FILED BY CLERK
MAR 22 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

N. TERRYL ROGERS, as Successor Trustee for the Bankruptcy Estate of Michael Keith Schugg, Plaintiff/Appellant, v. BOARD OF REGENTS OF THE UNIVERSITY OF ARIZONA, Defendant/Appellee.	2 CA-CV 2011-0128 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CV200905071

Honorable Bradley M. Soos, Judge Pro Tempore

APPEAL DISMISSED

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E C K E R S T R O M, Presiding Judge.

¶1 In this action relating to an alleged easement, appellant N. Terryl Rogers, who is the successor trustee for the bankruptcy estate of Michael Schugg (hereafter "Schugg"), challenges the trial court's dismissal of his complaint against appellee, the Arizona Board of Regents for and on behalf of the University of Arizona ("the university"). Schugg argues the court erred in concluding his action was barred by the one-year statute-of-limitations period in A.R.S. § 12-821. Because the ruling Schugg challenges is not a final, appealable order, we dismiss for lack of jurisdiction.

¶2 In December 2009, Schugg filed a complaint alleging trespass, seeking a declaratory judgment, and asking to quiet title in regards to an alleged implied easement that gave him access to a road over the university's land. The university filed an amended answer and counterclaim in December 2010. The answer included a statute of limitations defense, as noted above. The counterclaim sought (1) to quiet title against any claims by Schugg and (2) a declaratory judgment that Schugg had no right, title, or interest in the university's property, "including any right of access on, over or through" it. The counterclaim also sought an award of attorney fees. After the pleadings had been submitted, the university filed a motion to dismiss Schugg's complaint with prejudice based on § 12-821, which the trial court granted after a hearing.

¶3 Upon granting the motion to dismiss, the trial court directed the university to prepare a formal order. Schugg objected to the university's lodged order on the ground it did not include finality language that would authorize an appeal pursuant to Rule 54(b), Ariz. R. Civ. P. Schugg thus submitted an alternative proposed order that included language "[f]inding no just cause for delay" and specifying "th[e] dismissal shall be final

pursuant to . . . Rule . . . 54(b)." The court denied Schugg's objection, observing it had "dismissed Plaintiff's Complaint in its entirety." The court did not address the outstanding counterclaims in its ruling.

¶4 The trial court then signed the university's proposed dismissal order and entered it on June 2, 2011.[1] On June 16, the university moved for summary judgment on its counterclaims. The record does not reveal whether the court ruled on the university's motion or on its request for attorney fees.

¶5 On June 27, Schugg filed a notice of appeal from the court's June 2011 order in an "abundance of caution" that it might be appealable, even in the absence of Rule 54(b) language. The university moved to dismiss the appeal, arguing the judgment was not final and appealable in light of the pending counterclaims. The parties then argued the jurisdictional basis for the appeal by motions filed with this court. We denied the university's motion to dismiss through an unsigned order filed in October 2011. Having reconsidered that order *sua sponte*, we now reach the issue again.

¶6 "Our jurisdiction is provided and limited by statute, and we have an independent duty to confirm whether we have jurisdiction over the case before us." *Santee v. Mesa Airlines, Inc.*, 629 Ariz. Adv. Rep. 18, ¶ 2 (Ct. App. Feb. 28, 2012) (citation omitted). The university argues the present appeal is premature because the trial court's dismissal order did not resolve the outstanding counterclaims and thus was not a

[1]This was a corrected order. An earlier order, signed May 27 and filed May 31, contained an erroneous reference to A.R.S. § 12-821.01 rather than § 12-821.

final judgment under what is now A.R.S. § 12-2101(A)(1).[2] Nor did the order contain the language necessary to make it final and appealable under Rule 54(b). *See Maria v. Najera*, 222 Ariz. 306, ¶ 6, 214 P.3d 394, 395 (App. 2009) ("[C]ourt may designate as final . . . a judgment that disposes of fewer than all claims" but may do so "'only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.'"), *quoting* Ariz. R. Civ. P. 54(b). We agree with the university, and we reject Schugg's arguments that we have jurisdiction over the present appeal.

¶7 Schugg first urges the appeal is proper because his complaint and the university's counterclaims "relate to the same easement and are inextricably intertwined." He maintains the court's ruling dismissing the complaint based on the statute of limitations "took away [his] ability to assert a property interest in the easement" and "essen[tially] disposed of the counterclaim." Analogizing his case to *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, 965 P.2d 47 (App. 1998), he thus argues jurisdiction is appropriate here even without Rule 54(b) language.

