

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

APPEALS COURT NO.
2018-P-0643

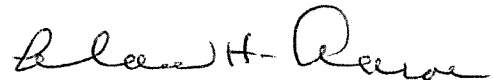
YOUGHAL, LLC

v

AMANDA ENTWISTLE, ET AL

AMANDA ENTWISTLE, ET AL'S
APPLICATION FOR FURTHER APPELLATE REVIEW

By Their Attorney,

A handwritten signature in black ink, appearing to read "Alan H. Aaron".

Alan H. Aaron, Esq.
929 Worcester Road
Framingham, MA 01701
Tel: 508-875-3991
BBO# 010000
Email: alanhaaronesq@yahoo.com
March 28, 2019

TABLE OF CONTENTS

REQUEST FOR LEAVE	3
STATEMENT OF PRIOR PROCEEDINGS	3
STATEMENT OF FACTS RELATIVE TO THE APPEAL	3
POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT	3
BRIEF STATEMENT	4
ADDENDUM	6

REQUEST FOR RELIEF

The defendants/appellees request leave to obtain further appellate review.

STATEMENT OF PRIOR PROCEEDINGS

This is a summary process action initiated by the plaintiff/appellant against the defendants/appellees. The matter was tried before a judge without a jury on September 14 and 18, 2017. The decision was entered on the docket on November 2, 2017. The judgment was entered on the docket on November 15, 2017. On November 13, 2017, the defendants filed a Motion for New Trial or to Alter or Amend Judgment. That Motion was denied on November 21, 2017. There were then cross notices of appeal with defendants' notice filed on December 1, 2017.

The case was then argued in the Appeals Court with the Appeals Court dismissing defendants' appeal claiming that the Motion for New Trial was not filed "not later than 10 days after the entry of judgment", and, as a result, the Notice of Appeal filed on December 1, 2017 was not timely filed. The merits of the appeal were not decided.

STATEMENT OF FACTS RELEVANT TO THE APPEAL

The decision of the trial judge was docketed on November 2, 2017. The Motion for New Trial or to Alter or Amend Judgment was filed on November 13, 2017. The judgment was docketed on November 15, 2017. The Motion for New Trial or to Alter or Amend Judgment was denied on November 21, 2017. The defendants' Notice of Appeal was filed on December 1, 2017.

POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

1. What is the interpretation of "not later than 10 days after the entry of judgment"?
2. Does this preclude a Rule 59(b) motion filed before the entry of judgment?

3. Where a Rule 59(b) motion was filed two days before the entry of judgment and where a Notice of Appeal was filed within 10 days of the denial of a Rule 59(b) motion, but more than 10 days after the entry of judgment, should the appeal be dismissed as not being timely filed?

STATEMENT

This appears to be a case of first impression in Massachusetts as there appears to be no state case directly deciding this issue.

Massachusetts Rules of Civil Procedure 59(b) is word for word identical to Federal Rule 59(b). The Reporter's Notes to M.R.C.P. 59 state "the time limit for making a motion under Rule 59(b) is computed from the date of effective entry of judgment under Rule 58. The wording of 59(b), however, allows a motion to be made both before or after the entry of judgment".

The federal courts have decided that a Rule 59(b) motion can be made both before or after the entry of judgment.

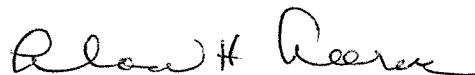
In the case of Partridge v. Presley, 189 f2d 645 (D.C. Cir. 1951), the court stated: "Appellee's argument that the motion for a new trial was premature because it was filed before the actual entry of judgment must be rejected, since Rule 59(b) of the Federal Rules of Civil Procedure requires a motion for a new trial to be served not later than 10 days after the entry of judgment."

In the case of McCulloch Motors Corp. v Oregon Saw Chain Corp., 245 f. Supp. 851 (S.D. Cal 1965), the court stated: "Oregon makes the point that the motion for new trial is premature, contending that the findings of fact and conclusions of law should be signed and the judgment entered before a motion for new trial should be entertained. F.R.Civ.P. 59(b) provides that a motion for a new trial "shall" be served not later than ten days after the entry of judgment.

It is obvious that by use of the words “shall” and “not later than” the ten days after the entry of judgment is an outside limit within which a motion can be made and not as an inside limit.”

