

No. 14-1012

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

v.

BEVERAGE DISTRIBUTORS COMPANY, LLC,

Defendant-Appellant.

On appeal from the United States District Court
for the District of Colorado
Hon. Christine M. Arguello, United States District Judge
No. 11-cv-2557

APPELLEE'S SUPPLEMENTAL RESPONSE BRIEF

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APPELLEE’S SUPPLEMENTAL RESPONSE BRIEF

Pursuant to this Court’s January 22, 2015, Order, Plaintiff-Appellee the U.S. Equal Employment Opportunity Commission (“Commission”) submits its supplemental response brief on the question of whether this Court has jurisdiction to consider the challenge by Defendant-Appellant Beverage Distributors Company, LLC (“BDC”) to the tax penalty offset. In sum, because BDC failed to amend its notice of appeal after the district court finally disposed of the Commission’s post-judgment motions and entered an amended judgment that included a sum-certain award of a tax penalty offset, BDC failed properly to appeal from the court’s disposition of those motions. As a result, this Court lacks jurisdiction over the matters addressed by the district court in its orders resolving the Commission’s post-judgment motions.

This Court has “jurisdiction over appeals from all final decisions of the district court under 28 U.S.C. § 1291.” *Utah v. Norton*, 396 F.3d 1281, 1286 (10th Cir. 2005). “Final decisions are those that “end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment.” *Id.* (citations

omitted; alterations by this Court). “A final judgment is one that terminates all matters as to all parties and causes of action, and [a]ny order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties.” *Id.* (citations and internal quotation marks omitted). “[T]he touchstone of a final order is ‘a decision by the court that a party shall recover only a *sum certain*.’” *Albright v. UNUM Life Ins. Co. of Am.*, 59 F.3d 1089, 1092 (10th Cir. 1995) (quoting Fed. R. Civ. P. 58) (emphasis added by this Court).

This Court has long recognized “the general and well-established rule that ‘an order that determines liability but leaves damages to be calculated is not final’” for purposes of § 1291 jurisdiction. *Albright*, 59 F.3d at 1092 (citations omitted). And while courts have recognized a narrow exception to this rule, that exception is only available under circumstances where “the amount of damages awarded pursuant to a judgment on liability ‘speaks for itself,’” such as when the “calculation of damages is

ministerial and pursuant to a predetermined procedure” or “readily ascertainable” from the complaint, and “any unresolved issues are sufficiently ministerial that there would be no likelihood of further appeal.” *Id.* at 1093 (citations omitted).

“[H]owever, if calculating damages would be complicated and the *possible* subject of a separate and future appeal, then we cannot assume appellate jurisdiction over the issue of liability.” *Id.* (emphasis added).

The rules governing how and when to appeal from district court orders disposing of post-judgment motions are consistent with § 1291’s finality requirement. Rule 4 of the Federal Rules of Appellate Procedure provides that “[i]f a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion,” and identifies Rule 59 motions to alter or amend the judgment, or for a new trial, as such tolling motions. Fed. R. App. P. 4(a)(4)(A). The rule further provides that “[i]f a party files a notice of appeal after the court announces or enters a judgment–

but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.” Fed. R. App. P. 4(a)(4)(B)(i).

Of particular relevance here, the rule also provides that if a party wishes to challenge on appeal the court’s order ultimately disposing of timely-filed post-judgment tolling motions, and not merely the judgment entered by the court before such motions were filed, it cannot rest on a notice of appeal filed before the court entered its order disposing of the last such remaining motion. Instead, the rule requires that “[a] party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended 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.”¹ Fed. R. App. P. 4(a)(4)(B)(ii).

¹ In the Advisory Committee notes regarding Rule 4(a)(4)(B), the Committee stated, “[t]he amendment provides that a notice of appeal filed before the disposition of a posttrial tolling motion is

It is notable that Rule 4(a)(4)(B)(ii) does not simply require an amended notice after the court’s entry of *any* post-judgment motion, but instead after entry of the *last* such motion—contemplating that parties often file multiple post-judgment motions that are not always disposed of simultaneously by the district court. Given the final judgment rule’s purpose of avoiding “fragmentary and piecemeal” appellate review of district court rulings, *Boughton v. Cotter Corp.*, 10 F.3d 746, 748 (10th Cir. 1995), it is consistent with that purpose to make the only notice of appeal, or amended notice, sufficient to create appellate jurisdiction over post-judgment motions that which is filed after “entry of the order disposing of the *last* such remaining motion,” Fed. R. App. P. 4(a)(4)(B)(ii) (emphasis added). For permitting appellate jurisdiction to lie whenever the court disposes of one motion while other motions remain under consideration, and

sufficient to bring the underlying case, as well as any orders specified in the original notice, to the court of appeals. If the judgment is altered upon disposition of a posttrial motion, however, and if a party wishes to appeal from the disposition of the motion, the party must amend the notice to so indicate.” Fed. R. App. P. 4, Notes of Advisory Committee on Rules—1993 Amendment.

