

20-6945

No. _____

Supreme Court, U.S.
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In the Supreme Court of the United States

ROBERT WHITE,
Pro se
Petitioner;

v.

KUBOTEK CORPORATION;
KUBOTEK USA INC.,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the “act” of mailing a Federal Rule of Civil Procedure 59(e) motion for reconsideration in time for normal US Mail Second Day delivery to the US District Court before the deadline to file expires, yet whose delivery is delayed for two weeks and therefore arrives at the Court late for filing, constitute excusable neglect for filing late and good cause for the District Court to have granted a subsequent motion to deem the motion for reconsideration as timely filed pursuant to Federal Rules of Civil Procedure 6(b)(1)(B) & 6(b)(2)? That is, does Federal Rule of Civil Procedure 59(e) only prohibit an extension of time to “act” to file a motion for reconsideration whereby mailing the motion in time for delivery before the deadline expires satisfies the “act” of filing on time.
2. If so then does a separate motion to deem that motion for reconsideration as timely filed qualify as an “amendment” to the motion for reconsideration such that Federal Rule of Appellate Procedure 4(a)(4)(B)(ii) applies to require challenges to the grant of timeliness of the motion for reconsideration must be taken by the challenger’s direct appeal filed in the US Circuit Court of Appeals instead of the challenger’s motion to dismiss the underlying appeal, and is such a challenge forfeited if not “properly invoked” by appeal?
3. And, if the motion for reconsideration is deemed timely filed by the US District Court then does that in turn extend the time to appeal the underlying order referenced in the motion for reconsideration until 30 day after the District Court rules on the motion for reconsideration, as set forth in Federal Rule of Appellate Procedure 4(a)(4)(A)(v)?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below are:

Petitioner, Robert White - *pro se*, (hereafter “White”), is an individual. White is the Plaintiff and Appellant below.

Respondents, are Kubotek Corporation, a Japanese Corporation, and its wholly owned US subsidiary, Kubotek USA Inc., a Massachusetts Corporation (collectively hereafter “Kubotek”). Kubotek is the Defendant and Appellee below. The First Circuit Court of Appeals dismissed Kubotek from White’s appeal, which is the subject of this writ.

The other Defendant and Appellee below who White does not consider to be a Respondent to this writ in this Court is Cadkey Corporation (hereafter “Cadkey”), a dissolved Massachusetts Corporation, who did not answer White’s complaint or file an appearance at any stage in this litigation or appeal, yet the US Court of Appeals for the First Circuit has directed White to proceed on appeal with briefing against Cadkey, which brief White filed on November 25, 2020, and Cadkey did not respond the White’s Opening Brief.

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Cases Cited

<i>Hamer v. Neighborhood Housing Services of Chicago et al.</i> , 583 US __, 138 S.Ct. 13	4, 5, 6, 8, 9
<i>Mission Product Holdings, Inc., v. Tempnology, LLC</i> , 139 S Ct. 1652 (2019)	2
<i>Walker v Weatherspoon</i> , 900 F.3d 354 (7 th Circuit 2018)	5

US Codes Cited

11 U.S.C. §108(c)	2
11 U.S.C. §362	2
28 U.S.C. §1291	1

28 U.S.C. §1332	1
28 U.S.C. §2154(1).....	1

Federal Rules of Civil Procedure

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Opinions Below

There are no published opinions in this case.

Travel and Jurisdiction

The US Court of Appeals for the First Circuit (hereafter “Circuit Court”) dismissed Kubotek from White’s appeal on July 9, 2020 (appendix page 1), by granting Kubotek’s motion to dismiss (appendix page 2) which Kubotek filed before briefing commenced in White’s appeal. White opposed Kubotek’s motion to dismiss (appendix page 8). White also filed a motion for reconsideration of dismissal on July 16, 2020 (appendix page 11), and two amendments thereafter (appendix pages 14 & 17), which the Circuit Court denied on August 26, 2020, and October 29, 2020 (appendix page 21 & 22).

White’s appeal to the Circuit Court was taken on November 18, 2019 (appendix page 23), from the US District Court’s (hereafter “District Court”) dismissal order entered on August 12, 2019 (appendix page 24) and from the District Court’s denial of reconsideration of that order entered on October 22, 2019 (appendix page 25), which was the same day the District Court granted White’s motion to deem his motion for reconsideration as timely filed (appendix page 26).

The Circuit Court had jurisdiction over the final order of the District Court resolving all issues in the case pursuant to 28 U.S.C. §1291. The District Court had jurisdiction over White’s complaint and the parties pursuant to 28 U.S.C. §1332. This Court has jurisdiction to hear this Petition pursuant to 28 U.S.C. §2154(1).

