

STATE OF NEW MEXICO
THIRTEENTH JUDICIAL DISTRICT
COUNTY OF VALENCIA

SOCORRO ELECTRIC COOPERATIVE, INC.,

Plaintiff,

v.

CHARLENE WEST, et al.,

No. D1314-CV-2010-0849

Judge: Mitchell

Defendants,

And

CHARLES WAGNER, individually and
on behalf of those similarly situated, et al.,
Cross-Claim Plaintiff,

v.

SOCORRO ELECTRIC COOPERATIVE, INC.,
et al.,

Cross-Claim Defendants.

PLAINTIFF'S MOTION TO RECONSIDER ORDER AWARDING ATTORNEY'S FEES

Plaintiff Socorro Electric Cooperative, Inc. hereby brings this, its Motion to Reconsider Order Awarding Attorney's Fees. In support of this Motion, Plaintiff states as follows:

INTRODUCTION:

As will be discussed in more detail below, on November 3, 2011 this Court entered an Order Awarding Attorney's Fees in the above cited matter. Plaintiff wishes to preserve its right to appeal this Order upon the entry of a final judgment in this matter. While Plaintiff's primary case has been fully addressed, the cross-claims filed by Defendant Wagner have not been

considered. In fact, discovery is only now beginning as to the cross-claims. While Plaintiff would ordinarily withhold any further action as to the Order until the resolution of the pending cross-claims, the Court has included a 30-day payment requirement in its Order. Without further action by the Court, Plaintiff will be compelled to make a disputed, and substantial, payment of attorney's fees to Defendants without having the opportunity for appellate review of the Order. Consequently, Plaintiff asks that the Court reconsider its November 3rd Order, and that the Court strike the 30-day payment requirement entirely, or that the Court modify its Order to allow for payment 30 days after the entry of a final judgment in this suit. In the alternative, Plaintiff asks that the Court provide for payment to be made into the registry of the Court, where the payment shall remain until a final judgment has been entered and all potential appeals have been resolved.

PROCEDURAL BACKGROUND:

- 1) On or about June 24, 2011, this Court entered an Order on Hearing on Partial Merits. See, Order, entered June 24, 2011. By its own plain language, this Order was not a full and final resolution of the current lawsuit, and it did not address any cross-claims now pending. The Order, at Para. 13, allowed Defendants to file requests for attorney's fees.
- 2) On or about June 13, 2011, before the appropriate Order was even entered, the Deschamps and Kortemeier Law Offices, P.C. entered a Motion for Attorney's Fees and Supporting Declaration & Documents. See, Motion, entered June 13, 2011.
- 3) On or about June 29, 2011, Defendants Fitch and Tausch, who had appeared *pro se* in this matter, filed a Motion for Attorney's Fees and Costs. See, Motion, entered June 29, 2011.

- 4) Plaintiff subsequently filed two Responses. On July 11, 2011, Plaintiff filed its Response to Motion for Attorney's Fees as to the Motion filed by Deschamps and Kortemeier. See, Response, entered July 11, 2011. On July 14, 2011, Plaintiff filed its Response to Motion for Attorney's Fees as to the Motion filed by Defendants Fitch and Tausch. See, Response, entered July 14, 2011.
- 5) On July 9, 2011, Deschamps and Kortemeier filed their Reply to Plaintiff's Response. See, Reply, entered July 9, 2011. Defendants Fitch and Tausch filed their Reply on or about July 29, 2011. See, Reply, entered July 29, 2011.
- 6) On November 3, 2011, the Court entered its Order Awarding Attorney's Fees. The Court's Order provided for the payment of \$13,000 dollars in attorneys fees to Defendants Fitch and Tausch, the law firm of Ikard Wynne, and the Deschamps & Kortemeier Law Offices, P.C. See, Order, entered November 3, 2011.
- 7) By and through the Order, the Court stated that the designated attorney's fees shall be paid within 30 days from the entry of the Order.

STATEMENTS AND ARGUMENTS OF LAW:

Plaintiff brings its current Motion to request that the Court reconsider its November 3rd Order, at least insofar as the imposition of the 30-day mandatory payment period.¹

New Mexico courts have repeatedly stated that "a judgment or order is not final unless all issues of law and of fact necessary to be determined have been determined, and the case is completely disposed of to the extent the court has power to dispose of it." *Clancy v. Gooding*, 98 N.M. 252, 254 647 P.2d 885, 887 (Ct.App. 1982). New Mexico's standard for determining the

¹ Plaintiff has limited the current Motion to the issue of the 30-day payment period. In so doing, Plaintiff has not in any way waived its right to appeal the underlying Order, nor has Plaintiff adopted or accepted any of the findings of fact or conclusions of law contained in the November 3, 2011 Order.

finality of a judgment mirrors the federal court standard. See eg., *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521-22, 108 S.Ct. 1945 (1988) (stating that final decisions are those which end the litigation on the merits and leave nothing for the court to do but execute the judgment.)

