

February 11, 2009

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

MIGUEL GUTIERREZ; INGA
GUTIERREZ,

Plaintiffs - Appellants,

v.

THOMAS SCHWANDER, an individual acting in conspiracy with those acting under the color of state law; KERRIN SCHWANDER; JOHN S. GORDON; ELIZABETH A. GORDON; MARK BOLINGER; PHILLIP SIMPSON; BRIAN M. NELSON, JR.; WILFORD (RAY) QUICK; MARY ALICE (POLLY) QUICK; BRENDA ROGERS; Otero County Sheriff's Office Sheriff JOHN BLANSETT, in his individual capacities, acting under color of state law; DAVID HENLEY, undersheriff, in his individual capacities, acting under color of state law; Captain NORBERT SANCHEZ, in his individual capacities, acting under color of state law; Sgt. TOM SKIPWORTH, in his individual capacities, acting under color of state law; Sgt. LEDBETTER, in his individual capacities, acting under color of state law; Deputy FRANK BRIETBACH, in his individual capacities, acting under color of state law; Deputy ALFONSO GUTIERREZ, in his individual capacities, acting under color of state law; Deputy STEVE ODOM, in his individual

No. 08-2289

(D.C. No. 2:06-CV-00937-RB-WPL)

capacities, acting under color of state law; Deputy DANIEL ESTRADA, in his individual capacities, acting under color of state law; Deputy CHARLES WOLF, in his individual capacities, acting under color of state law; NM State Police Officer MARK DAVIS, in his individual capacities, acting under color of state law; LOWER COTTONWOOD TRIAL MAINTENANCE FUND (John S. Gordon, et al.); JOAN BRUMAGE; GEORGE CLARK; MARLENE CLARK; PATRICIA O'DONNELL; 12TH JUDICIAL DISTRICT ATTORNEY'S OFFICE, in their official capacities; OTERO COUNTY BOARD OF COUNTY COMMISSIONERS, in their official capacities; F. RANDOLPH BURROUGHS, acting under color of state law; LISW PAIGE VISCARRA, in her individual capacities, acting under the color of state law; Dr. ZAHID AFRIDI, in his individual capacities, acting under the color of state law,

Defendants - Appellees.

ORDER

Before **MURPHY, McCONNELL** and **TYMKOVICH**, Circuit Judges.

The plaintiffs appeal the district court's order denying their third request

for certification under 28 U.S.C. § 1292(b) (providing that the district court may certify for appeal an interlocutory order which the court feels would materially advance the litigation; the court of appeals may then, in its discretion, allow an appeal to proceed if a permission to do so is filed within 10 days of the district court order). We dismiss for lack of jurisdiction.

An order denying § 1292(b) certification is not appealable. *See Pfizer v. Lord*, 522 F.2d 612, 614 n. 4 (8th Cir. 1975) (“This court is without jurisdiction to review an exercise of the district court’s discretion in refusing [§ 1292(b)] certification.”); *In re Master Key Antitrust Litigation*, 528 F.2d 5, 8 (2d Cir. 1975) (“[The district court judge’s] refusal to certify the interlocutory appeal of his rulings is, of course, not appealable and hence not at issue here.”).

In their response to this court’s jurisdictional show cause order, the plaintiffs argue that there is pendent appellate jurisdiction, that there is jurisdiction under the collateral order doctrine, and that this court has jurisdiction to hear an appeal from the denial of injunctive relief. None of these arguments has merit.

Pendent appellate jurisdiction requires a valid appeal with which an otherwise non-appealable order will be heard. *See Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1205 (10th Cir. 2008) (““This court has discretion to exercise pendent appellate jurisdiction over nonappealable issues once we have asserted jurisdiction over other appealable issues in the same case.””) (quoting *Roska ex*

rel. Roska v. Sneddon, 437 F.3d 964, 970 (10th Cir. 2006), *cert. denied*, 2009 WL 129122 (Jan. 21, 2009). Here, there is no valid appeal.

Similarly, there is no jurisdiction under the collateral order doctrine. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In order to come within the collateral order doctrine, the order being appealed must meet three conditions. The order must “(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.” *Will v. Hallock*, 546 U.S. 345, 349 (2006). The order being appealed here does not meet these requirements.

The plaintiffs also contend that this court has jurisdiction to hear their appeal from the denial of an injunction. However, the notice of appeal did not designate the order denying their motion for an injunction. *See Fed. R. App. P. 3(c)(1)(B)* (the notice of appeal must designate the order being appealed); *Navani v. Shahani*, 496 F.3d 1121, 1133 (10th Cir. 2007), *cert. denied*, 128 S.Ct. 1232 (2008). In addition, the notice of appeal was untimely. It was filed on November 26, more than 60 days after entry of the order denying injunctive relief. In a civil case, where the United States is a party, a notice of appeal must be filed within 60 days of entry of the order being appealed. *See 28 U.S.C. § 2107(b)* (a notice of appeal in a civil matter must be filed within 60 days of entry of judgment where the United States is a party); *Fed. R. App. P. 4(a)(1)(B)* (same). A timely notice

of appeal in a civil case is both mandatory and jurisdictional. *See Bowles v. Russell*, 551 U.S. 205, ___, 127 S.Ct. 2360, 2363, 2366 (2007).

APPEAL DISMISSED.

Entered for the Court,
ELISABETH A. SHUMAKER, Clerk



Ellen Rich Reiter
Deputy Clerk/Jurisdictional Attorney