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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DAVON ALEXANDER OWENS,

Plaintiff and Respondent,

v.

MENZIES AVIATION (USA), INC.,

Defendant and Appellant.

B324385

(Los Angeles County
Super. Ct. No.
20STCV19891)

APPEAL from an order of the Superior Court of Los Angeles County, Stephanie M. Bowick, Judge. Dismissed.

Foley & Lardner, Christopher Ward, and Kaleb N. Berhe for Defendant and Appellant.

Pairavi Law, Edwin Pairavi, and Joshua M. Mohrsaz for Plaintiff and Respondent.

The trial court, on May 18, 2022, granted plaintiff and respondent Davon Owens's (Owens's) motion to lift a stay on trial court proceedings that the court entered pursuant to the parties' stipulation to permit Owens's employment discrimination claims to proceed in arbitration. (We shall refer to this ruling as the Stay Ruling.) Under the authority provided by Code of Civil Procedure 1281.98,¹ the trial court lifted the stay because defendant and appellant Menzies Aviation (USA), Inc. (Menzies) did not pay the arbitration fees within 30 days of the due date (a point Menzies conceded).²

Roughly two weeks later, on May 31, 2022, Menzies filed what it styled as a "Motion for Reconsideration, or in the Alternative, Motion to Compel Arbitration and Stay Court Proceedings." The trial court denied that motion in an order filed on August 25, 2022. (We shall refer to this ruling as the Reconsideration Ruling.)

Menzies filed a notice of appeal on October 27, 2022. The notice states Menzies is appealing orders issued by the trial court on August 25, 2022, and May 18, 2022.

Menzies' opening brief includes the statement of appealability that is required when an appeal is not taken from a final judgment (rule 8.204(a)(2)(B)), and the statement addresses

¹ Undesignated statutory references that follow are to the Code of Civil Procedure. Undesignated rule references that follow are to the California Rules of Court.

² The minute order memorializing the Stay Ruling states a certificate of mailing is attached. The record does not reveal whether the clerk attached the certificate on top of, or at the end of, the minute order itself.

whether its appeal was taken from an appealable order. Menzies explains courts have permitted appeals from orders that are the “functional equivalent” of orders denying a petition to compel arbitration, and Menzies cites to the Stay Ruling as just such a functionally equivalent order from which its appeal is taken.

Owens’s respondent’s brief argues the notice of appeal of the Stay Ruling is untimely, coming more than 90 days after Menzies filed its motion for reconsideration. (Rule 8.108(e)(2).) Owens further argues that the Reconsideration Ruling is not appealable.

The reply brief filed by Menzies takes a different approach than its opening brief. Menzies concedes that its appeal is “subject to . . . Rule 8.104(a)’s 60-day deadline to appeal,” but Menzies asserts it adhered to this deadline. The reply brief so argues because, unlike the opening brief, it asserts Menzies is appealing the Reconsideration Ruling (which it claims is a ruling denying a petition to compel arbitration), not the Stay Ruling. As Menzies argues the point, it “filed its notice of appeal on October 27, 2022—59 days after learning of the [Reconsideration Ruling]. [Citation.] The notice of appeal was thus timely filed before the applicable 60-day deadline.” Menzies further asserts it need not rely on the provisions of the Rules of Court that allow for an extension of time to file a notice of appeal when a reconsideration motion is filed in the trial court because it “timely appealed its motion to compel arbitration.”

We hold the notice of appeal was not timely filed and the appeal must be dismissed. (*Rowan v. Kirkpatrick* (2020) 54 Cal.App.5th 289, 294 [“[T]he timely filing of an appropriate notice of appeal or its legal equivalent is an absolute prerequisite to the exercise of appellate jurisdiction”].) Menzies’ opening brief

(not its reply brief) has it right: the only appealable order here is the Stay Ruling.³ (§ 1008, subd. (g); *Reynolds v. City of Calistoga* (2014) 223 Cal.App.4th 865, 871 [the “denial of [a] motion for reconsideration [is] not appealable but [is] reviewable on [a] timely appeal of the underlying order”]; *Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1576; see also *Global Protein Products, Inc. v. Le* (2019) 42 Cal.App.5th 352, 363-364.)