interpreting Rule 4(a)(4)(B)(ii) as requiring an amended notice of appeal upon entry of every order disposing of any post-judgment tolling motion, not only invites, but requires, the prosecution of multiple appeals in the same action. This is a clear recipe for piecemeal appellate litigation.

Accordingly, it is well-settled that, absent the filing of an amended notice of appeal after a district court enters “the order disposing of the last such remaining motion,” this Court is without jurisdiction over the district court’s orders disposing of any such post-judgment motions. *See, e.g., Triplett v. U.S. Dep’t of Defense*, 441 F. App’x 618, 619 n.1 (10th Cir. 2011) (unpubl.) (citing Fed. R. App. P. 4(a)(4)(B)(ii) as supporting its holding that “[t]his [C]ourt is without jurisdiction to review the order denying post-judgment relief because Mr. Triplett did not file an amended notice of appeal following entry of th[e] order” disposing of his post-judgment motion); *see also Ortiz Del-Valle v. N.B.A.*, 190 F.3d 598, 600 (2d Cir. 1999) (noting that in that case, the defendant “fails to appreciate that the period for filing a notice of appeal runs from the ‘entry of the order *disposing*’ of the motion,” and holding it

lacked appellate jurisdiction over the order) (quoting Fed. R. App. P. 4(a)(4)(B)(ii)) (emphasis by court).

In the instant appeal, it is uncontested that BDC did not file an amended notice of appeal after the district court entered its March 27, 2014, second amended final judgment—the order which resolved the last post-judgment motion by adding the tax penalty offset award amount to the judgment.² It is also uncontested that the amount of the tax penalty offset was not determined by the court at the time it entered its order on liability. *See* District Court Docket No. (“R.”) 116. Because the district court’s December 9, 2013, Order fixed only liability for the tax penalty offset, but not the amount of the offset, it was not a final disposition of the post-judgment motions. That is, the December 9 Order was not “the order disposing of the last such remaining motion.” As a result, BDC’s January 8, 2014, notice of appeal—which BDC filed well before the court’s March 27, 2014, entry of the second amended final judgment, and which BDC did not

² In the second amended judgment, the court also modified its December 9, 2013, Order by awarding a sum-certain amount of prejudgment interest. *See* R.116 (Order); R.134 (second amended final judgment).

amend after that second amended final judgment—was insufficient to confer appellate jurisdiction over the district court’s disposition of the Commission’s post-judgment motions.

Nor did the tax penalty offset amount “speak for itself.” Its calculation was not sufficiently ministerial or otherwise readily ascertainable to permit application of the limited, damages-calculation exception to the finality rule. *Albright*, 59 F.3d at 1093. Given that the remaining damages calculation required determining the additional tax burden Sungaila would face as a result of receiving as taxable income a lump sum back pay award in a single year, it cannot reasonably be asserted (and BDC has not so asserted) that this calculation was so ministerial or readily ascertainable to satisfy the exception to the finality rule.

In its December 9, 2013, Order, the district court determined BDC was liable for the tax penalty offset, but did not determine the amount of the offset. R.116. In its post-judgment motion requesting the court alter or amend the judgment to include a tax penalty offset award, the Commission argued that it was impossible to calculate the proper award amount at that time,

given the uncertainty over whether the court would reinstate the full back pay amount and/or award front pay, as well as uncertainty over what actual percentage of the damages award would constitute a proper tax penalty offset award. *See* R.105 at 11 (motion).

In its motion, the Commission asserted that the amount of the award was “likely to be at least 10%” of the back pay award “but could also be significantly higher.” R.105 at 11. Accordingly, the Commission requested that, should the court decide to award a tax penalty offset, that it either request briefing on the amount of the tax penalty, or hold an evidentiary hearing where the Commission’s expert witness “could testify and calculate the tax penalty for the Court.”³ *Id.* These are hardly circumstances where the damages calculation remaining after the court’s December 9, 2013, Order was so ministerial or readily

³ The court ordered a hearing on the amount of the tax penalty offset award, R.127, but after the parties negotiated a stipulated amount for the tax penalty offset and prejudgment interest, R.131, the court vacated the hearing, R.132, and entered its second amended final judgment, R.134.

ascertainable as to “speak for itself” and preclude any possibility of separate appeal.

