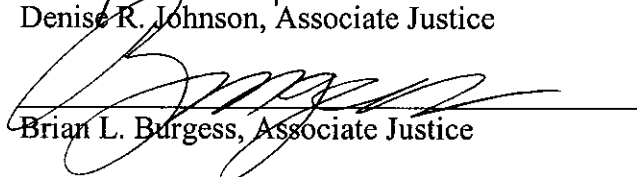
We conclude, therefore, that the notice of appeal in this matter was not timely filed, and that the appeal must be dismissed. See Turner, 160 Vt. at 647 (this Court lacks jurisdiction where the notice of appeal is untimely filed).

Appeal dismissed.

BY THE COURT:


Paul L. Reiber, Chief Justice


Denise R. Johnson, Associate Justice


Brian L. Burgess, Associate Justice