When considering the finality of a judgment or order, the 10th Circuit has found that an order is not a final, appealable judgment if there are still cross-claims pending before the federal district court. See, *Utah v. Norton*, 396 F.3d 1281, 1287 (10th Cir. 2005). This conclusion is in compliance with New Mexico's Rules of Civil Procedure. Unless a court expressly determines that the relief provided as to one claim, counter-claim or cross claim is a final judgment, and that there is "no just reason for delay" of potential appellate review of such relief, then the order is not final, and it is "subject to revision at any time before the entry of judgment adjudicating all claims. See, Rule 1-054(B)(1) NMRA 2011.

Rule 1-54(B)(2), NMRA 2011 addresses the finality of orders which "adjudicate all issues as to one or more, but fewer than all parties." Ordinarily, such orders are deemed to be final, and an appeal can proceed from such orders. However, in the current suit, the Court's rulings as to Plaintiff's claims *do not* adjudicate all issues related to Plaintiff. This is because the cross-claims being asserted are being brought expressly against Plaintiff Socorro Electric Cooperative. Because claims remain to be adjudicated, neither the Court's June 24th Order on Hearing on Partial Merits, nor the November 3rd Order Awarding Attorney's Fees can be deemed "final."

Where an Order does not resolve all claims, and neither Rule 1-54(B)(1) or (2) are applicable, the matter is not ripe for appeal, and the content of the order may be revised at any time. See, eg, *Healthsource, Inc. v. X-Ray Assoc. of New Mexico*, 2005-NMCA-097, ¶14, 138 N.M. 70.

In the current suit, it is undisputed that none of these three conditions apply. The Court has made no adjudication as to the pending cross-claims. The Court has not made any express determination of finality which would comply with the requirements of Rule 1-054(B)(1). Finally, the two existing Orders do not adjudicate “all issues” as to Plaintiff Socorro Electric Cooperative. Thus, any attempt by Plaintiff to appeal the November 3rd Order Awarding Attorney’s Fees would be premature, and at this time the Court of Appeals has no jurisdiction to consider any appeal based on these Orders.

Notwithstanding that the November 3rd Order is not a “final judgment”, the Court has included a 30-day payment requirement in the Order. Under these circumstances, Plaintiff is faced with an Order that is currently non-appealable, but which imposes a significant financial penalty and sanction on the Plaintiff Cooperative and its members. Non-payment of this amount would invite a contempt motion and additional penalties, while present payment of the \$13,000 award would invite complicated and costly litigation involving potential disgorgement and repayment at the conclusion of any future appeal.

Rather than risk further complication of litigation that is already procedurally complex, Plaintiff asks that the Court reconsider the 30-day payment requirement established by the November 3rd Order. Plaintiff requests that the Court exercise its discretion and alter the November 3rd Order Awarding Attorney’s Fees to either:

- 1) Completely eliminate the 30-day payment requirement; or,
- 2) Make the payment due 30 days from the entry of a final judgment in this matter; or,
- 3) Make the payment due to the registry of the Court, which will hold such funds until a final judgment is entered and all potential appeals have been resolved.

Each of these proposed alternatives streamlines the current litigation, prevents costly ancillary litigation or multiple rounds of appeals, preserves Plaintiff's right to a meaningful appeal at the proper time in the litigation, and preserves the Defendants' interest in the attorney's fees awarded by the November 3rd Order.

WHEREFORE, Plaintiff requests that the Court reconsider its November 3, 2011 Order Awarding Attorney's fees, and that the Court strike that portion of the Order which requires payment of the award within 30 days. Alternatively, Plaintiff requests that the Order be altered so that the payment will be due 30 days from the entry of a final judgment on this matter. As a final alternative, Plaintiff asks that the Order be amended to allow for payment into the registry of the Court. Plaintiff asks that the Court reconsider and alter the Order in the manner which best serves the interests of justice and the integrity of the litigation and appeal process.

Defendants' counsel has been contacted regarding this Motion. Being informed of the content and basis of the Motion, Defendants oppose.

Respectfully submitted,

KENNEDY & HAN, P.C.

"Electronically Filed"

/s/ Darin Foster, Attorney at Law

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and

LAW OFFICES OF DENNIS FRANCISH

Dennis Francish

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Counsel for Plaintiff

CERTIFICATE OF SERVICE:

I certify that a copy of this
Response was served by the Court's
electronic filing system to the following
counsel of record on this 21th day of November, 2011.

s/s Darin Foster

Darin M. Foster

ALL PARTIES ENTITLED TO NOTICE (D1314-CV-2010-0849)

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