

IN THE COURT OF APPEALS OF TENNESSEE

**FILED**  
**December 23, 1997**  
**Cecil Crowson, Jr.**  
**Appellate Court Clerk**

RICHARD PALLMER JAHN, JR., ) C/A NO. 03A01-97-00023  
 )  
Plaintiff-Appellee, )  
 )  
 )  
 )  
v. ) APPEAL AS OF RIGHT FROM THE  
 ) HAMILTON COUNTY CHANCERY COURT  
 )  
 )  
 )  
SHERYL JUNE JAHN, )  
 ) HONORABLE DOUGLAS A. MEYER,  
Defendant-Appellant.) JUDGE, By Interchange

For Appellant

WILLIAM C. KILLIAN  
Jasper, Tennessee

For Appellee

J. W. DIETZEN  
Dietzen & Atchley  
Chattanooga, Tennessee

OPINION

APPEAL DISMISSED  
REMANDED

Susano, J.

This matter is before us on the appellee's motion to dismiss appeal, as well as on other motions. The appellee contends that the appellant failed to timely file her notice of appeal in the trial court.

This case was heard below on June 30, 1997. That hearing addressed the division of the parties' marital property -- the only issue before the trial court.<sup>1</sup> An order memorializing the trial court's June 30, 1997, decision was entered on July 29, 1997.

On August 26, 1997, the appellee filed a motion in the trial court entitled "Motion of Plaintiff for Stay of Judgment Pending Appeal." The appellee's motion was denied by order entered September 19, 1997. The appellant filed a notice of appeal in the trial court on September 15, 1997. It recites that the appellant is appealing "from the final judgment entered...on the 29th day of July, 1997." On September 23, 1997, the appellant filed a second notice of appeal, which recites that the appellant is appealing from "a judgment entered...on the 19th day of September, 1997."

Rule 4(a), T.R.A.P., provides that the notice of appeal "shall be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from." There is a limited exception to this requirement in Rule

---

<sup>1</sup>We had earlier remanded this case to the trial court to hold a hearing "for the purpose of (a) identifying the marital assets of the parties; (b) establishing the value of those assets; and (c) equitably dividing same between the parties." *Jahn v. Jahn*, 932 S.W.2d 939, 944 (Tenn.App. 1996).

4(b), T.R.A.P.<sup>2</sup> The notice of appeal requirement is jurisdictional. *Deweese v. Sweeney*, 947 S.W.2d 861, 863 (Tenn.App. 1996). If the notice of appeal is not filed as required by Rule 4, an appellate court is without jurisdiction to hear the issues raised on the defective appeal. *Id.* at 864.

This court is not authorized to "permit the extension of time for filing a notice of appeal prescribed in Rule 4." See Rule 2, T.R.A.P. See also Rule 21(b), T.R.A.P. However, the Rules of Appellate Procedure do provide that certain specified post-judgment motions have the effect of extending the time for filing the notice of appeal. See Rule 4(b), T.R.A.P.

In the instant case, the appellee's motion for stay was filed pursuant to Rule 62.04, Tenn.R.Civ.P.<sup>3</sup> A Rule 62.04 motion is not one of the motions specified in Rule 4(b), T.R.A.P. This being the case, and in view of the fact that the judgment of July 29, 1997, is a final judgment as to all issues before the trial court, see Rule 3(a), T.R.A.P., the notice of appeal had to "be

---

<sup>2</sup>Rule 4(b), T.R.A.P., provides as follows:

In a civil action, if a timely motion under the Tennessee Rules of Civil Procedure is filed in the trial court by any party: (1) under Rule 50.02 for judgment in accordance with a motion for a directed verdict; (2) under Rule 52.02 to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59.02 for a new trial; (4) under Rule 59.04 to alter or amend the judgment; the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion.

<sup>3</sup>Rule 62.04, Tenn.R.Civ.P., provides as follows:

Except as otherwise provided in Rule 62.01, when an appeal is taken the appellant by giving a bond may obtain a stay. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the bond is approved by the court.

filed with and received by the clerk of the trial court" on or before August 28, 1997. See Rule 4(a), T.R.A.P. We cannot grant relief from this requirement.

In this case, the notice of appeal in the record before us with respect to the judgment of July 29, 1997, was filed in the trial court on September 15, 1997. It was not timely filed.

The appellant contends that the notice of appeal was served on opposing counsel within 30 days of the judgment of July 29, 1997. The appellee acknowledged timely receipt of the notice in his motion seeking a stay; however, service on opposing counsel does not comply with Rule 4(a), T.R.A.P., and, regrettably, we cannot grant relief based upon service on the other party, which is a separate and distinct requirement set forth in Rule 5(a), T.R.A.P.<sup>4</sup>

With respect to the notice of appeal filed on September 23, 1997, it reflects that it is an appeal as to the trial court's order denying the stay, which was entered on September 19, 1997. That appeal was timely filed, but only as to the action of the court in denying the appellee's request for a stay. Since it is clear in the record before us that the appellant does not seek to appeal the denial of the appellee's motion for stay of execution -- an action of the trial court that was not adverse

---

<sup>4</sup>Rule 5(a), T.R.A.P., provides, in pertinent part, as follows:

Not later than 7 days after filing the notice of appeal, the appellant in a civil action shall serve a copy of the notice of appeal on counsel of record for each party...

to the appellant -- it results that the appeal of September 23, 1997, is moot.

Accordingly, this appeal is dismissed. Costs of this appeal are assessed against the appellant and her surety.

All other motions presuppose a pending appeal; therefore, all of said motions are denied as moot, again at the costs of the appellant and her surety.

This case is remanded to the trial court for enforcement of the trial court's judgment and collection of costs assessed below, all pursuant to applicable law.

---

Charles D. Susano, Jr., J.

CONCUR:

---

Houston M. Goddard, P.J.

---

Herschel P. Franks, J.