

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

NOV 23 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

KEITH JAMES McKINNEY,)	
)	2 CA-CV 2011-0032
Plaintiff/Appellant,)	DEPARTMENT A
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
KONDAUR CAPITAL)	Rule 28, Rules of Civil
CORPORATION, a Delaware)	Appellate Procedure
corporation; KONDAUR CAPITAL)	
TRUST SERIES 2009-3, a Delaware)	
statutory trust; KONDAUR VENTURE)	
X, LLC, a Delaware LLC; PAULA)	
CHASTAIN; PETER BAI; FOLKS &)	
O'CONNOR, PLLC, an Arizona LLC;)	
M & I MARSHALL & ILSLEY BANK,)	
a Wisconsin corporation,)	
)	
Defendants/Appellees.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV201000970

Honorable William J. O'Neil, Judge
Honorable Daniel A. Washburn, Judge

DISMISSED

Keith James McKinney

Mesa
In Propria Persona

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B R A M M E R, Judge.

¶1 Keith McKinney appeals from the trial court’s judgment dismissing his and James McKinney’s complaint “in its entirety with prejudice.”¹ Because McKinney’s notice of appeal was premature and because we find inapplicable the exception permitting jurisdiction to hear appeals prematurely taken, first described in *Barassi v. Matison*, 130 Ariz. 418, 636 P.2d 1200 (1981), we dismiss the appeal for lack of jurisdiction.

Factual and Procedural Background

¶2 On January 5, 2010, the McKinneys filed a complaint in Maricopa County against Kondaur Capital Corp., Kondaur Venture X, LLC, Kondaur Capital Trust Series 2009-3 (the Kondaur defendants), Deutsche Bank Trust Company Delaware, various individuals, Folks and O’Connor, PLLC (Folks & O’Connor), Security Title Agency, and

¹Keith is the only appellant in this appeal as only he paid the required filing fee.

M & I Marshall and Ilsley Bank (M&I). They asserted various claims concerning James's property. They also filed an application for a temporary restraining order to prevent a trustee's sale of the property. On January 20, the McKinneys filed a motion for summary judgment. On February 9, Folks & O'Connor filed a motion to dismiss the complaint, and on February 22, the Kondaur defendants filed both an opposition to the McKinneys' motion for summary judgment and a cross-motion for summary judgment. M&I supported these motions. The case subsequently was transferred to Pinal County.

¶3 On June 30, 2010, the McKinneys filed a notice of removal purporting to remove the action to the United States Bankruptcy Court, District of Arizona, and directing the trial court to "proceed no further with this action." At a hearing on July 1, unattended by the McKinneys or their counsel, the trial court in an unsigned minute entry struck the notice of removal and granted the Kondaur defendants' cross-motion for summary judgment and the motion to dismiss Folks & O'Connor had filed. The court signed an order granting Folks & O'Connor's motion to dismiss on July 13.

¶4 On July 20, 2010, the Kondaur defendants lodged a form of judgment dismissing the McKinneys' complaint "in its entirety with prejudice" and stating the Kondaur defendants' application for attorney fees and costs would be addressed in a separate order. The form of judgment included language pursuant Rule 54(b), Ariz. R. Civ. P. The trial court apparently signed the proposed form of judgment on July 26, but it neither was filed with the clerk of the court nor sent to the parties.

¶5 On August 2, 2010, the McKinneys filed a notice with the trial court again purporting to notify it that the proceedings were stayed due to a pending bankruptcy action. On the same day, the McKinneys filed an objection to the “defendants’ request for attorney’s fees and costs” and an “objection to all defendants’ motions (and all joinders).” The McKinneys filed an additional objection “to the Court’s Orders to date” noting they believed there was a “[s]trong likelihood that [they] will succeed at trial” and asking the court to reverse all its decisions rejecting the McKinneys’ assertion the defendants lacked “standing.”

¶6 On October 20, 2010 the Kondaur defendants filed an application for attorney fees to which the McKinneys objected on November 4. On October 25, the Kondaur defendants provided notice to the trial court that the bankruptcy court had entered an order declaring void the McKinneys’ attempt to remove the action. The Kondaur defendants lodged a new form of judgment on November 23, which included an award of attorney fees and costs. On November 24, the McKinneys filed a “re-notice of bankruptcy stay and order” alleging the proceeding in the trial court had been stayed by the bankruptcy court and asking the court to vacate all its orders dated June 30 and forward.

¶7 In an unsigned minute entry dated November 29, 2010, the trial court awarded the Kondaur defendants attorney fees and costs. On December 10, the McKinneys filed a pleading objecting to the proposed form of judgment and to the attorney fee award; on December 14 they “replace[d]” this filing with an additional

objection. The same day they filed a motion to dismiss the case. The objections to the judgment and motion to dismiss were still pending on December 27 when the McKinneys filed a notice of appeal from “all Ruling(s) and Judgment(s) entered on this case, including the latest one for attorney[] fees filed/mailed on 11/29/2010.”