In the interest of complying with this Court’s Rules requiring full disclosure of the

travel of a case White contends his underlying lawsuit dismissed by the District Court raises nearly identical issues as this Court vetted in Mission Product Holdings, Inc., v. Tempnology, LLC, 139 S Ct. 1652 (2019) and therefore his underlying issues raised in his lawsuit and appeal in the Circuit Court are not frivolous. White's District Court litigation contends the bankrupt debtor, Cadkey, may not reject White's non-executory contract during bankruptcy such that White's contract (and royalty payment obligation therein) assigns to the buyer of the debtor's property, who is Kubotek, under the common law and according to the assignment clause in White's contract; and these issues are preserved by the Bankruptcy Tolling statute at 11 U.S.C. §108(c) because White's lawsuit against Cadkey and Kubotek was enjoined by the automatic stay pursuant to 11 U.S.C. §362 until after Cadkey's bankruptcy closed.

Federal Rules of Civil and Appellate Procedure Involved

The Federal Rules at issue in this Petition involve Federal Rules of Civil Procedure 6(b)(1)(B) & 6(b)(2) and 59(e), and Federal Rule of Appellant Procedure 4(a)(4)(B)(ii).

Federal Rules of Civil Procedure 6(b)(1)(B):

(b) EXTENDING TIME.

(1) In General. When an act may or must be done within a specified time, the court may, for good cause, extend the time:

- (A) ...
- (B) on motion made after the time has expired if the party failed to act because of excusable neglect.

Federal Rules of Civil Procedure 6(b)(2):

(2) Exceptions. A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).

Federal Rules of Civil Procedure 59(e):

(e) MOTION TO ALTER OR AMEND A JUDGMENT. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

Federal Rule of Appellant Procedure 4(a)(4)(B)(ii):

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

Statement of Case

This writ questions how the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure interact to govern the right to appeal. White contends the District Court may extend the deadline “file” a Federal Rule of Civil Procedure 59(e) motion for reconsideration that is delivered to the clerks office late by the US Mail if White “acted” to mail the motion in time for delivery to the Court before the deadline to file expired, which in turn extends the deadline to appeal the underlying order referenced in the motion for reconsideration. And, once the District Court deems the motion for reconsideration as timely filed then Kubotek’s challenge to that finding made in the Circuit Court must be taken on direct appeal by Kubotek, or in a brief filed by Kubotek in response to White’s primary brief, and not by a collateral motion to dismiss the appeal, else Kubotek forfeited its right to challenge the timeliness of White’s appeal because that challenge is to a claims processing rule and not a jurisdictional rule.

White filed a breach of contract complaint in the District Court against two Defendants, Kubotek and Cadkey. The District Court dismissed White's complaint against both Defendants by granting Kubotek's Fed. R. Civ. Proc. 12(b)(6) motion even though Cadkey did not file an answer or make an appearance. White filed a motion for reconsideration of dismissal of Defendant Cadkey that White mailed 21 days after receiving the District Court's dismissal order yet White's motion was delayed in the US mail but ultimately delivered two weeks later, and late for filing, which was five weeks after the District Court dismissed White's complaint. White then filed a motion to deem his motion for reconsideration as timely filed, which the District Court granted on the same day the District Court denied White's motion for reconsideration. White subsequently filed a notice of appeal of the District Court's dismissal order within 30 days after the District Court denied reconsideration. Kubotek did not appeal the District Court's grant of timeliness of White's motion for reconsideration. Kubotek did however file a motion in the Circuit Court to dismiss White's appeal as untimely due to the alleged lateness of White's motion for reconsideration filed in the District Court, which the Circuit Court granted as to Kubotek yet ordered briefing to proceed as to the remaining Appellee, Cadkey, who has yet to file an appearance, pleading, or brief in this case or appeal.

Reasons for Granting Certiorari

White's Questions Presented raise the exact questions left open and unanswered in HAMER v. NEIGHBORHOOD HOUSING SERVICES OF CHICAGO ET AL., 583 US __, 138 S.Ct. 13 :

We note, in this regard, that our decision does not reach issues raised by Hamer, but left unaddressed by the Court of Appeals, including: (1) whether respondents' failure to raise any objection in the District Court to the overlong time extension, by itself, effected a forfeiture, see Brief for Petitioner 21–22; (2) whether respondents could gain review of the District Court's time extension only by filing their own appeal notice, see *id.* at 23–27; and (3) whether equitable considerations may occasion an exception to Rule 4(a)(5)(C)'s time constraint, see *id.*, at 29–43.

This Court should grant certiorari to address these important unanswered questions regarding federal appellate procedure.

Additionally, when dismissing White's appeal by granting Kubotek's motion the Circuit Court ignored and therefore misapplied Federal Rule of Appellate Procedure 4(a)(4)(B)(ii)'s requirement that an appellate challenge filed in the Circuit Court to the timeliness of a motion for reconsideration filed in the District Court must be taken by direct appeal and not by way of a collateral motion to dismiss the appeal filed in the Circuit Court.

Furthermore, the Circuit Court collaterally rebranded White's motion for reconsideration filed in the District Court as being untimely when the District Court explicitly ruled White's motion for reconsideration was timely filed - and when such findings by the Circuit Court are reserved for rulings on direct appeal and not in a ruling on a collateral motion to dismiss the appeal, all in respect for the principal of *res judicata*.

