

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

November 16, 2018

**Elisabeth A. Shumaker
Clerk of Court**

TONY B. THOMAS,

Plaintiff - Appellant,

v.

C. BLAKE; J. WESTBROOKS,

Defendants - Appellees.

No. 18-3243
(D.C. No. 5:15-CV-03257-JAR-KGS)
(D. Kan.)

ORDER

Before **TYMKOVICH**, Chief Judge, **HOLMES** and **EID**, Circuit Judges.

Tony B. Thomas, a federal prisoner proceeding pro se, seeks to appeal the district court's February 14, 2018 order and judgment, dismissing his 42 U.S.C. § 1983 complaint. Upon review of Mr. Thomas's "Notice of Appeal Out-of-Time" and the entirety of the district court docket, the court dismisses this appeal as untimely for the reasons set forth below.

"This Court can exercise jurisdiction only if a notice of appeal is timely filed."

Allender v. Raytheon Aircraft Co., 439 F.3d 1236, 1239 (10th Cir. 2006). Mr. Thomas's pro se status does not affect this rule, see Mayfield v. U.S. Parole Comm'n, 647 F.2d 1053, 1055 (10th Cir. 1981) (dismissing pro se appeal filed three days late), and this court has no authority to make equitable exceptions to jurisdictional requirements. See Bowles v. Russell, 551 U.S. 205, 216 (2007).

The district court entered final judgment in this matter on February 14, 2018. Accordingly, pursuant to Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure, Mr. Thomas's notice of appeal was due on March 16, 2018, but was not received by the district court until November 15, 2018.

"[T]his court may not extend the time for filing a notice of appeal." *Savage v. Cache Valley Dairy Ass'n*, 737 F.2d 887, 889 (10th Cir. 1984). "Only the district court may do so and only under limited circumstances and for a limited time." See *Alva v. Teen Help*, 469 F.3d 946, 950 (10th Cir. 2006) (citing 28 U.S.C. § 2017(c); Fed. R. App. P. 4(a)(5)). However, Mr. Thomas did not timely request an extension of time from the district court within which to file his notice of appeal, see Fed. R. App. P. 4(a)(5)(A), and his opportunity to do so has expired. See Fed. R. App. P. 4(a)(5)(A)(i) (requiring a party to move for an extension of time to file a notice of appeal "no later than 30 days after" he was otherwise required to file the notice).

Mr. Thomas is likewise ineligible for an order reopening the time to appeal, despite his protestations in his "Notice of Appeal Out-of-Time" regarding the prison's alleged failure to forward mail to the facility to which he was transferred. See Fed. R. App. P. 4(a)(6) (allowing the district court to reopen the time to file an appeal only if certain conditions are met, including that the would-be appellant files a motion to reopen the time to file an appeal "within 180 days after the judgment . . . is entered or within 14 days after the moving party receives notice . . . of the entry, whichever is earlier"); see also D. Kan. 5.1(c)(3) ("Each . . . pro se party must notify the clerk in writing of any change of address or telephone number. Any notice mailed to the last address of record of

... [a] pro se party is sufficient notice.”). In the absence of a motion requesting relief under Rule 4(a)(6) within 180 days after the entry of judgment, the district court is without authority to reopen the time to appeal. See Fed. R. App. P. 4(a)(6) (providing that district court may reopen the time to file an appeal, “but only if all the [specified] conditions are satisfied”); Portley-El v. Milyard, 364 F. App’x 912, 917 (10th Cir. 2010) (unpublished).

As a result, “[t]he time limit has run and we are without jurisdiction under the facts of this case.” Jenkins v. Burtzloff, 69 F.2d 460, 464 (10th Cir. 1995). Accordingly, the court dismisses Mr. Thomas’s appeal.

APPEAL DISMISSED.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

A handwritten signature in black ink, appearing to read "LA Lee", is written over the printed name of Lisa A. Lee.

by: Lisa A. Lee
Counsel to the Clerk

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

April 4, 2019

Elisabeth A. Shumaker
Clerk of Court

TONY B. THOMAS,

Plaintiff - Appellant,

v.

C. BLAKE; J. WESTBROOKS,

Defendants - Appellees.

No. 18-3243
(D.C. No. 5:15-CV-03257-JAR-KGS)
(D. Kan.)

ORDER

Before **TYMKOVICH**, Chief Judge, **HOLMES**, and **EID**, Circuit Judges.

This matter is before the court on pro se appellant Tony B. Thomas's *Motion for Reconsideration* and his affidavit in support of that motion. Upon consideration, the court construes the *Motion for Reconsideration* as a petition for panel rehearing, accepts it for filing despite Mr. Thomas's untimely submission, and denies it on its merits as construed. *See* Fed. R App. P. 40(a); 10th Cir. R. 40.1(A); *see also* Fed. R App. P. 4(a)(6).

The court likewise denies any additional relief Mr. Thomas requests in his *Motion for Reconsideration* or the papers he filed contemporaneously with it.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk



by: Lisa A. Lee
Counsel to the Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

TONY B. THOMAS,

Plaintiff,

v.

C. BLAKE, et al.,

Defendants.

Case No. 15-3257-JAR-KGS

ORDER OF DISMISSAL

On January 16, 2018, Magistrate Judge K. Gary Sebelius issued a Notice and Order to Show Cause (Doc. 78), requiring Plaintiff Tony B. Thomas to show good cause in writing to this Court why this action should not be dismissed with prejudice for failure to prosecute pursuant to Fed. R. Civ. P. 41(b). The order was sent to Plaintiff by certified mail and regular mail to his last address of record. Plaintiff failed to respond and the time to do so has expired.

IT IS THEREFORE ORDERED BY THE COURT that this case is **dismissed with prejudice** for failure to prosecute pursuant to Fed. R. Civ. P. 41(b).

IT IS SO ORDERED.

Dated: February 14, 2018

S/ Julie A. Robinson
JULIE A. ROBINSON
CHIEF UNITED STATES DISTRICT JUDGE