Appending a request for alternative procedural relief to a motion that seeks reconsideration of an earlier ruling cannot extend the time to appeal. Indeed, if Menzies’ appealability position in this case were accepted, it would create an unjustifiable loophole in the time limits that govern appeals from orders denying requests to compel arbitration. A party whose request to compel arbitration is denied would just need to file at some later date a motion for reconsideration “or in the alternative” a (renewed) motion to compel arbitration and, presto, additional time to appeal the first denial would be gained when

³ Even Menzies’ reply brief is not fully consistent in specifying what it believes to be the appealable order. While it proceeds primarily on the incorrect belief that the Reconsideration Ruling is the operative ruling for purposes of this appeal, the reply brief also argues that the Reconsideration Ruling “diverted a pending arbitration proceeding into court and is thus the functional equivalent of an order denying a petition to compel arbitration.” By again invoking the functional equivalent doctrine (which we assume, solely for purposes of this appeal, was correctly applied in *Williams v. West Coast Hospitals, Inc.* (2022) 86 Cal.App.5th 1054), the reply brief acknowledges the appeal is not truly taken from an order denying a petition to compel arbitration.

the trial court denies that (redundant) motion. That is not the law.

Because the Stay Ruling is the operative appealable order—i.e., the order that, in Menzies’ words, “diverted a pending arbitration proceeding into court and is thus the functional equivalent of an order denying a petition to compel arbitration”—the appeal is untimely and must be dismissed.⁴ (Rule 8.108(e)(2).)

DISPOSITION

The appeal is dismissed. Owens is awarded costs on appeal.

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BAKER, Acting P. J.

I concur:

KIM, J.

⁴ Justice Moor’s dissent misunderstands the Rules of Court and available precedent to find the appeal timely on a rationale that no party advances and that Menzies affirmatively disavows. The ultimate import of Justice Moor’s dissent is also left unclear: he believes the appeal is properly before him for decision, but he does not explain how he would resolve it.

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MOOR, J., Dissenting

I would find the appeal in this case to be timely. On May 18, 2022, the trial court issued a minute order lifting a stay on the trial court proceedings. The May 18, 2022 minute order instructed appellant Menzies Aviation (USA), Inc. (Menzies), to give notice of the court’s ruling and stated that a certificate of mailing was attached. The minute order itself is not file-stamped. A document entitled “certificate of mailing” file-stamped May 18, 2022, shows the court clerk served the May 18, 2022 minute order on Menzies. Menzies subsequently filed a motion for reconsideration, or in the alternative, a motion to compel arbitration, which the trial court denied on August 25, 2022. The August 25, 2022 minute order was not served on Menzies. Menzies filed a notice of appeal on October 27, 2022, from both minute orders.

In the respondent’s brief, Davon Owens contends the appeal is untimely under California Rules of Court, rule 8.104(a)(1)¹ because Menzies filed the notice of appeal more than 60 days after service of “notice of entry” of an appealable order, even assuming the deadline was extended an additional 30 days based on a valid motion for reconsideration. Respondent’s

¹ All subsequent references to “Rule” are to the California Rules of Court.

contention is not supported by the record, as there is no document entitled “notice of entry.” In response, Menzies contends the appeal is timely. Specifically, Menzies asserts the “operative,” “applicable” 60-day deadline to file a notice of appeal never began to run because respondent failed to serve the trial court’s ruling on the motion for reconsideration.

An appellate court has no jurisdiction to consider a late appeal and must dismiss an appeal, even on its own motion, if the notice of appeal is untimely. (*Nu-Way Associates, Inc. v. Keefe* (1971) 15 Cal.App.3d 926, 928–929.) Rule 8.104(a)(1) sets forth the time to file an appeal as follows: “Unless a statute or rules 8.108, 8.702, or 8.712 provides otherwise, a notice of appeal must be filed on or before the earliest of: [¶] (A) 60 days after the superior court clerk serves on the party filing the notice of appeal a document entitled ‘Notice of Entry’ of judgment or a filed-endorsed copy of the judgment, showing the date either was served; [¶] (B) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled ‘Notice of Entry’ of judgment or a filed-endorsed copy of the judgment, accompanied by proof of service; or [¶] (C) 180 days after entry of judgment.” (Rule 8.104(a)(1)(A)–(C).) “As used in (a) . . . ‘judgment’ includes an appealable order if the appeal is from an appealable order.” (Rule 8.104(e).) “The entry date of an appealable order that is entered in the minutes is the date it is entered in the permanent minutes.” (Rule 8.104(c)(2).)

