[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-11753

Non-Argument Calendar

GREGORY MAKOZY,

Plaintiff-Appellant,

versus

WESTCOR LAND TITLE,
ARMOUR SETTLEMENT SERVICES,
XL INSURANCE,
d.b.a. Indian Harbour Insurance,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 2:21-cv-14367-DMM

Before JILL PRYOR, LAGOA, and ANDERSON, Circuit Judges.

PER CURIAM:

Greg Makozy, proceeding *pro se*, appeals the district court's dismissal with prejudice of his complaint as barred by *res judicata* based on the prior federal lawsuit that Makozy had filed that the court dismissed as barred by the statute of limitations, and the denial of his motion to reopen and for recusal. He argues that *res judicata* did not apply because he added a new defendant and new claims to his complaint and that the district court abused its discretion in denying his motion for recusal because the district judge was biased against him. In response, Westcor Land Title ("Westcor") and Armour Settlement Services ("Armour") argues that we lack jurisdiction over Makozy's appeal because (1) Makozy failed to evince an intent to appeal any particular order or decision and (2) he failed to timely file his notice of appeal.

For the following reasons, we conclude that we have appellate jurisdiction over the appeal and that the district court did not err in dismissing Makozy's complaint.

I.

Because the district court dismissed this case under the doctrine of *res judicata*, we first discuss Makozy's prior lawsuit that was dismissed. *See Makozy v. Stewart Title*, No. 20-14316-cv, 2021 WL 686863 (S.D. Fla. Feb. 11, 2021). In September 2020, Makozy, proceeding *pro se*, filed an initial complaint against Stewart Title Guaranty Company ("Stewart"), Westcor, and Armour, which the district court dismissed without prejudice for failure to properly invoke subject matter jurisdiction. Subsequently, Makozy filed a first amended complaint, which the district court dismissed without prejudice for failing to cure the jurisdictional defects.

Then, in October 2020, Makozy filed a second amended complaint against Stewart, Westcor, and Armour ("the first lawsuit"), which alleged the following. In May 2015, Makozy sold a property in Mars, Pennsylvania, (the "Mars property") and subsequently filed a notice of mechanic's lien on the Mars property. The buyer of the property refinanced the mortgage on the Mars property twice, using Defendants to conduct the refinance transactions. According to Makozy, Stewart, Westcor, and Armour "missed or ignored" the mechanic's lien on the Mars property and failed to notify him of the transactions in violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.*, and other laws. Makozy sought $75,000 in compensatory damages and $75,000 in punitive damages from each defendant.

Westcor and Amour moved to dismiss the first lawsuit. The district court granted the motions to dismiss, finding that Makozy's claims were time barred by the applicable statutes of limitations

and dismissing the second amended complaint with prejudice. *Makozy v. Westcor Land Title*, 852 F. App'x 518, 518–19 (11th Cir. 2021). Makozy appealed that decision to this Court, and we affirmed because the district court properly dismissed the first lawsuit as time barred. *Id.* at 519. Following our decision, Makozy sought to add XL Insurance ("XL") as a party to the first lawsuit, but the district court denied his motion because the case had been closed.

Turning to this appeal, Makozy filed a complaint against Westcor, Armour, and XL in September 2021 and alleged the following. In May 2015, he sold the Mars property and subsequently filed a notice of mechanic's lien on that property. The buyers twice refinanced the mortgage on the property, using the defendants to conduct the refinance transaction, and "[t]he underwriters who insured the loan was Westcor Land Title who had E & O insurance with XL insurance." Armour had "deliberately ignored the mechanics lien" and did so "because they would no[t] be able to make money on the loan closing," and both Armour and Westcor failed to notify him of the refinance. Makozy's only allegation against XL was that it "provided the E & O insurance for errors." Makozy again sought $75,000 in compensatory damages and $75,000 in punitive damages from each defendant. In November 2021, Makozy moved for leave to file an amended complaint to add Greenwich Insurance, a partner of XL, and the district court granted leave to amend. In the "Statement of Claims" section of the amended

complaint, Makozy stated only that "[i]t needs to be noted that Greenwich Insurance issued the E&O policy for the transaction."