¶8 On January 31, 2011 the trial court entered the judgment that had been signed on July 26, 2010 but never filed. In a separate ruling the court noted the judgment had not been filed previously but “re-affirm[ed]” the July 26 judgment and the November 29 award of attorney fees. The court entered a separate formal judgment awarding the Kondaur defendants attorney fees and costs on March 17, 2011. The McKinneys filed no other notice of appeal following the entry of the January 31 and March 17 judgments.

Discussion

¶9 We have an independent duty to determine whether we have jurisdiction. *Sorensen v. Farmers Ins. Co. of Ariz.*, 191 Ariz. 464, 465, 957 P.2d 1007, 1008 (App. 1997). Our jurisdiction is prescribed by statute and we have no authority to entertain an appeal over which we do not have jurisdiction. *Hall Family Props., Ltd. v. Gosnell Dev. Corp.*, 185 Ariz. 382, 386, 916 P.2d 1098, 1102 (App. 1995).

¶10 Section 12-2101(A), A.R.S., vests jurisdiction in this court for an appeal “[f]rom a final judgment.” There exists

only a limited exception to the final judgment rule that allows a notice of appeal to be filed after the trial court has made its final decision, but before it has entered a formal judgment, if

no decision of the court could change and the only remaining task is merely ministerial.

Smith v. Ariz. Citizens Clean Elections Comm'n, 212 Ariz. 407, ¶ 37, 132 P.3d 1187, 1195 (2006). Appellate courts must dismiss an appeal for lack of jurisdiction when a notice of appeal is filed while a motion is pending in the trial court. *Barassi*, 130 Ariz. at 422, 636 P.2d at 1204. Where a case does not fit the limited exception to the final judgment rule, the notice of appeal is ineffective and a nullity. *Smith*, 212 Ariz. 407, ¶ 39, 132 P.3d at 1195. This prevents disruption of the judicial process and also prevents two courts from acting in the same case simultaneously and, perhaps, inconsistently. *See Engel v. Landman*, 221 Ariz. 504, ¶ 13, 212 P.3d 842, 847 (App. 2009).

¶11 This is not a case where the trial court had made a final decision and the notice of appeal was filed prior to the entry of formal judgment but “no decision of the court could change and the only remaining task [wa]s merely ministerial.” *See Smith*, 212 Ariz. 407, ¶ 37, 132 P.3d at 1195; *see also Craig v. Craig*, 227 Ariz. 105, ¶ 13, 253 P.3d 624, 626 (2011). Rather here, when the notice of appeal was filed, substantive issues were pending before the court that could have changed the final outcome. Accordingly, we are required to dismiss the appeal. *See Smith*, 212 Ariz. 407, ¶ 38, 132 P.3d at 1195; *see also Barassi*, 130 Ariz. at 422, 636 P.2d at 1204. After the court granted the Kondaur defendants’ cross-motion for summary judgment and Folks & O’Connor’s motion to dismiss in an unsigned minute entry, the McKinneys asked the court to stay the proceedings pending a bankruptcy action. They also filed an objection to all recent motions of the defendants and an objection to all the court orders to date.

And, they asked the court to reverse all of its decisions. Apparently believing at that time the case might move forward, the McKinneys also argued to the court that there was a “[s]trong likelihood that [they] w[ould] succeed at trial.” The McKinneys then filed an additional notice regarding the bankruptcy proceeding, asserting the proceeding in the trial court had been stayed and asking the court to vacate all of the orders it had entered beginning June 30. The trial court had not ruled on or addressed any of those motions and objections when the McKinneys filed the notice of appeal on December 27.

¶12 After the trial court awarded the Kondaur defendants attorney fees and costs in an unsigned minute entry on November 29, 2010, the McKinneys filed an objection to the proposed form of judgment and an objection to the attorney fee award. They also filed a motion to dismiss the case.² These objections and motions were pending when the McKinneys filed the notice of appeal on December 27. Presumably, had the McKinneys prevailed on the merits of any of these filings, particularly their objections to the proposed form of judgment, the court’s decisions reflected in the unsigned minute entry, the unfiled but signed proposed judgment, and the unsigned minute entry granting fees, might have changed. *See Smith*, 212 Ariz. 407, ¶ 37, 132 P.3d at 1195; *see also Craig*, 227 Ariz. 105, ¶ 13, 253 P.3d at 626.

²Although the McKinneys requested that the court dismiss their case, it appears what they intended was to request that the court vacate any judgment that may be entered against them or to dismiss any underlying eviction or forcible detainer proceedings. Under any interpretation, the motion nevertheless was a substantive motion pending before the court when the notice of appeal was filed.

¶13 For the foregoing reasons, McKinney’s notice of appeal is a nullity. Because the notice of appeal is a nullity, we do not consider whether any party was prejudiced, as we would if the notice had been within the *Barassi* exception. See *Barassi*, 130 Ariz. at 421, 636 P.2d at 1203. Because we lack jurisdiction over this appeal, we dismiss it. The Kondaur defendants and M&I request an award of attorney fees. In our discretion, we deny their requests.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge