

IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY

LEXISNEXIS, A DIVISION OF RELX, INC.

*Plaintiff-Appellee*

v.

DAVID OSTROW

*Defendant-Appellant*

Appellate Case No. 27715

Trial Court Case No. 2013 CV 04378

[Civil Appeal from  
Common Pleas Court]

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**DECISION AND FINAL JUDGMENT ENTRY**

October 20, 2017

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PER CURIAM:

{¶ 1} On September 8, 2017, David Ostrow filed a notice of appeal in the underlying case. Ostrow appeals the trial court's August 2, 2017 final judgment resolving that case. Appellee, LexisNexis, a Division of RELX, Inc., moved to dismiss the appeal, arguing that the notice of appeal was filed more than 30 days after the order it seeks to appeal. Ostrow filed a response to the motion and an affidavit in support of his response.

{¶ 2} App.R. 4(A)(1) provides that "a party who wishes to appeal from an order that is final upon its entry shall file the notice of appeal required by App.R. 3 within 30 days of that entry." Here, the judgment on appeal was entered by the trial court on August 2,

2017. The notice of appeal was filed more than 30 days thereafter on September 8, 2017. It is therefore untimely.

{¶ 3} Ostrow argues that he timely mailed his notice of appeal on September 1, 2017, which is within 30 days of the judgment. Mailing is not filing, however. “A document is considered filed when it is filed with the clerk of courts, not when it is mailed.” *State v. Slivinski*, 2d Dist. Montgomery No. 27304 (Dec. 19, 2016); *see also Zanesville v. Rouse*, 126 Ohio St.3d 1, 2010-Ohio-2218, 929 N.E.2d 1044, ¶ 7, *judgment vacated in part on reconsideration on other grounds*, 126 Ohio St.3d 1227, 2010-Ohio-3754, 933 N.E.2d 260, ¶ 7 (“A document is ‘filed’ when it is deposited properly for filing with the clerk of courts”). The rule requires timely *filing* for this court to proceed. *Transamerica Ins. Co. v. Nolan*, 72 Ohio St.3d 320, 649 N.E.2d 1229 (1995), syllabus (a timely-filed notice of appeal is the only jurisdictional requirement for an appeal).

{¶ 4} Ostrow also asserts that there is an extra three-day period allowed for out-of-state filings by mail. Ostrow may be referring to Civ.R. 6(D), which provides in relevant part:

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other document upon that party and the notice or paper is served upon that party by mail or commercial carrier service under Civ.R. 5(B)(2)(c) or (d), three days shall be added to the prescribed period.

*See also* App.R. 14(C) (providing similarly). These provisions do not help Ostrow, as neither Civ.R. 6(D) nor App.R. 14(C) apply to extend the time for filing a notice of appeal. *See Paratore v. Norfolk S. Ry. Co.*, 11th Dist. Portage No. 2009-P-0093, 2010-Ohio-1162, ¶ 10, citing *Leach v. Rosenblum*, 1st Dist. Hamilton No. C-000476, 2000 WL 1235952

(Sept. 1, 2000) (“Civ.R. 6(E) [now (D)] does not extend the time for filing the notice of appeal”); *State v. De Capito*, 11th Dist. Trumbull No. 2009-P-0093, 2011-Ohio-1301, ¶ 11 (“App.R. 14(C) does not apply” to notices of appeal). App.R. 4’s time requirements are “mandatory and jurisdictional,” and in this case, not satisfied. *Craft v. Ferguson*, 5th Dist. Stark No. 2002CA00346, 2003-Ohio-3173, ¶ 15.

{¶ 5} Ostrow asks, in the alternative, that this court construe any misunderstanding about the rules as excusable neglect and allow the appeal to proceed. We cannot do so. There is no excusable neglect standard in App.R. 4 that permits this court to allow an untimely civil appeal. While delayed appeals may be permitted for good cause under App.R. 5(A), that rule only applies in criminal, delinquency, and serious youthful offender proceedings. This court otherwise “may not enlarge or reduce the time for filing a notice of appeal.” App.R. 14(B).

{¶ 6} Finally, we note for completeness that App.R. 4(A)(3), an exception to the 30-day rule of App.R. 4(A)(1), does not apply here. That division states that “[i]n a civil case, if the clerk has not completed service of the order within the three-day period prescribed in Civ.R. 58(B), the 30-day periods referenced in App.R. 4(A)(1) and 4(A)(2) begin to run on the date when the clerk actually completes service.” This exception changes the date on which the 30-day clock begins to run, depending on when the clerk serves the parties with notice of the final judgment and notes service on the docket. If the clerk serves notice within three days of the entry of a final civil judgment, a notice of appeal is due within 30 days of the entry of final judgment. App.R. 4(A)(1). If the clerk does not serve notice within three days of the entry of a final civil judgment, a notice of appeal is due 30 days after the clerk served notice. App.R. 4(A)(3). The record here shows that the clerk timely served notice of the August 2, 2017 final judgment the same day it was entered. Ostrow’s

30-day window for filing his notice of appeal thus began to run on August 2, 2017. The September 8, 2017 notice of appeal was filed more than 30 days thereafter and is untimely.

{¶ 7} Timely filing of a notice of appeal “is a prerequisite to a civil appeal as of right.” *Moldovan v. Cuyahoga Cty. Welfare Dept.*, 25 Ohio St.3d 293, 294-295, 496 N.E.2d 466 (1986). “The Supreme Court of Ohio has held that the failure to comply with time requirements of App.R. 4(A) is a jurisdictional defect, which is fatal to an appeal.” *CitiBank v. Abu-Niaaj*, 2d Dist. Greene No. 2011CA45, 2012-Ohio-2099, ¶ 7, citing *In re H.F.*, 120 Ohio St.3d 499, 2008-Ohio-6810, 900 N.E.2d 607, ¶ 17 and *Transamerica Ins. Co. v. Nolan*, 72 Ohio St.3d 320, 649 N.E.2d 1229 (1995). Without a timely notice of appeal, this court lacks jurisdiction to consider Ostrow’s appeal. We therefore SUSTAIN the motion to dismiss. This appeal, Montgomery Appellate Case No. 27715, is DISMISSED.

{¶ 8} Pursuant to Ohio App.R. 30(A), it is hereby ordered that the Clerk of the Montgomery County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.

SO ORDERED.

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MICHAEL T. HALL, Presiding Judge

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MARY E. DONOVAN, Judge

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MICHAEL L. TUCKER, Judge

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