

IN THE SUPREME COURT OF THE STATE OF NEVADA

PACIFIC WEST BUILDERS, INC.,
Appellant,
vs.
WALTER JOHNSON,
Respondent.

No. 43503

FILED

APR 25 2005

ORDER DISMISSING APPEAL

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a district court order granting summary judgment against appellant. Second Judicial District Court, Washoe County; James W. Hardesty, Judge.

Our preliminary review of the docketing statement and the documents before us revealed that appellant's notice of appeal appeared to be untimely under NRAP 4(a) because it appeared to have been filed more than thirty days after written notice of the order's entry was served.¹ Accordingly, we directed appellant to show cause why this appeal should not be dismissed for lack of jurisdiction. Appellant has filed its response, and respondent has filed a reply.

The district court order granting summary judgment against appellant was filed on December 11, 2003. On December 18, 2003, respondent's counsel mailed written notice of entry of the order. On May 26, 2004, appellant's counsel sent out a second notice of entry for the district court's order. Appellant filed its notice of appeal on June 22, 2004. Although the notice of appeal was timely as to the second notice of entry sent out by counsel for appellant, it was not timely as to the first notice of entry.

¹See NRAP 4(a)(1); NRAP 26(c).

In its response to our show cause order, appellant, relying on Fitzharris v. Phillips,² argues that the December 18 notice of entry did not commence the running of the time for filing the notice of appeal. Appellant maintains that, under Fitzharris, a district court order granting a motion for summary judgment is not a final judgment and therefore is not appealable. According to appellant, the only valid notice of entry was the one it filed on May 26, 2004.

The portion of Fitzharris on which appellant relies to support its argument has been expressly overruled by this court's decision in Lee v. GNLV Corp.³ In Lee, this court held that "[t]o the extent that Fitzharris v. Phillips . . . suggests that a summary judgment order is not a final judgment, we hereby disapprove of that portion of Fitzharris."⁴ Lee, in fact, stands for the proposition that "an order granting summary judgment, which disposes of all claims and parties before the district

²74 Nev. 371, 333 P.2d 721(1958). Appellant also cites Musso v. Triplett, 78 Nev. 355, 372 P.2d 687 (1962), in support of its argument that an order granting a motion for summary judgment is not a final judgment. In Musso, this court held that a district court's minute order granting summary judgment was not an appealable order. In its response, appellant erroneously attempts to classify the district court's December 11, 2003 order as a minute order. A minute order is an oral order recorded in the minutes of the district court. The December 11 order, in contrast, was a formal written order. Although a minute order is not appealable, see Rust v. Clark Cty. School District, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987), as noted below, an appeal may be taken from a final written order granting a motion for summary judgment.

³116 Nev. at 428 n.3, 996 P.2d at 418 n.3.

⁴Id.

court, is final and appealable.”⁵ Therefore, under Lee, the December 11, 2003 order granting respondent’s motion for summary judgment was a final judgment appealable under NRAP 3A(b)(1).⁶ Accordingly, the notice of entry mailed by respondent’s counsel on December 18, 2003, commenced the running of the time for filing the notice of appeal.⁷ Appellant’s notice of appeal was therefore more than five months overdue.⁸ The notice of entry of judgment filed by appellant on May 26, 2004, has no impact on the timeliness of this appeal because service of the first notice of entry commenced the running of the time for filing the notice of appeal.⁹

⁵Id. at 425, 996 P.2d at 417.

⁶Id.

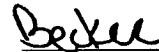
⁷We note that the fact that the December 18 notice of entry was labeled notice of entry of order rather than notice of entry of judgment is irrelevant. The December 18 notice of entry provided notice of the December 11 order granting summary judgment against appellant, which was a final, appealable judgment. See id. at 427, 996 P.2d at 417 (stating that the finality of an order depends not on its label as an order or a judgment, but on what the order or judgment at issue substantively accomplishes).


⁸Under NRAP 26(c) appellant received an additional three days to file its notice of appeal, since the December 18, 2003 notice of entry was served by mail. Thus, appellant had 33 days to file its notice of appeal. See also NRAP 4(a).


⁹See Healy v. Volkswagenwerk, 103 Nev. 329, 741 P.2d 432 (1987) (holding that, where multiple notices of entry were filed and each notice of entry was filed by a different party, the first notice of entry started the time for filing an appeal under NRAP 4(a)); Ross v. Giacomo, 97 Nev. 550, 635 P.2d 298 (1981) (stating that a party that creates confusion as to when the time for filing a notice of appeal starts cannot benefit from that confusion).

Accordingly, as the notice of appeal was untimely filed under NRAP 4(a), we lack jurisdiction over this appeal. We therefore dismiss the appeal.

It is so ORDERED.


_____, C.J.
Becker


_____, J.
Rose


_____, J.
Gibbons

cc: Second Judicial District Court Dept. 9, District Judge
Cathy Valenta Weise, Settlement Judge
Guenther and Castronova LLP/Reno
Atkin Winner Sherrod & Vames
Washoe District Court Clerk