No. 18-5925

IN THE

Supreme Court of the United States

DEAN LOREN,

Petitioner,

vs.

CITY OF NEW YORK, NEW YORK, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

COZEN O'CONNOR

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Table of Contents

Page

STATEMENT

Dean Loren's petition for writ of certiorari should be denied because it seeks to place before this Court matters that are not preserved for appellate review. The Second Circuit dismissed Petitioner's appeal on purely jurisdictional grounds because Petitioner failed to file his notice of appeal within the statutory 30-day deadline. Petitioner now asks this Court to review questions relating to appellate deadlines that were either not raised with the Second Circuit at all, or raised only in a motion for reconsideration. In any event, these jurisdictional arguments have no merit. Moreover, to the extent Petitioner seeks this Court's review of the merits of his underlying case, such review is inappropriate in light of the threshold jurisdictional determination made by the Second Circuit and because the Second Circuit never considered the merits of his appeal.

FACTUAL AND PROCEDURAL BACKGROUND

On May 11, 2016, Petitioner, a public access television producer, filed a Complaint in the United States District Court for the Southern District of New York against Manhattan Neighborhood Network ("**MNN**"), Cory Brice, and Jeanette Santiago, as well as the City of New York, alleging a First Amendment violation in connection with his use of the public access channel administered by MNN. (No. 18-36 (2d Cir.), Dkt. #22 ("Mot. to Dismiss Appeal"), at 1.) On September 9, 2016, Loren filed an Amended Complaint, adding additional defendants including Daniel Coughlin, Zenaida Mendez (collectively, with MNN, Brice and Santiago, the "**MNN Defendants**") and several fellow producers (the "**Producer Defendants**"). (*Id.*) In the Amended Complaint, Loren, alleged that the MNN Defendants and the Producer Defendants somehow violated his constitutional rights by banning him from the use of MNN's facilities. MNN is an independent, non-profit, private corporation that administers the public access channels in

Manhattan. (*Id.*) In the Amended Complaint, Loren brought claims for federal constitutional violations under 42 U.S.C. Sec. 1983, and a violation of New York's Open Meetings Law. (*Id.*)

On December 27, 2016, the MNN Defendants, the Producer Defendants, and the City of New York filed motions to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6). (*Id.* at 2.) By Opinion and Order dated July 11, 2017, the District Court granted the motions to dismiss, finding that the Amended Complaint failed to allege that the MNN Defendants acted "under color of law" for Section 1983 purposes. *Loren v. City of New York*, No. 16 Civ. 3605 (PAE), 2017 WL 2964817, *3-4 (S.D.N.Y. July 11, 2017). The District Court also held that the Amended Complaint did not adequately allege "any action undertaken pursuant to a policy, practice, or custom as is required for municipal liability under Section 1983." *Id.* The District Court declined to exercise supplemental jurisdiction over the remaining state law claim and dismissed the Amended Complaint with prejudice. *Id.*

On July 26, 2017, Petitioner filed a motion to renew, reargue, and reconsider the July 11, 2017 Opinion and Order. (Mot. to Dismiss Appeal, at 2.) Petitioner filed an amended motion the next day. (*Id.*) In these motions to renew, reargue, and reconsider, Loren argued that the District Court did not consider certain documents and other additional evidence and that the District Court made unspecified errors in its decision. (*Id.*) By Opinion and Order dated and entered November 28, 2017, the District Court denied Petitioner's motion for reconsideration. Pet. App. 7a-14a.

On December 29, 2017, Petitioner filed a notice of appeal. (No. 18-36 (2d Cir.), Dkt. #1.) The notice of appeal did not name all the defendants from the district court action. Critically, Petitioner inaccurately states in his Petition that "Defendant Kyle O. Wood was a defendant-appellee in the court of appeals in no 18-36 CV [sic] and a federal district judge clerk and federal employee." Pet. iii. Petitioner also refers to Mr. Wood as a "part[y] of the case." Pet. 4. But

these characterizations are false. Petitioner did not name Mr. Wood as an appellee in Petitioner's notice of appeal to the Second Circuit. (No. 18-36 (2d Cir.), Dkt. #1.) Mr. Wood, therefore, was never a party to the appeal to the Second Circuit.

