

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

October 30, 2017

Elisabeth A. Shumaker
Clerk of Court

JORGE CASANOVA,

Plaintiff - Appellant,

v.

ROBERT ULIBARRI,

Defendant - Appellee.

No. 17-2093
(D.C. No. 6:08-CV-00288-JAP-CG)
(D. N.M.)

ORDER

Before **BRISCOE**, **BACHARACH**, and **McHUGH**, Circuit Judges.

Appellant Jorge Casanova seeks to appeal the district court's denial of his motion for new trial following a defense verdict on his 42 U.S.C. § 1983 claim against appellee Robert Ulibarri, a warden at the prison at which Mr. Casanova was formerly housed. This court entered an order directing Mr. Casanova to show cause as to why it should not dismiss the appeal as untimely filed, and both Mr. Casanova and Mr. Ulibarri responded to that order. Upon consideration, the court concludes that it is without jurisdiction to consider Mr. Casanova's appeal.

A timely notice of appeal in a civil case is both mandatory and jurisdictional. *See Bowles v. Russell*, 551 U.S. 205, 209, 213 (2007). "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). This court has no authority to make equitable exceptions to jurisdictional requirements. *Bowles v. Russell*, 551 U.S. 205, 216 (2007).

“Proceeding *pro se* does not relieve [Mr. Casanova] of the responsibility to learn about and follow the correct procedures to file a notice of appeal.” *Cosby v. Astrue*, 507 F. App’x 819, 821 (10th Cir. 2013) (unpublished). Indeed, this court has “repeatedly insisted that *pro se* parties follow the same rules of procedure that govern other litigants.” *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994).

The district court entered final judgment in the underlying case on May 11, 2017, and, on June 6, 2017, Mr. Casanova filed both a notice of appeal with respect to that judgment and a motion for new trial. The district court denied Mr. Casanova’s motion for new trial on June 16, 2017. Accordingly, the deadline to appeal the district court’s denial of his motion for new trial was July 16, 2017. *See* Fed. R. App. P. 4(a)(1)(A) & (4). However, Mr. Casanova did not timely file a new or amended notice of his intent to appeal the district court’s denial of his motion for new trial in compliance with Rule 4(a)(4)(B)(ii) of the Federal Rules of Civil Procedure, which states:

A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A) [specifically including a motion for new trial] . . . must file a notice of appeal, or an amended notice of appeal . . . within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

Instead, in response to this court’s jurisdictional show cause order, Mr. Casanova filed both a new and an amended notice of appeal with the district court on October 10,

2017—some three months after any notice of appeal regarding the district court’s denial of his motion for new trial was due.

Mr. Casanova’s principal brief addresses only perceived errors in the district court’s denial of his motion for new trial. This court lacks jurisdiction to review the denial of Mr. Casanova’s motion for new trial because he did not timely file a new notice of appeal or amend his previous notice of appeal to include the court’s denial of that motion. *See, e.g., Harris v. Matthews*, 417 F. App’x 758, 761 n.5 (10th Cir. 2011) (unpublished) (holding that, where district court denies post-trial motion after appellant files his initial notice of appeal, this court lacks jurisdiction over that denial unless appellant files a new or amended notice of appeal).

Further, “this Court is not empowered to extend the time to file a notice of appeal. That power lies with the district court under the narrow terms set out in Rule 4(a)(5).” *See Le Williamson v. Deluxe Fin. Servs., Inc.*, 216 F. App’x 728, 730 (10th Cir. 2007) (unpublished); *Savage v. Cache Valley Dairy Ass’n*, 737 F.2d 887, 889 (10th Cir. 1984) (“[Any] claim of excusable neglect is a matter to be timely addressed to the *district* court in accordance with Fed. R. App. P. 4(a)(5).”). Mr. Casanova “made no attempt to avail himself of that exclusive safety valve,” *id.*, and his “failure to make a motion before the end of the 30-day grace period extinguished his right to appeal beyond revival by either this court or the district court.” *Mayfield v. U.S. Parole Comm’n*, 647 F.2d 1053, 1055 (10th Cir. 1981).