Then, Westcor and Armour filed a joint motion to dismiss, which XL joined, arguing, *inter alia*, that Makozy had failed to state a cause of action. Specifically, they argued that the complaint did not contain a single factual allegation, identify any causes of action, or seek any relief, and that Makozy's prior filings suffered from these same deficiencies.

On April 4, 2022, the district court granted the defendants' motion to dismiss. The district court first stated that Makozy had unsuccessfully tried to bring the same lawsuit in 2020, with "the exact same alleged mechanic's lien, the exact same property in Pennsylvania, and the exact same alleged conduct," noting that Makozy had only added one additional defendant, XL. The court then stated that the amended complaint was patently deficient, raising no legal claims against any defendant, but because Makozy appeared to have intended it as a supplement to his original complaint, the court would construe it as such.

The district court then dismissed Makozy's complaint as barred by *res judicata*. The court found that it was a court of competent jurisdiction in the first lawsuit and that its order dismissing Makozy's claims as time-barred was a final judgment on the merits, which this Court had affirmed on appeal. The court explained that Makozy was the plaintiff and Westcor and Armour were the defendants in the first lawsuit, just as they were in the case before it. While Makozy had added XL to the suit, the court noted that "his

only allegation against XL was that it "provided the E & O insurance for errors," which did not transform the present case into a new lawsuit. The court found that the claims against XL could and should have been brought in the first lawsuit because they stemmed from the same mechanic's lien on the Mars property and involved the same alleged conduct by Westcor and Armour. As such, the court dismissed the complaint with prejudice.

On April 13, 2022, Makozy then filed a motion for reconsideration, arguing that the district court had "patently misunderstood" him and was allowing the financial abuse of a senior citizen and that it was "amazing" that his complaint was dismissed on the same day several discovery documents were due. The district court denied Makozy's motion on April 18, 2022, finding that (1) Makozy had failed to address the applicable legal standard or articulate what the misunderstanding was or why it warranted reconsideration and (2) his "financial abuse" arguments appeared to refer to arguments already presented in his complaint and response to the motion to dismiss, which could not be raised again in a motion for reconsideration.

Then, on May 9, 2022, Makozy filed a motion to reopen and for recusal of the district court judge in the case, arguing that the circumstances showed the judge was biased against him. On May 12, 2022, the district court denied the motion, finding that Makozy had failed to cite the applicable standard or raise any ground that would meet that standard. The court further explained that Makozy misunderstood the judicial process and power of the court

and that it had dismissed his claims in the first lawsuit as time barred, which precluded him from raising the same claims in the second lawsuit under the doctrine of *res judicata*.

On May 25, 2022, Makozy filed a notice of appeal, stating that he "hereby appeal[s] the entire case." This Court subsequently issued jurisdictional questions to the parties concerning the parties' citizenship and what orders or decisions Makozy's notice of appeal evinced an intent to appeal from. A panel of this Court entered an order deciding that although the notice of appeal did not designate a specific decision being challenged, it evinced an intent to appeal from the district court's April 5, 2022, final order of dismissal and its denial of Makozy's two post-judgment motions in an April 18, 2022, order and a May 13, 2022, order.

This Court then remanded to the district court for the limited purpose of determining the citizenship of the parties. Following remand, this Court noted that it appeared to have jurisdiction to consider this appeal but that a final determination regarding jurisdiction would be made by the panel to whom the appeal was submitted on the merits. We now consider our appellate jurisdiction before turning to the merits of the appeal.

II.

We must *sua sponte* examine the existence of appellate jurisdiction and review jurisdictional issues *de novo*. *United States v. Lopez*, 562 F.3d 1309, 1311 (11th Cir. 2009). The timely filing of a notice of appeal in a civil case is a jurisdictional requirement, and

we cannot entertain an appeal that is out of time. *Green v. Drug Enf't Admin.*, 606 F.3d 1296, 1301 (11th Cir. 2010); *see also Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 20 (2017). "[E]xcept as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c)," a notice of appeal in a civil case must be filed with the district court clerk "within 30 days after entry of the judgment or order appealed from." Fed. R. App. P. 4(a)(1)(A). Rule 4(a)(4), in turn, specifies that if a party timely files any of the listed motions, including a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59, then "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion."

