

November 10, 2008

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

WILMA G. VIALPANDO,

Plaintiff - Appellant,

v.

MIKE JOHANNNS, Secretary, United
States Dept. of Agriculture,

Defendant - Appellee.

No. 08-1146

(D.C. No. 1:05-CV-01904-MSK-BNB)

ORDER

Before **KELLY, TYMKOVICH, and GORSUCH** , Circuit Judges.

This matter comes on for consideration of the parties’ responses to this court’s jurisdictional show cause order. Upon consideration thereof, we conclude that the plaintiff’s notice of appeal was filed out-of-time and that the appeal must be dismissed.

The plaintiff’s motion to alter or amend the district court’s amended judgment entered on February 13, 2008 did not toll the time to appeal because the motion addressed the issue of costs only. *See Utah Women’s Clinic, Inc. v. Leavitt*, 75 F.3d 564, 567 (10th Cir.) (“[A Fed. R. Civ. P.] 59(e) motion, challenging only the award of costs and attorney’s fees, does not toll the time for a merits appeal. The Supreme Court has created a uniform rule, regardless of the

statutory or decisional law which authorizes the award and despite claims that fee matters are part of the merits.”) (citing to *Buchanan v. Stanships, Inc.*, 485 U.S. 265, 267-68 (1988) (per curiam) (costs) and *White v. New Hampshire*, 455 U.S. 445, 451 (1982) (attorney fees)).

Utah Women’s Clinic rejected the argument made by the plaintiff here: that because she filed a Motion to Alter or Amend the judgment under the Federal Rules of Civil Procedure, her motion is a tolling motion under Fed. R. App. P. 4(a)(4).

Plaintiffs argue that their Rule 59(e) motion questioned the correctness of the February decisions insofar as attorney’s fees are concerned; however, that does not change the fact that costs and attorney’s fees normally are collateral to the merits judgment, particularly when the judgment contemplates significant further proceedings concerning costs and attorney’s fees. *Therefore, a Rule 59(e) motion, challenging only the award of costs and attorney’s fees, does not toll the time for a merits appeal.* The Supreme Court has created a uniform rule, regardless of the statutory or decisional law which authorizes the award and despite claims that fee matters are part of the merits.

Id. (citing to *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 201-02 (1988) (emphasis added).

Even though in *Utah Women’s Clinic*, unlike here, the amount of costs had not been determined, this distinction does not change the result. Regardless of whether the amount of costs has been determined, the matter of costs is still

collateral to the merits.

While a different issue may be presented if expenses of this sort were provided as an aspect of the underlying action, we are satisfied that a motion for costs filed pursuant to Rule 549d) does not seek to ‘alter or amend the judgment’ within the meaning of Rule 59(e). Instead, such a request for costs raises issues wholly collateral to the judgment in the main cause of action, issues to which Rule 59(e) was not intended to apply.

Buchanan, 485 U.S. at 268-69.

Thus, it is whether the costs are part of the underlying action, not whether the court awarded an amount certain, which determines the tolling effect of a motion to reconsider.

The plaintiff cites to a Fifth Circuit case, *Ramsey v. Colonial Life Insurance Co.*, 12 F.3d 472 (5th Cir. 1984) (holding that a Rule 59(e) motion directed to a merits judgment awarding a sum certain for attorney fees and costs which only sought reconsideration of the attorney fees award was a tolling motion). However, *Ramsey*, which was decided before *Budinich* and *Buchanan*, was overruled in *Moody National Bank v. GE Life and Annuity Assurance Co.*, 383 F.3d 249, 252-53 (5th Cir. 2004). *Moody* discusses the change in Rule 4(a)(4) made in 1993 which included among the motions that will toll the time for filing an appeal motions for attorney fees under Fed. R. Civ. P. 54 if the district court extends the time to appeal under Rule 58. The *Moody* court noted that Rule 58 makes no provisions for extending the time to appeal relating to the taxing of

costs. “Because Rule 58(c)(2) is silent on post-judgment motions addressing costs, the intent of the rule is clear: a post-judgment motion addressing costs will not extend the time to appeal.” *Id.* at 253. “Thus, reading [Rule 4(a)(4)] and the rule it refers to – Rule 58 – together, it is clear to us that any post-judgment motion addressing costs or attorney’s fees must be considered a collateral issue even when costs or attorney’s fees are included in a final judgment.” *Id.*

Accordingly, the plaintiff’s motion to alter or amend did not postpone the time to appeal from the amended judgment. Because the notice of appeal was filed more than 60 days after entry of the amended judgment, this court lacks appellate jurisdiction. *See* Fed. R. App. P. 4(a)(1)(B) (where the United States or its officer or agency is a party the notice of appeal must be filed within 60 days after entry of judgment); *Bowles v. Russell*, ___ U.S. ___, 127 S.Ct. 2360, 2363, 2366 (2007) (a timely notice of appeal in a civil case is both mandatory and jurisdictional).

APPEAL DISMISSED.

Entered for the Court,
ELISABETH A. SHUMAKER, Clerk



Ellen Rich Reiter
Deputy Clerk/Jurisdictional Attorney