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California Appeal Filed One Minute Late -- Literally One Minute -- Dismissed As Untimely

Tim Kowal *March 06, 2023*

After getting hit with an anti-SLAPP fee award, the plaintiff in *McKenna v. Sony Pictures Entertainment, Inc.* (D2d5 Feb. 15, 2023 No. B304256) 2023 WL 2007687 (nonpub. opn.) filed a notice of appeal. McKenna had already filed the order granting Sony's anti-SLAPP motion based on alleged misappropriation of the likeness of the late actor Christopher Jones in the Quentin Tarantino film "Once Upon a Time … in Hollywood."

To file the notice of appeal, the attorney logged on to the e-filing system late in the evening of the appellate deadline. Like, really late—at 11:52 p.m. Owing to a reportedly "slow connection," the notice of appeal was not file-stamped until 12:00 a.m. That is, the day after the deadline.

One minute late.

The plaintiff also had a second problem: the notice of appeal did not identify the order being challenged on appeal, or the name of the appellant, and so the clerk rejected the notice of appeal for that reason. So the morning after the deadline, the plaintiff filed a motion to amend the notice of appeal to correct those errors. The plaintiff also explained the e-filing problems.

But the Court of Appeal still dismissed the appeal.

While e-filing errors may excuse an untimely appeal based on a "failure…in the electronic transmission," a "slow connection" may not suffice.

As discussed in another recent case in *Garg v. Garg* (D4d3 Sept. 7, 2022 No. G061500) --- Cal.Rptr.3d ---- 2022 WL 4092828), California Rule of Court Rule 8.77(d) may support extending the deadline to appeal where a technical problem prevented a timely filing. Rule 8.77(d) provides that "[i]f a filer fails to meet a filing deadline … because of a failure at any point in the electronic transmission and receipt of a document the filer may file the document on paper or electronically as soon thereafter as practicable and accompany the filing with a motion to accept the document as timely filed…."

In *Garg*, the Fourth District compared rule 8.77(d) to a similar but narrower rule at rule 2.259(c). The narrower rule appears to apply only when "technical problems with the court's electronic filing system prevents the clerks from accepting the document for filing." Relief under rule 2.259(c) should be directed to trial courts.

But rule 8.77(d), *Garg* continued, "appears to be broader than rule 2.259(c)" because it allows for relief based on a "failure at any point in the electronic transmission and receipt of a document" (not just a "technical problem with a court's electronic filing system" as under rule 2.259(c)). Relief under rule 8.77(d) should be directed to the Court of Appeal.

Garg would have afforded relief to the appellant, except that the appellant did not request relief immediately. Instead, the appellant there waited 29 days. That was too late.

Here in *McKenna*, the plaintiff sought relief immediately, explaining that the attorney logged on sometime between 11:49 and 11:52 p.m., but that a "slow connection" prevented the filing from being received until 12:00 a.m.

But unlike the Fourth District in *Garg*, the Second District in *McKenna* read rule 8.77(d) more narrowly. *McKenna* held that a "slow connection" does not warrant relief under rule 8.77(d). "[W]e do not believe a "slow connection" resulting in a delay of a few minutes between the submission of an electronically-filed document and its receipt by the court is a "failure ... in the electronic transmission" as contemplated by Rule 8.77(d)."

This appears to be a difference in the way the Second and Fourth Districts read rule 8.77, with the former reading it more narrowly.

The the doctrine of liberality did not save a notice of appeal that failed to identify the order and the appellant.

Even if the notice of appeal had been timely, the court said that "[j]ust as important" was the fact that the notice of appeal also failed to specify the order being appealed from, as well as the identity of the appellant. Those deficiencies also made the notice of appeal "insufficient to invoke this court's jurisdiction."

Comment: I found this surprising given that the Second District recently excused a similarly deficient notice of appeal in *Magyar v. Kaiser Permanente Medical Center* (D2d2 Jan. 23, 2023 No. B315353) 2023 WL 355173 (nonpub. opn.), covered here. There, the appellant appealed from one summary judgment, but not a second summary judgment (as to a second defendant). After reading *McKenna*, one might assume the appeal must be dismissed. But that was not the outcome in *Magyar*. To

the contrary, the *Magyar* court said just the opposite, and emphatically: there was "nothing that would logically and conclusively demonstrate plaintiffs intended to appeal solely from one of the judgments."

There was nothing here that would suggest the plaintiff intended to appeal from any other order than the anti-SLAPP fee order. Yet unlike *Magyar*, the court did not invoke the liberality doctrine to save the appeal.

So when it comes to invoking the rules that might relax the deadline to appeal, your mileage may vary. Do not count on them.

This article was originally published on the website of Thomas Vogele & Associates, APC.

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