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.3d 460, 464 (10th Cir. 1995).

APPEAL DISMISSED.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

A handwritten signature in black ink, appearing to read "LA Lee", is positioned above the typed name of the signatory.

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

December 1, 2017

Elisabeth A. Shumaker
Clerk of Court

JORGE CASANOVA,

Plaintiff - Appellant,

v.

ROBERT ULIBARRI,

Defendant - Appellee.

No. 17-2093
(D.C. No. 6:08-CV-00288-JAP-CG)
(D. N.M.)

ORDER

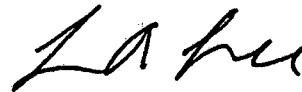
Before **BRISCOE**, **BACHARACH**, and **McHUGH**, Circuit Judges.

This matter is before the court on appellant Jorge Casanova's *Petition for Rehearing or Rehearing En Banc*.

The court denies the petition for rehearing.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the court also denies the petition for rehearing en banc.

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 NEW MEXICO

JORGE CASANOVA,

Plaintiff,

vs.

Civ. No. 08-288 JP/CG

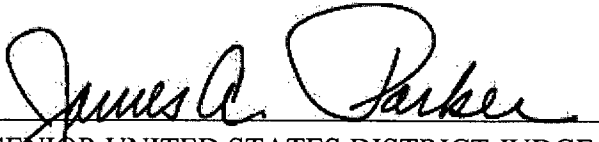
ROBERT ULIBARRI, Warden,

Defendant.

JUDGMENT

The trial of this case, by jury, began Monday, May 8, 2017. On Thursday, May 11, 2017, the jury returned answers to the Special Interrogatories finding that Plaintiff Jorge Casanova had not proven, by a preponderance of the evidence, all elements of his Eighth Amendment claim of deliberate indifference against Defendant Robert Ulibarri. Given the jury's answers to the Special Interrogatories, the Court concluded, as a matter of law, that the jury had found in favor of Defendant on Plaintiff's Eighth Amendment claim and also, that Defendant was entitled to the defense of qualified immunity.

Therefore, JUDGMENT is entered in favor of Defendant Warden Robert Ulibarri and this case is dismissed with prejudice.



SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JORGE CASANOVA,

Plaintiff,

vs.

Civ. No. 08-288 JP/CG

ROBERT ULIBARRI, Warden,

Defendant.

O R D E R

On May 8, 2017, Plaintiff Jorge Casanova filed PLAINTIFF MOTION TO STRIKE DOCUMENT 325 FILED BY DEFENDANT COUNSEL AND REQUEST AN IMMEDIATE INVESTIGATION BY THE COURT (Doc. No. 337) (Motion to Strike). On May 8th, before selection of the jury, the Court discussed with the parties Plaintiff's Motion to Strike the Pretrial Order (PTO). The Court explained that while Plaintiff's Motion to Strike challenged some of the content of the PTO, the document Plaintiff identified was the proposed PTO (Doc. No. 325) rather than the final PTO (Doc. No. 334). Plaintiff's Motion To Strike asks that certain matters be added to the final PTO (Doc. No. 334).

Plaintiff explained that Exhibit 3 (Ex. 3) to the Motion to Strike sets out the contentions he wants to include in his portions of the final PTO. The Court will allow some, but not all, of Plaintiff's requested amendments to the PTO. Under the section entitled "Identify the affirmative relief sought in this action," the final PTO states that Plaintiff seeks "monetary damages for injuries resulting from the deprivation of medicines and medical equipment or devices while he

was in segregation.” Doc. No. 334 at 3, § II, ¶ D(1). The final PTO will be amended to include the following additional statement as set out in Plaintiff’s Ex. 3: “Plaintiff’s damages may include pain and suffering damages that endured as a result of the wrongful conduct showed by Defendant within this lawsuit which prove the nature, the extent, and the cause of the Plaintiff’s injuries in detail.” The Court will not allow any other proposed contentions set out in Ex. 3 under this section of the final PTO.

