

UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT

Docket No. 07-2146

WESLEY C. SMITH

Plaintiff/Appellant,

v.

CHERI SMITH, et al.,

Defendants/Appellees.

From the United States District Court
For the Western District of Virginia
Roanoke Division

APPELLEE RONALD FAHY'S MOTION TO DISMISS

Ronald Fahy, an appellee herein, by counsel,
moves to dismiss this appeal. Mr. Fahy makes his
motion pursuant to 28 U.S.C. § 2107(a) and Rule
4(a)(1) of Federal Rules of Appellate Procedure,
and for the reasons that follow.

Statement of the Case

1. Plaintiff/Appellant, Wesley C. Smith, filed his Complaint in the district court on March 13, 2007, alleging violations of federal and state law.

2. All defendants filed motions to dismiss. By order entered October 12, 2007, the district court granted those motions and dismissed Mr. Smith's federal claims with prejudice and his state law claims without prejudice. A copy of the district court's order and memorandum opinion are attached hereto as Exhibit A.

3. Mr. Smith had until November 12, 2007, to file a notice of appeal with the district court. Fed. R. App. P. 4(a)(1).

4. Mr. Smith mailed his notice of appeal to the district court on November 10, 2007. The notice, however, was not received by the court and filed until November 14, 2007.

Argument

5. Section 2107(a) of the United States Code and Rule 4(a)(1) of the Federal Rules of Appellate Procedure provide that a notice of appeal must be

filed with the district court within 30 days after the judgment or order appealed from is entered.

"This 30-day time limit is mandatory and jurisdictional." *Browder v. Director, Ill. Dept. of Corrections*, 434 U.S. 257, 264 (1978).

6. "Filed" in this context means actual receipt and filing by the district court clerk. Fed. R. Civ. P. 5(e).¹ Mailing does not constitute filing. See *Thompson v. E.I. DuPont de Nemours & Co., Inc.*, 76 F.3d 530, 531-32 (4th Cir. 1996) (notice of appeal mailed 3 days before expiration of 30-day time period but not received by the district court until 3 days after the deadline was not timely filed).

7. Because Mr. Smith's notice was not filed until November 14, 2007, this Court lacks jurisdiction to consider his appeal. 76 F.3d at 532.

¹ The procedure for filing a notice of appeal must comply with the practice of the district court for the filing of other pleadings. Fed. R. App. P. 1(a)(2).

8. All parties have been previously notified of this motion. Defendant/Appellees consent to the granting of the motion. Upon information and belief, Mr. Smith does not.

WHEREFORE, for the reasons set forth above, Ronald Fahy asks the Court to dismiss this appeal.

RONALD FAHY

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on December ~~14th~~ 2007, I mailed the original and three copies of the foregoing to Patricia S. Connor, Clerk, Fourth Circuit Court of Appeals, U.S. Court Annex, Suite 501, 1100 E. Main Street, Richmond, VA 23219-3517 and a copy to:

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