

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

---

No. 92-3547

---

CLAY CALLAGHAN, ET AL.,

Plaintiffs-Appellees,

VERSUS

NICK CONGEMI, ET AL.,

Defendants-Appellants.

---

Appeal from the United States District Court  
for the Eastern District of Louisiana  
(CA-91-1496-I)

---

(January 6, 1993)

Before DUHÉ and WISDOM, Circuit Judges, and HAIK,<sup>1</sup> District Judge.  
DUHÉ, Circuit Judge:<sup>2</sup>

Appellants appeal the district court order granting in part, and denying in part their Motion for Summary Judgment. We dismiss for lack of jurisdiction.

FACTS

Daiquiris and Creams began operation in Kenner, Louisiana, in 1989. In 1991, Plaintiffs-Appellees Daiquiris and Creams No. 6, Inc., Clay Callaghan (the manager of Daiquiris and Creams), and

---

<sup>1</sup> District Judge of the Western District of Louisiana, sitting by designation.

<sup>2</sup> Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Nelson Rajo (a customer), sued Defendants-Appellants the City of Kenner, Nick Congemi (the Chief of Police of Kenner), John Averett (a policeman), Wayne McInnis (a policeman), and Joseph Marroccolli (a policeman), in their official and individual capacities. Appellees argued that a politically motivated scheme existed within Kenner to destroy Daiquiris and Creams. Specifically, Appellees asserted claims under 42 U.S.C. §§ 1983, 1985, 1986, and 1988 based upon violations of their rights under the First, Fourth, Fifth, and Fourteenth Amendments to the Constitution, as well as pendant state law claims for inter alia, defamation, false arrest, and false imprisonment. Appellees also asked the court to declare unconstitutional certain newly-enacted ordinances in Kenner.

Appellants filed a Motion to Dismiss and, alternatively, a Motion for Summary Judgment. The district court granted in part, and denied in part the Motion for Summary Judgment. Appellants then filed these appeals.

#### DISCUSSION

Appellant Nick Congemi argues, in his individual capacity, that the district court failed to rule on his claim of qualified immunity. He claims this court has jurisdiction over his appeal because the denial of a claim of qualified immunity is a "final judgment" within the meaning of 28 U.S.C. § 1291, under Mitchell v. Forsyth, 472 U.S. 523, 530 (1985). Although Congemi correctly states the law, he ignores the fact that the district court did not deny his qualified immunity claim; it failed to rule upon it. A failure to rule is not an appealable "final judgment." Congemi's

appeal is dismissed for lack of jurisdiction.

Appellants City of Kenner, Nick Congemi in his official capacity, and John Averett, Wayne McInnis, and Joseph Marroccolli in their official and individual capacities argue that the district court erred in (1) denying summary judgment to the City of Kenner on Appellees' Fourth and Fourteenth Amendment claims, (2) denying summary judgment to the police officers on Appellees' Fifth Amendment claim, (3) denying summary judgment to all Appellants on Appellees' 42 U.S.C. §§ 1985(3) and 1986 claims, and (4) determining that genuine issues of material fact existed regarding the frequency and nature of checks by police of customers' identification in Daiquiris and Creams and regarding the enforcement of the City of Kenner's alcoholic beverage laws.

Appellants claim this Court has jurisdiction pursuant to 28 U.S.C. § 1291. Appellants fail to recognize, however, that the district court's partial denial of their Motion for Summary Judgment is not an appealable final judgment within the statute. See Mitchell v. Forsyth, 472 U.S. 511 (1985). This appeal is dismissed.

#### CONCLUSION

The appeals of all Appellants are DISMISSED for lack of jurisdiction.