FILED
United States Court of Appeals
Tenth Circuit

June 27, 2008

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TOMMY RAY HOOK; CHARLES MONTANO,

Plaintiffs - Counterclaim-Defendants - Appellants,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, d/b/a Los Alamos National Laboratory; JOHN BRETZKE; PATRICK REED; WILLIAM BARR; DEBBIE LYNN BROWN, as Personal Representative of the Estate of Vernon Brown,

Defendants - Counter-Claimants - Appellees,

and

BANI CHATTERJEE,

Defendant - Appellee,

and

RICHARD MARQUEZ,

Defendant.

No. 08-2102
(D.C. No. 1:05-CV-00356-JCH-WPL)

ORDER

Before **TACHA**, **BRISCOE**, and **LUCERO**, Circuit Judges.

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The plaintiffs appeal the award of costs granted to Defendant Chatterjee after the district court entered summary judgment in her favor. The action is still pending before the district court as to other claims involving other defendants. The district court has not entered certification under Fed. R. Civ. P. 54(b).

This court has jurisdiction to review only final decisions, 28 U.S.C. § 1291, and specific types of interlocutory orders not applicable here. A final decision is one that "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Cunningham v. Hamilton County*, 527 U.S. 198, 204 (1999) (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521-22 (1988)).

In support of their argument that this court has jurisdiction because appeals of costs are appealable separately from the merits, the plaintiffs rely on decisions regarding post-judgment decisions. *See, e.g. Buchanan v. Stanships, Inc.*, 485 U.S. 265, 267-68 (1988). However, although post-judgment decisions on requests for costs are appealable independently of the merits, appellate review of *pre-judgment* decisions regarding costs is deferred until the litigation is over. *See Cunningham*, 572 U.S. at 206-07; *Marin v. Norton*, 1992 WL 19869 (10th Cir. 1992) (unpublished); *D&H Marketers, Inc. v. Freedom Oil & Gas, Inc.*, 744 F.2d 1443 (10th Cir. 1984).

The plaintiffs reliance on *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), is misplaced. That case involved a cost allocation order in a class action, not the award of costs to a prevailing party.

Moreover, the order appealed does not meet the third requirement of the collateral order doctrine, that the order be effectively unreviewable on appeal from a final judgment. *See Will v. Hallock*, 546 U.S. 345, ___, 126 S.Ct. 952, 958 (2006),

The plaintiffs' motion to dismiss the portion of the appeal against the Regents of California is **GRANTED**.

APPEAL DISMISSED.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

Ellen Rich Reiter

Ellen Rich Reiter
Deputy Clerk/Jurisdictional Attorney