BDC asserts, without citation to Rule 4 or other authority, that it only would have been required to file an amended notice of appeal if it had “intended to appeal the *amount* of the tax penalty offset.”⁴ BDC Supplemental Brief at 5. But the earlier order allowing a tax penalty offset did not “dispos[e]” of that motion, as Rule 4(a)(4)(B)(ii) requires, for the amount was not set. *See Albright*, 59 F.3d at 1092; *see also Carter v. Ashland, Inc.*, 450 F.3d 795, 796-97 (8th Cir. 2006) (“a sanctions order reserving the determination of the amount of sanctions is not yet final”); *Feldman v. Olin Corp.*, 692 F.3d 748, 758 (7th Cir. 2012) (same).

Moreover, as described *supra* at 1-6, by Rule 4’s express terms a court’s disposition of post-judgment motions is not considered “final” for appeal purposes until the court disposes of

⁴ Despite BDC’s assertion in its supplemental brief on appeal that it never intended to appeal the amount of the tax penalty offset award, there was no indication before the court issued its December 9, 2013, Order setting liability for the tax penalty offset that BDC would not contest the amount of that award, or that it otherwise considered the calculation to be a readily ascertainable or ministerial act. *See* R.111 at 11-12 (BDC’s response to Commission’s motion for a tax penalty offset).

the “last such remaining motion.” The Commission is aware of no authority allowing a party to challenge a court’s ruling on a portion of a post-judgment motion while other aspects of that or other post-judgment motions are still pending before the court. This Court implicitly recognized as much when it stayed this very appeal after determining that BDC had filed its notice of appeal prematurely, before the district court had fully disposed of the tax penalty offset issue.

BDC suggests that its premature filing of a notice of appeal was cured by operation of Rule 4(a)(4)(B)(i). *See* BDC Supplemental Brief at 4-5. BDC is incorrect. Under Rule 4(a)(4)(B)(i), prematurely filed notices of appeal that are filed after the court initially enters judgment but before it “disposes of *any* motion listed in Rule 4(a)(4)(A),” are deemed effective upon disposition of “the last such remaining motion.” As such, the rule is limited to notices of appeal that challenge only the underlying judgment, regardless of the post-judgment motions. In contrast, Rule 4(a)(4)(B)(ii) expressly provides that to challenge on appeal the court’s disposition of a post-judgment motion, such notice of

appeal or amended notice must be timely filed after the court disposes of the last such motion. These rules foreclose BDC's argument on this point.

For all these reasons, BDC's failure to amend its notice of appeal after the district court entered its second amended final judgment—the order disposing of the last of the Commission's post-judgment motions—deprives this Court of jurisdiction over the district court's ruling on the tax penalty offset award.⁵

⁵ This Court's January 22, 2015, Order requesting supplemental briefing was limited to the question of jurisdiction over the tax penalty offset award. However, it appears that the same jurisdictional bar may also extend to the district court's grant of judgment as a matter of law to the Commission on BDC's failure-to-mitigate defense to the back pay award. Because BDC failed to amend its notice of appeal after March 27, 2014, when the court disposed of the last of the Commission's post-judgment motions, by operation of Rule 4(a)(4)(B)(ii) its appeal was ineffective as to *all* of the district court's orders on the Commission's post-judgment motions, including its motion for judgment as a matter of law on BDC's failure-to-mitigate defense to the back pay award. *See* Fed. R. App. P. 4(a)(4)(B)(ii) ("A party intending to challenge an order disposing of *any* motion listed in Rule 4(a)(4)(A), or a judgment altered or amended 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.") (emphasis added).

Conclusion

For the foregoing reasons, the Commission respectfully requests that this Court decline to exercise appellate jurisdiction over the district court's orders disposing of the Commission's post-judgment motions.

Respectfully submitted,

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Certificate of Service

I hereby certify that on February 5, 2015, I electronically filed the foregoing supplemental response brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

I further certify that on this same date, seven hard copies of the foregoing brief were submitted to the Clerk of Court, United States Court of Appeals for the Tenth Circuit, Byron White U.S. Courthouse, 1823 Stout St., Denver, CO 80257.

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