

APPELLATE

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ALERT

## RECENT SECOND CIRCUIT DECISION TEACHES TRIAL LAWYERS A DIFFICULT APPELLATE LESSON: FOLLOWING TRIAL RULES THAT CONFLICT WITH RULES OF APPELLATE PROCEDURE CAN CAUSE FORFEITURE OF APPELLATE RIGHTS

*By Bruce P. Merenstein*

Lawyers are taught to follow the rules, and that includes local rules of trial courts and individual judges. But a recent Second Circuit decision adds an important caveat to that lesson: beware of local rules that can lead to forfeiture of appellate rights. In *Weitzner v. Cynosure, Inc.*, No. 14-723-cv (Sept. 16, 2015), the court dismissed an appeal as untimely when the appellant's late filing was caused by compliance with a trial judge's local rule.

### The Decision

The plaintiffs in *Weitzner* alleged the defendant violated the federal Telephone Consumer Protection Act, but the trial court dismissed their action as barred by an earlier state court decision involving some of the same parties. The court entered final judgment on March 5, 2013.

Under Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure, a notice of appeal in a civil action not involving the federal government must be filed within 30 days of the final judgment unless that period is stayed by the *timely* filing of certain post-trial motions. One such post-trial motion is a motion for reconsideration, which, under Rule

4(a)(4)(A)(vi), must be filed within 28 days of the final judgment to be deemed timely.

Ten days after the final judgment was entered in *Weitzner*, the plaintiffs *served* on the defendant a motion for reconsideration, but they did not *file* the motion. They postponed filing because the trial judge in the case had adopted a rule prohibiting parties from filing a motion until that motion was fully briefed. Under a schedule set by the trial judge, the motion for reconsideration was not fully briefed—and then filed—until August 2013, more than five months after final judgment had been entered. Six months later, in February 2014, the trial court denied the motion, and less than 30 days later, the plaintiffs filed a notice of appeal.

On appeal, the defendant argued that the appeal was untimely because the plaintiffs had not complied with the 28-day requirement in Rule 4(a)(4)(A)(vi) for filing a motion for reconsideration, and thus, the 30-day appeal period was not stayed. The plaintiffs contended that their failure to comply with the 28-day requirement should be excused because of the trial court's rule prohibiting the filing of motions

until fully briefed. Although the Second Circuit agreed that the 28-day requirement was not jurisdictional and therefore could be subject to equitable exceptions, it held that such an exception did not apply in this case.

The court noted that the plaintiffs could have asked the trial court for permission to file their motion within the 28-day period after judgment was entered, but failed to do so. In fact, during that 28-day period, plaintiffs had written to the judge to inform him of their intention to file the motion and had then met with him to schedule the briefing of the motion. Nevertheless, they failed to ask permission to actually file the motion either time. Thus, the court held, plaintiffs were not entitled to the benefit of an equitable exception and their appeal had to be dismissed as untimely.

### **The Appeals Court's Admonition to Trial Courts**

In dicta expressing what many trial lawyers might well regard as an understatement, the court said that it was “deeply troubling” that a trial court’s local rule could cause a party to forfeit its right to appeal. It disclosed that its own review of local rules within the Second Circuit revealed that many judges had rules prohibiting the filing of a motion until after a conference with the judge or the completion of briefing, and opined that it was “a virtual certainty” that such rules would lead to additional forfeitures of appeal rights by litigants. As a result, the court “strongly recommended” that district judges in the circuit revisit such rules to eliminate the risk that appeal rights would be forfeited when litigants comply with them.

### **The Lesson from *Weitzner***

The lesson from this case is clear: Where appellate rules provide time limits for filing a notice of appeal—or time limits for filing motions that delay the appeal period—those time limits must be strictly followed, even if doing so requires violation of local rules or procedures that interfere with these deadlines. Of course, as suggested by the Second Circuit in *Weitzner*, the preferred approach would be to request permission from the trial court to be excused from compliance with the local

rule so that the putative appellant can then take the necessary steps to perfect an appeal.

But if obtaining such permission before expiration of the applicable deadline is not possible (or permission is denied), steps still must be taken to assure that the right to appeal is not forfeited. Perhaps that will mean filing the motion in violation of the local rule and then seeking approval after the fact. Or, if the trial court refuses to excuse compliance with the local requirement, it may mean seeking mandamus from the appellate court or even risking the trial court’s wrath by filing the motion anyway. When the alternative is forfeiture of a client’s appeal rights, ducking that rock may be preferable to cowering in the hard place of the trial judge’s good graces. ♦

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