On January 18, 2018, Respondents and the City of New York filed motions to dismiss the appeal on jurisdictional grounds. (Mot. to Dismiss Appeal, at 2-3.) Respondents argued that the Second Circuit lacked appellate jurisdiction because Petitioner filed his appeal on December 29, 2017—more than 30 days after the entry of the District Court opinion from which Petitioner appealed. Because Petitioner's notice of appeal was untimely, Respondents argued that the Second Circuit lacked appellate jurisdiction and must dismiss the notice of appeal. Over Petitioner's opposition, the Second Circuit dismissed the appeal on April 25, 2018, "for lack of jurisdiction," citing 28 U.S.C. § 2107, which sets forth the deadline for filing a notice of appeal. Pet. App. 3a.

Petitioner timely filed a motion for reconsideration, arguing for the first time that he was entitled to a 60-day appeal deadline because Mr. Wood, a federal law clerk, was a defendant. (No. 18-36 (2d Cir.), Dkt. #73, at 2.) The Second Circuit denied Petitioner's motion for reconsideration on June 12, 2018. Pet. App. 2a.

REASONS FOR DENYING THE PETITION

1. The Jurisdictional Questions Presented Were Not Properly Preserved Below.

Certiorari should be denied because Petitioner failed to preserve the jurisdictional issues he presents to the Court for review. Specifically, Petitioner asks the Court to review whether it was appropriate for an appeal to be filed within 60 days where a defendant is "a US Deputy Marshal Security Monitor contracted by the Department of Justice." Pet. ii. But Petitioner never raised this issue with the Second Circuit; it is therefore not properly before this Court. This Court

"ordinarily abstain[s] from entertaining issues that have not been raised and preserved in the court of first instance." *See, e.g.*, *Wood v. Milyard*, 132 S. Ct. 1826, 1834 (2012).

Moreover, the additional jurisdictional arguments that Petitioner raises for review, *i.e.*, that Mr. Wood is a defendant and a federal law clerk, and that Petitioner should be granted three additional mailing days,[1] were raised for the first time in Petitioner's motion for reconsideration before the Second Circuit. As such, they were not properly preserved.

In any event, these arguments are unavailing. First, the District Court dismissed Mr. Wood as a defendant in November 2016, long before the District Court's dismissal of the Amended Complaint on July 11, 2017. (16-cv-3605-PAE (S.D.N.Y.), Dkt. #8, at 3.) Petitioner's notice of appeal to the Second Circuit did not appeal this November 2016 dismissal of Mr. Wood. (No. 18-36 (2d Cir.), Dkt. #1.) Mr. Wood was no longer in the case caption by the time the District Court issued its July 11, 2017, Order from which Petitioner appealed to the Second Circuit. *Loren*, 2017 WL 2964817, at *1. Moreover, Petitioner did not name Mr. Wood as an appellee in his Notice of Appeal. (No. 18-36 (2d Cir.), Dkt. #1.)

Second, the Federal Rules of Appellate Procedure nowhere allow extra time for the filing of a notice of appeal where the appellant has no access to electronic filing. Federal Rule of Appellate Procedure 26(c), which allows for additional time in the event of mailing, applies only "[w]hen a party may or must act within a specified time after being ***served***." F.R.A.P. 26(c) (emphasis added). The timing of filing a notice of appeal to the Second Circuit is not triggered by the date of ***service***, but rather from "entry of the judgment or order appealed from." F.R.A.P. 4(a)(1)(A). As such, the additional time afforded under F.R.A.P. 26(c) is inapplicable here.

[1] In opposition to Respondents' motion to dismiss that the appeal was time-barred, Petitioner argued that the calculation of time "should include ***five*** days from date of mailing." (No. 18-36 (2d Cir.), Dkt. #54, at 2.) The argument about three extra days was not made in this opposition.

2. The Court Need Not Consider The Merits.

Petitioner's remaining questions address the merits of Petitioner's case. Pet. ii. These questions were never addressed by the Second Circuit because the Second Circuit determined that it lacked jurisdiction over the appeal. There is, therefore, no reason for this Court to review this case.

Dated: October 12, 2018
New York, New York

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