

June 3, 2008

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

RICHARD G. KIRBY,

Plaintiff-Appellant,

v.

DALLAS COUNTY ADULT
PROBATION DEPARTMENT,
Community Supervision and
Corrections Department, Dallas Co.;
MARK OLSEN; D. TODD HILL,
Probation Officer, Dallas County
Probation Department; LAURA
CARAWAY, Probation Officer
Supervisor, Dallas County Probation
Department; JIM MILLS, Assistant
Director, Dallas County Probation
Department; ROBERT L. WEBSTER,
Assistant U.S. Attorney, Dallas,
Texas; GRANT COUNTY DISTRICT
ATTORNEY'S OFFICE; JIM FOY,
Prior Grant County District Attorney;
ARNOLD CHAVEZ, Grant County
DA Investigator; MARY LYNN
NEWELL, Grant County District
Attorney; TIM GARNER, Grant
County Assistant District Attorney,
Sixth Judicial District, Silver City,
New Mexico; NEW MEXICO
SECURITIES DIVISION; BRUCE
KOHL; JAMES MAES, New Mexico
Securities Division, Santa Fe,
New Mexico; JOHN DOE; JANE
DOE, Grant County Detention Center,
Grant County, New Mexico;
DONA ANA COUNTY DISTRICT
ATTORNEY; TOM CLARK;

No. 07-2125
(D.C. No. 04-CV-844-DJS-ACT)
(D. N.M.)

MICHAEL CAIN, Assistant District Attorney, Las Cruces, New Mexico; KANSAS SECURITIES DIVISION, Topeka, Kansas; GARY FULTON; SCOTT SCHULTZ, Kansas Securities Division, Topeka, Kansas; FIRST NEW MEXICO BANK, doing business as Copper Country Escrow; MARTHA STEWART; JOHN DOE; JANE DOE, First New Mexico Bank, Silver City, New Mexico; GENE CRAWFORD; HAROLD JOHNSON, Pinto Altos, New Mexico; UNITED STATES SECRET SERVICE; CHUCK QUINN, Agent, United States Secret Service, Wichita, Kansas; ANDREW BAZEMORE, Agent, United States Secret Service, Albuquerque, New Mexico; BUTLER COUNTY SHERIFF'S DEPARTMENT; RANDY COFFMAN, Butler County Sheriff's Investigator; MIKE TANNER, Butler County Sheriff's Deputy, El Dorado, Kansas; STEVE HOWE, Assistant District Attorney, Olathe, Kansas; BILL MATTIACE, Las Cruces Mayor, Adventure Travel, Las Cruces, New Mexico; J.D. JONES, Investigator, Las Cruces Police Department; RICKY MADRID, Sgt., Las Cruces Police Department, Las Cruces, New Mexico; THE SILVER CITY POLICE DEPARTMENT, Silver City, New Mexico; HAM, Lt.; UNKNOWN POLICE OFFICERS, Silver City Police Department, Silver City, New Mexico; RANDALL HARRIS, Curry County District Attorney, at the time, Clovis, New

Mexico; JOHN DOES; JANE DOES;
FREDERICK SHERMAN, Attorney at
Law, for First New Mexico Bank,
Deming, New Mexico; GRANT
COUNTY DETENTION CENTER,
County of Grant, New Mexico, Silver
City, New Mexico,

Defendants-Appellees.

ORDER AND JUDGMENT*

Before **LUCERO** and **PORFILIO**, Circuit Judges, and **BRORBY**, Senior Circuit Judge.

Richard G. Kirby appeals the district court's denial of his motion for a mandatory injunction in district court docket number 257 and its dismissal of his claims against certain defendants in district court docket number 258. We note that Mr. Kirby brought claims against numerous defendants in this action, and that the district court has yet to dispose of many of his claims. Consequently, this appeal is an interlocutory appeal. Defendant First New Mexico Bank of Silver City has moved to dismiss the appeal for lack of jurisdiction.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

We have jurisdiction over the interlocutory appeal of district court docket number 257 because that order is an express denial of injunctive relief. *See* 28 U.S.C. § 1292(a) (providing jurisdiction to review “[i]nterlocutory orders of the district courts . . . or of the judges thereof . . . refusing . . . injunctions”). The district court correctly construed the motion as one for a preliminary injunction, and we review the denial of a preliminary injunction for an abuse of discretion. *See Utah Licensed Beverage Ass’n v. Leavitt*, 256 F.3d 1061, 1065 (10th Cir. 2001). “An abuse of discretion occurs only when the trial court bases its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling.” *Id.* (quotation omitted). The district court did not abuse its discretion in denying Mr. Kirby’s motion for a mandatory injunction. Accordingly, we affirm the district court’s decision for substantially the reasons stated in district court docket number 257.

In contrast, we lack jurisdiction over the interlocutory appeal of district court docket number 258. With some exceptions, such as § 1292(a), this court generally has jurisdiction to review only “final decisions” of the district courts. 28 U.S.C. § 1291. An order that disposes of “fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties” unless the district court “expressly determines that there is no just reason for delay” and “direct[s] entry of a final judgment as to one or more, but fewer than all, claims or parties.” Fed. R. Civ. P. 54(b). Thus, “[i]n

the absence of [a Rule 54(b)] determination, any order, however designated, which adjudicates fewer than all of the claims or the liabilities of all of the parties, is not a final appealable order.” *Atiya v. Salt Lake County*, 988 F.2d 1013, 1016 (10th Cir. 1993). This is so even if the order may seem “final” as far as the particular defendants and/or claims addressed therein are concerned. Our review of the district court’s docket indicates that, to date, claims against more than thirty defendants remain pending in the district court. Moreover, district court docket number 258 does not contain a Rule 54(b) determination. Accordingly, we do not have jurisdiction over the appeal of district court docket number 258.

The denial of Mr. Kirby’s motion for a mandatory injunction in district court docket number 257 is AFFIRMED. First New Mexico Bank of Silver City’s motion to dismiss the appeal is GRANTED in part, and the portion of this appeal that concerns district court docket number 258 is DISMISSED for lack of appellate jurisdiction.

Entered for the Court

John C. Porfilio
Circuit Judge