

April 4, 2008

UNITED STATES COURT OF APPEALS

Elisabeth A. Shumaker
Clerk of Court

FOR THE TENTH CIRCUIT

In re: STICHTING MAYFLOWER
RECREATIONAL FONDS;
STICHTING MAYFLOWER
MOUNTAIN FONDS, Netherlands
associations,

Petitioners.

No. 08-4053
(D.C. No. 2:04-CV-00925-DAK)
(D. Utah)

ORDER

Before **HARTZ**, **TYMKOVICH**, and **GORSUCH**, Circuit Judges.

Petitioners previously attempted to appeal the district court’s dismissal of their complaint. Because a counterclaim remains pending against them, their appeal was dismissed for lack of finality and they were sanctioned for pursuing the premature appeal on frivolous legal grounds. *Stichting Mayflower Recreational Fonds v. City of Park City*, 225 F. App’x 744 (10th Cir. 2007). Since then, they have been unsuccessful in securing the dismissal of the counterclaim in summary judgment proceedings, as the district court has held that a conclusive disposition of the matter must await further discovery. They now seek a writ of mandamus directing the district court “to terminate at once its improper proceedings on the Counterclaim herein, to dismiss the Counterclaim, and to vacate all orders imposing sanctions in favor of counterclaimant.” We deny the petition.

It is within our discretion to issue a writ of mandamus if petitioners show (1) that they “have no other adequate means to attain the relief [they] desire[]—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process,” and (2) that they have a “clear and indisputable” right to relief. *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004) (internal quotation marks omitted); see *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35-36 (1980). Petitioners have not satisfied these conditions.

We note that to the extent petitioners complain of the district court’s failure to direct the entry of final judgment under Fed. R. Civ. P. 54(b) specifically as to the dismissal of their complaint, petitioners have never requested this procedural remedy. The Rule 54(b) motion they filed asked the district court to “enter[] final judgment as to all parts of the Counterclaim decided by the [district court],” and did not refer to entering final judgment on the court’s ruling dismissing their complaint. Motion for Final Judgment/Motion to Dismiss filed Jan. 18, 2006, at 1. Pursuit of this remedy could potentially obviate much of the perceived grievance prompting the instant petition.

The Petition is DENIED.

Entered for the Court,

A handwritten signature in black ink, reading "Elisabeth A. Shumaker". The signature is written in a cursive style with a long horizontal flourish extending to the right.

ELISABETH A. SHUMAKER, Clerk