Federal Rule of Appellate Procedure 4(a)(7) defines entry of judgment for purposes of appeal. If a separate document is required, judgment is entered for purposes of Appellate Rule 4(a) when the earlier of these events occurs: (1) the judgment is set forth on a separate document, or (2) 150 days have run from the entry of judgment or order in the civil docket. Fed. R. App. P. 4(a)(7)(A)(ii). Federal Rule of Civil Procedure 58 generally requires that every judgment must be set out in a separate document and that the clerk must enter the judgment when the court denies all relief. Fed. R. Civ. P. 58(a)–(b); *see* Fed. R. Civ. P. 54(a) ("'Judgment' as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings."). However, an order disposing of a motion for relief under Federal Rule of Civil Procedure

59 or 60 does not require a judgment to be set forth on a separate document. Fed. R. Civ. P. 58(a)(4)–(5).

In the Advisory Committee's note to the 2002 amendment to Civil Rule 58—i.e., the amendment that added the 150-day provision—the Advisory Committee noted that the failure to enter judgment on a separate document had previously meant that the time to appeal under Appellate Rule 4 and the time to file motions under rules such as Civil Rule 59 never began to run. Fed. R. Civ. P. 58 advisory committee's note to 2002 amendment. The 2002 amendments, the Advisory Committee explained, were designed to work in conjunction with Appellate Rule 4(a) to ensure that the time to appeal did not "linger on indefinitely" and to "maintain the integration of the time periods" set for in Civil Rule 59, among others. *Id.* The Advisory Committee cautioned that the new definition of the entry of judgment "must be applied with common sense to other questions that may turn on the time when judgment is entered" and that if it "serves no purpose, or would defeat the purpose of another rule, it should be disregarded." *Id.* The Advisory Committee also explained that if no separate document is entered, "the motion time periods set by Rules 50, 52, 54, 59, and 60 begin to run after expiration of 150 days from entry of the judgment in the civil docket as required by Rule 79(a)." *Id.* And the Advisory Committee specified that a companion amendment to Appellate Rule 4(a)(7) integrated these changes with the time to appeal. *Id.*

We have not addressed in a published opinion the application of Appellate Rules 4(a)(1)(a), (a)(4), and (a)(7) where a district

court denies relief but does not enter a separate judgment, the appellant then files a timely Civil Rule 59 motion seeking to alter or amend the order denying all relief, and the district court denies the Civil Rule 59 motion before the 150-day period after the dispositive order expires. Specifically, we have not addressed whether the appellant would be required to file a notice of appeal within 30 days after the court denied the Civil Rule 59 motion under Appellate Rule 4(a)(4) or whether the appellant retains the full 150-day period to appeal under Appellate Rule 4(a)(7).

In *Walters v. Wal-Mart Stores, Inc.*, 703 F.3d 1167 (10th Cir. 2013), the Tenth Circuit squarely addressed the question of "when a motion for reconsideration is filed in the absence of a separate judgment, does the denial of that motion start the notice-of-appeal clock, or does the appellant remain entitled to the 150-day period for constructive entry of judgment provided by Fed R. Civ. P. 58?" *Id.* at 1171 (10th Cir. 2013). In *Walters*, the appellant filed a motion to reconsider the district court's order disposing of the case, and the court denied the motion on August 28, 2011. *Id.* The appellant, however, did not file his notice of appeal until September 28, 2021—more than 30 days afterward. *Id.* The appellee argued that the appellant "waived the separate-document requirement when he filed a motion to reconsider the district court's ruling" such that the court's August 28 order denying that motion "triggered the thirty-day period for filing a notice of appeal, which [the appellant] missed." *Id.* But the Tenth Circuit held that, under such circumstances, "an appellant remains entitled to the 150-day period for