Accordingly, the Circuit Court's order dismissing White's appeal conflicts with numerous other Circuit Courts who have applied HAMER v. NEIGHBORHOOD HOUSING SERVICES OF CHICAGO, *supra*, who recognize that the Federal Rules of Appellate Procedure are claims processing rules which are forfeited if not properly invoked, *id.* at 16.

See Walker v Weatherspoon, 900 F.3d 354, at 356 (7th Circuit 2018) holding when applying HAMER, *supra*, (“The ‘properly invoked’ qualifier is important, for a litigant may waive or forfeit the benefit of these [Federal Appellate] rules.”) The Circuit Court in our instant case cited HAMER, *supra*, recognizing this requirement for a “properly invoked” motion to dismiss yet ignored Federal Rule of Appellate Procedure 4(a)(4)(B)(ii)’s requirement for a direct appeal rather than a collateral challenge and ignored and did not mention that the District Court had deemed White’s motion for reconsideration as timely filed. At bottom the Circuit Court is saying there is no excuse for White relying on the US Mail to deliver his papers to the Court on time, which is an Equal Protection infirmity because papers which an attorney attempts to file electronically before the deadline expires are automatically deemed timely filed by local rule if the ECF system is inaccessible for filing.

Summary of Arguments

This Petition raises pure issues of procedural law for determining how the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure interact to govern the timeliness of a notice of appeal with the caveat that Federal Rules of Civil Procedure 6(b)(1)(B) governing the extension of time to file a motion for reconsideration involves equitable considerations.

White’s Notice of Appeal Was Timely Filed

The District Court’s order granting the timeliness of White’s motion for

reconsideration worked to extend the deadline for White to file his notice of appeal of the underlying dismissal order referenced in White's motion for reconsideration according to Federal Rule of Appellate Procedure 4(a)(4)(A)(v). White complied with this deadline when the District Court docketed White's notice of appeal within 30 days after the District Court ruled on White's motion for reconsideration.

White's Motion for Reconsideration Was Timely Filed

Federal Rule of Civil Procedure 6(b)(1)(B) allows the District Court to determine that a late paper is timely filed if the Court finds good cause and the filing was late due to excusable neglect, which the District Court granted for White's motion for reconsideration.

White's Motion to Deem His Motion for Reconsideration as Timely Filed Was Properly Requested and Granted

According to Federal Rule of Civil Procedure 5(d)(2)(a) a paper is filed with the Court by delivering it to the court clerk. Additionally, Federal Rule of Civil Procedure 6(b)(2) prohibits the District Court from extending the time to "act" to file a motion for reconsideration, which according to Federal Rule of Civil Procedure 59(e) is 28 days after receipt of the order being sought for reconsideration. White contends that for an out-of-District *pro se* litigant who relies on filing thru the US Mail the "act" of filings means the "act" of mailing the paper in time for delivery to the Court before the deadline to file expires. White's District Court motion to deem his motion for reconsideration as timely filed argues he "acted" to file his motion for reconsideration within 21 days after receiving

the dismissal order whereby the District Court granted White's request to deem his motion for reconsideration as timely filed. Therefore, the District Court did not extend the time for White to "act" to file because White "acted" to file his motion for reconsideration on time and for no fault of his own the US Mail took two weeks to deliver White's motion for reconsideration to the Court, thus making White's motion for reconsideration forgivably late according to the District Court and the Rules.

Federal Rule of Appellate Procedure 4(a)(4)(B)(ii) Required Kubotek to Take a Direct Appeal to Challenge the Timeliness of White's Motion for Reconsideration

Since Federal Rule of Appellate Procedure 4(a)(4)(B)(ii) is a claims processing rule and is not jurisdictional then Kubotek forfeited its right to attempt to dismiss White's appeal in the Circuit Court by way of motion, or at least such an argument for dismissal must be reserved for Kubotek's responsive brief filed in White's appeal and not in Kubotek's collateral motion to dismiss. Kubotek's argument for dismissal of White's appeal is doomed without establishing error in the District Court's order granting the timeliness of White's motion for reconsideration, which Kubotek did not do nor did the Circuit Court find or even mention or address in its dismissal order. The Circuit Court did however acknowledge that the Civil and Appellate Rules governing the timeliness of White's notice of appeal are claims processing rules and therefore are not jurisdictional; however, the Circuit Court went on to dismiss White's appeal in clear contradiction to this Court's holding in HAMER v. NEIGHBORHOOD HOUSING, *supra*, and in clear contradiction to the rule of law that the District Court's grant of timeliness of White's motion for reconsideration is entitled to *res*

judicata protection and may not be collaterally challenged by way of Kubotek's motion to dismiss filed in the Circuit Court. The Circuit Court treated Kubotek's motion to dismiss White's appeal as though White never requested and was never granted a finding by the District Court that White's motion for reconsideration was timely filed.

Conclusion

This Petition for a Writ of Certiorari should be granted, or in the alternative this Court should summarily remand White's appeal to the Circuit Court for reinstatement of Kubotek into White's appeal in accordance with HAMER v. NEIGHBORHOOD HOUSING, supra.

Respectfully submitted on January 15, 2021, by

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