Because there is no document entitled “notice of entry,” the question in this case is whether the superior court clerk’s service of the May 18, 2022 minute order, which states that a certificate of mailing is attached, together with the certificate of mailing, which is file-stamped, constituted service of a filed-endorsed copy

of the order triggering the shortened time limits of Rule 8.104(a)(1)(A). I would conclude that the clerk’s service of the May 18, 2022 order did not meet the requirements for shortening time, and therefore Menzies’ appeal was timely.

The California Supreme Court has explained that Rule 8.104(a)(1) “require[s] a single document—either a ‘Notice of Entry’ so entitled or a file-stamped copy of the judgment or appealable order—that is sufficient in itself to satisfy all of the rule’s conditions, including the requirement that the document itself show the date on which it was mailed.” (*Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 905 (*Alan*).) In *Alan*, the superior court clerk mailed the parties two documents in a single envelope: a file-stamped copy of a statement of decision and a minute order that was not file-stamped but referred to issuing the statement of decision and showed the date that both documents were mailed. (*Id.* at p. 898.) The *Alan* court held the mailing did not constitute service of a filed-endorsed copy of the judgment, because the file-stamped statement of decision was not an appealable order, and the appealable minute order, which showed the date it was mailed, was not file-stamped. (*Id.* at pp. 901–902.)

Courts may treat a minute order with an attached certificate of mailing as a single document for purposes of satisfying the requirement in Rule 8.104(a)(1)(A) that the minute order “itself show the date on which it was mailed.” (*Alan, supra*, 40 Cal.4th at p. 905.) The *Alan* court stated, “we see no reason why the clerk could not satisfy the single-document requirement by attaching a certificate of mailing to the file-stamped judgment or appealable order, or to a document entitled ‘Notice of Entry.’ Obviously a document can have multiple pages. But the rule

does not require litigants to glean the required information from multiple documents or to guess, at their peril, whether such documents in combination trigger the duty to file a notice of appeal. ‘Neither parties nor appellate courts should be required to speculate about jurisdictional time limits.’ [Citation.]” (*Id.* at p. 905.)

The *Alan* court reiterated the well-established principle of construction that applies to court rules limiting the right to appeal, such as Rule 8.104(a)(1), that any uncertainties or ambiguities be resolved in favor of preserving the right to appeal. (*Alan, supra*, 40 Cal.4th at pp. 901–902.) “This principle has led courts interpreting rule 8.104(a)(1) and its predecessors to hold that documents mailed by the clerk do not trigger the 60-day period for filing a notice of appeal unless the documents strictly comply with the rule. . . . Thus, courts have consistently held that the required ‘document entitled “Notice of Entry” ’ (rule 8.104(a)(1)) must bear precisely that title, and that the ‘file-stamped copy of the judgment’ (*ibid.*) must truly be file stamped.” (*Id.* at pp. 902–903; see, e.g., *MSY Trading Inc. v. Saleen Automotive, Inc.* (2020) 51 Cal.App.5th 395, 401 [180-day deadline for appeal applied where order served by clerk “was neither file-stamped nor entitled ‘notice of entry’ ”]; *Bi-Coastal Payroll Services, Inc. v. California Ins. Guarantee Assn.* (2009) 174 Cal.App.4th 579, 586 [clerk’s mailing of minute order that that was not entitled “Notice of Entry” and was not file-stamped did not shorten time to appeal].)

In the present case, the minute order served by the superior court clerk was not filed-endorsed. (*Alan, supra*, 40 Cal.4th at p. 903.) Instead, the certificate of mailing was filed-endorsed. In my view, under *Alan*, we may not substitute a filed-

endorsed certificate of mailing for a minute order that is not filed-endorsed, even if the two documents may otherwise be treated as a single document for purposes of Rule 8.104(a)(1)(A). (See *Alan*, *supra*, at p. 905 [clerk may “satisfy the single-document requirement by attaching a certificate of mailing to the file-stamped judgment or appealable order”].)

Because the superior court clerk did not serve a document entitled “notice of entry” or a filed-endorsed copy of the appealable order, I would find the time to appeal the May 18, 2022 order was not shortened under Rule 8.104(a)(1)(A), and Menzies’ notice of appeal filed within 180 days of that minute order was timely. (Rule 8.104(a)(1)(C).)

MOOR, J.