constructive entry of judgment." *Id.* The Tenth Circuit found persuasive the Ninth Circuit's reasoning in *ABF Capital Corp. v. Osley*, 414 F.3d 1061, 1064 (9th Cir. 2005) that "until judgment had entered in one of the two ways mandated by [Civil] Rule 58—either in a separate document or the passage of 150 days—an appellant had no obligation to appeal the judgment." *Id.* The Tenth Circuit also stated that "[n]othing in the rules or the commentaries suggests an intent to shorten the time for appeal if a post-judgment motion is filed." *Id.* (alteration adopted) (quoting *ABF Cap.*, 414 F.3d at 1065).

In *ABF Capital*, the Ninth Circuit addressed an argument that the appellant's notices of appeal were untimely "because the 180-day timetable" caused by the district court's failure to set out its orders granting dismissal of the plaintiffs' claims on separate documents "was shortened after ABF prematurely moved to alter or amend judgment under Civil Rule 59(e)." 414 F.3d at 1064. There, the district court issued case-dispositive orders on April 10 and April 11, 2003, from which the appellant filed motions to alter or amend under Civil Rule 59(e). *Id.* The district court denied the motions on May 15, 2003. *Id.* However, the appellant did not file notices of appeal until July 30, 2003. *Id.* The Ninth Circuit concluded that "the district court's minute orders on ABF's Rule 59(e) motions did not substitute for its obligation to comply with the simple obligation of entering the judgment on a separate document." *Id.* at 1065 (alteration adopted) (quoting Fed. R. Civ. P. 58, advisory committee's note to 2002 amendment). Noting that

"[n]othing in the 2002 amendments provides otherwise, or suggests that Congress meant to require appeal of a final judgment *before* entry of judgment, because an early-filed motion questioning the announced-but-not-entered judgment had been denied," the Ninth Circuit held that "a premature post-judgment motion may not accelerate the deadline for appeal before a separate judgment has been entered." *Id.*

Here, as an initial matter, we decline to reconsider our prior panel's determination that Makozy's notice of appeal evinced an intent to appeal the April 5, 2022, final order dismissing the case, the April 18, 2022, order denying the motion for reconsideration of the final order, and the May 12, 2022, order denying the motion to reopen and for recusal.

Turning to the timeliness of Makozy's notices of appeal, the May 25, 2022, notice of appeal was timely to challenge the May 13, 2022, order denying the motion to reopen and for recusal because Makozy filed it within 30 days of entry of that order, and Makozy has abandoned on appeal any challenge to the April 18, 2022, denial of his motion for reconsideration. We also find that the notice of appeal was timely to challenge the April 5, 2022, final order dismissing the case based on the persuasive reasoning of the Ninth and Tenth Circuits in *ABF Capital* and *Walters*, respectively. Because the court did not enter a separate judgment, Makozy's filing of a Civil Rule 59 motion did not cut short that time period, and he filed the notice of appeal within 150 days of that order.

Accordingly, we conclude that we have appellate jurisdiction and now turn to the merits of the appeal.

III.

Because *res judicata* determinations are pure questions of law, we review them *de novo*. *Norfolk S. Corp. v. Chevron, U.S.A., Inc.*, 371 F.3d 1285, 1288 (11th Cir. 2004).

Res judicata bars the parties to a prior action from relitigating the same causes of action that were, or could have been, raised in that prior action, if that action resulted in a final judgment on the merits. *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1296 (11th Cir. 2001). *Res judicata* "generally applies not only to issues that were litigated, but also to those that should have been but were not." *Delta Air Lines, Inc. v. McCoy Restaurants, Inc.*, 708 F.2d 582, 586 (11th Cir. 1983). The bar applies where four prerequisites are met: (1) the prior decision was rendered by a court of competent jurisdiction; (2) there was a final judgment on the merits; (3) both cases involve the same parties or their privies; and (4) both cases involve the same causes of action. *Piper Aircraft*, 244 F.3d at 1296. "[D]ismissal of a complaint with prejudice satisfies the requirement that there be a final judgment on the merits." *Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1501 (11th Cir. 1990).

