**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFFREY MICHAEL PATAKY, an individual,

Plaintiff - Appellant,

v.

CITY OF PHOENIX, a political subdivision of the State of Arizona; PHILLIP B. GORDON and JANE DOE GORDON, husband and wife; FRANK FAIRBANKS and JANE DOE FAIRBANKS, husband and wife; JACK HARRIS and JANE DOE HARRIS, husband and wife; ANTHONY BROKAW and JANE DOE BROKAW, husband and wife; GEORGE J. RICHARDS and JANE DOE RICHARDS, husband and wife; BRANDON HUNTLEY and JANE DOE HUNTLEY, husband and wife; JOHN DOE RENTERIA and SANDRA RENTERIA, husband and wife; LOUIE TOVAR and JANE DOE TOVAR, husband and wife; GEORGE FULTON and JANE DOE FULTON, husband and wife,

Defendants - Appellees.

No. 09-17674

D.C. No. 2:09-cv-00534-HRH

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the District of Arizona
H. Russel Holland, Senior District Judge, Presiding

Submitted April 13, 2011[**]
San Francisco, California

Before: FERNANDEZ and RAWLINSON, Circuit Judges, and WELLS, Senior District Judge.[***]

Jeffrey Michael Pataky appeals the district court's dismissal with prejudice of his Section 1983 malicious prosecution and state law gross negligence claims against defendant-appellee Detective Anthony Brokaw. Pataky contends that the district court erred when it held that Det. Brokaw is entitled to absolute immunity.

The procedural posture of this case in the district court prevents us from taking jurisdiction, because some of Pataky's claims were dismissed without prejudice and with leave to amend. No final judgment was entered. Pataky neither amended nor noticed the district court of his intention not to amend. Nor did he seek a Federal Rule of Civil Procedure 54(b) certification. Instead, he filed this appeal.

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[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Lesley Wells, Senior District Judge for the Northern District of Ohio, sitting by designation.

We have held that "a plaintiff, who has been given leave to amend, may not file a notice of appeal simply because he does not choose to file an amended complaint. A further district court determination must be obtained." WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). "Unless a plaintiff files in writing a notice of intent not to file an amended complaint, [a dismissal order with leave to amend] is not an appealable final decision." Lopez v. City of Needles, 95 F.3d 20, 22 (9th Cir. 1996). The fact that some of Pataky's claims were dismissed with prejudice and without leave to amend is of no consequence, because "leave to amend was granted as to others, and there was no Federal Rule of Civil Procedure 54(b) certification." WMX Technologies, 104 F.3d at 1136 n. 1.

Therefore, the district court's dismissal was not a final decision for purposes of 28 U.S.C. § 1291, and we are without jurisdiction.

APPEAL DISMISSED.