Plaintiff also wants to add a number of contentions to Section III, paragraph A of the final PTO (description of party’s claim). *See* Motion to Strike, Ex. 3. The Court will permit the proposed amendments, which consist of Plaintiff’s allegations, that are set out in Ex. 3, § III, ¶ A, at 4–6.

The original version of the final PTO contained no contentions under Plaintiff’s statement of “Contested Material Facts.” *See* Doc. No. 334, § IV, ¶ B. Plaintiff’s Ex. 3 to the Motion to Strike proposes amendments to this section of the PTO. The Court will permit Plaintiff to amend the final PTO with the following language:

What Defendant Warden Ulibarri could not know, Due to nearly 25 years of experience within many prisons in NM in reference to the adverse effects of segregation for an ill person of 67 years, without his CPAP machine, hearing aid, medicine, etc. Due to that action by Defendant, the Plaintiff had a severe deterioration of his health during segregation, general population, and more so at the ICE facility where Casanova spent 11 months in the hospital due to severe illness.

See Motion to Strike, Ex. 3 at 9. *See also* May 8, 2017 Minutes (Doc. No. 340) (the Court replaced Plaintiff’s language of “medical care” with “medicine” in the above quotation).

However, the Court will not include Plaintiff's proposed language that is printed in a bold typeface in Ex. 3. *See* Motion to Strike, Ex. 3 at 9.

Under the parties' lists of witnesses in the PTO, Plaintiff wishes to amend his "may call" witnesses to include Plaintiff's two sons, Jorge Casanova Jr. and Julio Casanova, as well as Leonelo Rodriguez. Motion to Strike, Ex. 3 (page 15). The Court has already ruled that Mr. Rodriguez may not testify at trial, and, therefore, will not allow this proposed amendment to the final PTO. The Court stated that it would determine at trial whether Plaintiff's sons can provide rebuttal testimony. However, during the trial, Plaintiff informed the Court that his sons were not available to testify.

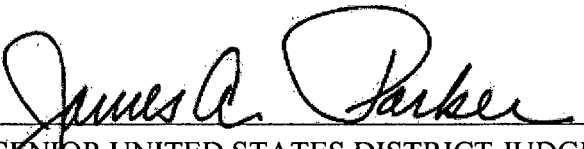
The original version of the final PTO contained no specific issues of law under Plaintiff's section. *See* Doc. No. 334, Ex. 3, § VI, ¶ 1. Plaintiff now proposes to amend this section of the final PTO to include a page of single-spaced contentions. Motion to Strike, Ex. 3 (page 16). Although these contentions are more in the nature of argument by Plaintiff, the final PTO is amended to include this page of Plaintiff's personal statement. *See* Ex. 3 (page 16).

In the Motion to Strike (Doc. No. 337 at 3), Plaintiff also objected to Mr. Steve Madrid who Defendant identified in the final PTO as a "may call" witness. *See* May 8 Minutes (Doc. No. 340). During the May 8th proceeding, the Court considered the parties' arguments about the testimony of Mr. Madrid and determined that if Defendant presents Mr. Madrid as a witness at trial, Plaintiff could voice his objection at that time. *Id.*

The Court allows only the amendments to the final PTO that are specified in this Order.

IT IS THEREFORE ORDERED that PLAINTIFF MOTION TO STRIKE DOCUMENT 325 FILED BY DEFENDANT COUNSEL AND REQUEST AN IMMEDIATE

INVESTIGATION BY THE COURT (Doc. No. 337) is GRANTED in part and DENIED in part as specified herein.



SENIOR UNITED STATES DISTRICT JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**