If the drafters of the rule wanted to make sure that a Rule 59(b) motion could not be filed until after the entry of judgment, they would have used language similar to “a Rule 59(b) motion cannot be filed until at least the date of the entry of judgment.” Where no such language exists, it can be presumed a Rule 59(b) motion, filed prior to the entry of judgment, is timely filed.

By Their Attorney,

A handwritten signature in cursive script, appearing to read "Alan H. Aaron".

Alan H. Aaron, Esq.
929 Worcester Road
Framingham, MA 01701
Tel: 508-875-3991
BBO# 010000
Email: alanhaaronesq@yahoo.com

Dated: March 28, 2019

ADDENDUM

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-643

YOUGHAL LLC

vs.

AMANDA ENTWISTLE & another.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following a bench trial, a judge of the Housing Court entered findings of fact, rulings of law, and an order for judgment on November 2, 2017.² The order for judgment provided that the defendants had ten days to pay \$6,225³ to the plaintiff and to file a receipt with the court. If the defendants complied, judgment for possession would enter for the defendants. If the defendants did not comply, judgment for possession and for unpaid rent would enter for the plaintiff. On November 13, 2017, the defendants filed a motion for new trial or to alter or amend judgment. On November 15, 2017,

¹ Angela Entwistle.

² The plaintiff landlord had filed a summary process complaint. The defendant tenants filed an answer and asserted counterclaims for breach of warranty, breach of quiet enjoyment, retaliation, and unfair or deceptive business practices.

³ This amount reflects unpaid rent of \$6,250 minus \$25 awarded to the defendants on their counterclaim for unfair and deceptive business practices.

judgment entered for the plaintiff as the defendants had failed to comply with the order of November 2, 2017. On November 21, 2017 the defendants' motion for new trial or to alter or amend judgment was denied. On December 1, 2017 the defendants filed a notice of appeal. On December 4, 2017 the plaintiff filed a motion in the Housing Court to dismiss the appeal as untimely, which was denied on December 20, 2017. The plaintiff filed a notice of appeal on December 28, 2017, from that denial. The case is before us on these cross appeals.

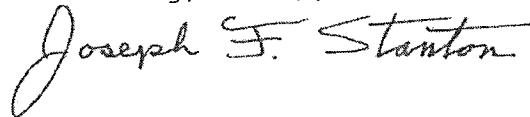
The initial question presented is whether the defendants' notice of appeal was timely. Issues of jurisdiction, such as this one, cannot be waived and can be raised at any time. See Federal Nat'l Mtge. Ass'n v. Gordon, 91 Mass. App. Ct. 527, 533 n.12 (2017), citing Commonwealth v. DeJesus, 440 Mass. 147, 151 (2003).

Pursuant to G. L. c. 239, § 5 (a), "[i]f either party appeals from a judgment of . . . a housing court . . . in an action under this chapter . . . that party shall file a notice of appeal with the court within [ten] days after the entry of the judgment." Here, the defendants filed their notice of appeal more than ten days after judgment entered. They argue that filing their motion for new trial or to alter or amend the judgment tolled the appeal period pursuant to Mass. R. A. P. 4 (a), as amended, 464 Mass. 1601 (2013). We agree with the

defendants that rule 4 (a) provides that the ten-day appeal period for all parties who file timely motions under Mass. R. Civ. P. 59, as amended, 365 Mass. 827 (1974), and Mass. R. Civ. P. 60, as amended, 365 Mass. 828 (1974), "shall run from the entry of the order denying a new trial or granting or denying any other such motion." However, to be timely such motions must be filed within ten days after the entry of judgment. See Manzaro v. McCann, 401 Mass. 880, 881-882 (1988);⁴ Empire Loan of Stoughton, Inc. v. Stanley Convergent Sec. Solutions, Inc., 94 Mass. App. Ct. 709, 712 (2019). To benefit from the tolling period under rule 4 (a), the defendants would have had to refile their motion within ten days after judgment entered. They failed to do so and accordingly their appeal is untimely. The order denying the plaintiff's motion to dismiss the appeal is reversed. The appeal of the defendants is dismissed.

So ordered.

By the Court (Meade, Blake &
Massing, JJ.⁵),



Clerk

Entered: March 11, 2019.

⁴ The 2013 amendment to Mass. R. A. P. 4 permitted a motion timely made under Mass. R. Civ. P. 60 to toll the appeal period, as was already the case for motions made under Mass. R. Civ. P. 59. This change does not otherwise affect the court's holding in Manzaro.

⁵ The panelists are listed in order of seniority.