As to the third factor, we have explained that "privity" comprises several different types of relationships and generally applies "when a person, although not a party, has his interests adequately represented by someone with the same interests who is a party."

EEOC v. Pemco Aeroplex, Inc., 383 F.3d 1280, 1286 (11th Cir. 2004). One such type of privity is known as "virtual representation." *Id.* "Virtual representation" is a term of art that we have defined as applying "when the respective interests are closely aligned *and* the party to the prior litigation adequately represented those interests." *Id.* at 1287 (quoting *Delta Air Lines*, 708 F.2d at 587).

Turning to the fourth factor, "[i]n general, cases involve the same cause of action for purposes of res judicata if the present case 'arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action.'" *Israel Disc. Bank Ltd. v. Entin*, 951 F.2d 311, 315 (11th Cir. 1992) (quoting *Citibank*, 904 F.2d at 1503). "In determining whether the causes of action are the same, a court must compare the substance of the actions, not their form." *Piper Aircraft*, 244 F.3d at 1297 (quoting *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1239 (11th Cir. 1999)). "The test for a common nucleus of operative fact is 'whether the same facts are involved in both cases, so that the present claim could have been effectively litigated with the prior one.'" *Lobo v. Celebrity Cruises, Inc.*, 704 F.3d 882, 893 (11th Cir. 2013) (quoting *Piper Aircraft*, 244 F.3d at 1301).

Here, the district court correctly dismissed Makozy's action as barred by *res judicata*. First, the parties agree that the district court was a court of competent jurisdiction in the first lawsuit. Second, the dismissal of the first lawsuit with prejudice as barred by the applicable statutes of limitations was a final judgment on the

merits. Third, the three principal parties—Makozy, Westcor, and Armour—were the same in both lawsuits, and XL, a newly added defendant to the present complaint, was in privity with Westcor as its errors and omissions insurance carrier. And fourth, the two cases involve the same factual nucleus.

Accordingly, we affirm the district court's dismissal order.[1]

IV.

We review for abuse of discretion a district court's denial of a motion to recuse. *United States v. Scrushy*, 721 F.3d 1288, 1303 (11th Cir. 2013).

Under 28 U.S.C. § 455, there are two primary reasons for judicial recusal. Section 455(a) provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Id.* "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *United States v. Patti*, 337 F.3d 1317, 1321 (11th Cir. 2003) (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988)). The standard of review for a § 455(a) motion "'is whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which

[1] We decline to consider the new arguments that Makozy attempts to raise for the first time on appeal, as those issues were not decided by the district court. *See MSP Recovery Claims, Series LLC v. Metro. Gen. Ins. Co.*, 40 F.4th 1295, 1306 (11th Cir. 2022).

recusal was sought would entertain a significant doubt about the judge's impartiality,' and any doubts must be resolved in favor of recusal." *Id.* (citation omitted) (first quoting *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988); then citing *United States v. Kelly*, 888 F.2d 732, 745 (11th Cir. 1989)).

In turn, § 455(b) provides that a judge should recuse himself when any of the specific circumstances set forth in that subsection exist, which show the fact of partiality. § 455(b)(1)-(5). For example, a judge should recuse himself "[w]here he has a personal bias or prejudice concerning a party" or "[w]here in private practice he served as [a] lawyer in the matter in controversy." *Id.* § 455(b)(1)–(2). Recusal under this subsection is mandatory because "the potential for conflicts of interest are readily apparent." *Patti*, 337 F.3d at 1321 (quoting *Murray v. Scott*, 253 F.3d 1308, 1312 (11th Cir. 2001)).

Here, the district court did not abuse its discretion in denying Makozy's motion to reopen and for recusal. The record does not support Makozy's claims that the district court judge's impartiality might reasonably have been questioned or that any special circumstances showing partiality existed.

V.

For the foregoing reasons, we conclude we have appellate jurisdiction and affirm the district court's orders.

AFFIRMED.