¶8 The university counters that *Bothell* is distinguishable because unlike that case, in which the dismissal of a negligence claim rendered the defendant's counterclaim for indemnification moot, 192 Ariz. 313, ¶¶ 5-6, 965 P.2d at 50, the university's counterclaim "asserts an independent claim that is in no sense dependent on the outcome of plaintiff's claim." We agree *Bothell* is distinguishable on this basis. Additionally, we

[2]This section was recently renumbered pursuant to 2011 Ariz. Sess. Laws, ch. 304, § 1.

note that Schugg has not legally supported his jurisdictional argument regarding "intertwined" claims, and our engaging in such an analysis would run counter to *Craig v. Craig*, 227 Ariz. 105, 253 P.3d 624 (2011), where our supreme court set forth a bright-line jurisdictional rule that favors clarity in final judgments.

¶9 The *Craig* court concluded that unless an order falls within the narrow exception set forth in *Barassi v. Matison*, 130 Ariz. 418, 636 P.2d 1200 (1981), which is not applicable here, "a notice of appeal filed in the absence of a final judgment, or while any party's time-extending motion is pending before the trial court, is 'ineffective' and a nullity." *Craig*, 227 Ariz. 105, ¶ 13, 253 P.3d at 626, *quoting Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, ¶ 39, 132 P.3d 1187, 1195 (2006). In so doing, our supreme court reaffirmed that "appellate courts should 'dismiss for lack of jurisdiction the case where a litigant attempts to appeal where a motion is still pending in the trial court.'" *Id.* ¶ 1, *quoting Barassi*, 130 Ariz. at 422, 636 P.2d at 1204.

¶10 While the *Craig* rule may appear formalistic, it effectively removes any confusion about a trial court's jurisdiction to rule on a pending motion. *Santee*, 629 Ariz. Adv. Rep. 18, ¶ 4. The rule also helps to avoid piecemeal appeals. *Id.* Indeed, in the absence of Rule 54(b) language, "'a judgment shall not be entered until claims for attorneys' fees have been resolved and are addressed in the judgment.'" *Britt v. Steffen*, 220 Ariz. 265, ¶ 18, 205 P.3d 357, 361 (App. 2008), *quoting* Ariz. R. Civ. P. 58(g).

¶11 Here, of course, the trial court did not address the issue of attorney fees in its June 2011 order, and the university's motion for summary judgment was still pending when Schugg filed his notice of appeal. The notice therefore created uncertainty as to the

superior court's jurisdiction to rule on the pending motion, as well as the possibility of a future appeal solely on the issue of attorney fees. In other words, it triggered the very problems the *Craig* rule was designed to avoid. *See Craig*, 227 Ariz. 105, ¶¶ 9, 14, 253 P.3d at 625, 626. "[O]rdinarily, appellate courts lack jurisdiction if 'a litigant attempts to appeal where a motion is still pending in the trial court.'" *Id.* ¶ 9, *quoting Barassi*, 130 Ariz. at 422, 636 P.2d at 1204. This appeal presents such an ordinary case. In the absence of Rule 54(b) language, the court's June ruling was a partial, interlocutory order not subject to appeal. It was not a final, appealable order.

¶12 In a second and somewhat related argument, Schugg contends "[t]he trial court's rejection of the Rule 54(b) language and statement that the case is dismissed in its entirety is sufficient to make the Order appealable." In support of this contention, Schugg cites *Arizona Bank v. Superior Court*, 17 Ariz. App. 115, 495 P.2d 1322 (1972). His reliance is misplaced.

¶13 In *Arizona Bank*, which came before this court as a special action, the trial court had entered a "formal written judgment" as to some parties and claims, but not all. *Id.* at 116, 495 P.2d at 1323. In response to a motion to vacate the judgment for lack of finality, the trial court had amended its judgment by a minute entry order that expressly found "'no cause or need for delay.'" *Id.* at 117, 495 P.2d at 1324. We held the judgment was final and thus not subject to revision by a second judge assigned to the case. *Id.* at 117, 120, 495 P.2d at 1324, 1327. In reaching this conclusion, we noted the undisputed fact that "the wording of th[e] minute entry order [wa]s sufficient to constitute the required determination" under Rule 54(b). *Ariz. Bank*, 17 Ariz. App. at 119, 495 P.2d

at 1326. Here, in contrast, no "express determination" was made pursuant to Rule 54(b), either by minute entry or otherwise. In fact, the court denied a motion requesting Rule 54(b) language. The case is therefore distinguishable.

¶14 To the extent Schugg reads *Arizona Bank* as doing away with Rule 54(b)'s requirement of an express determination, his interpretation is simply mistaken. In *Arizona Bank* this court held that the express determination required by the rule could be made by a later minute entry order; it need not appear in the judgment itself. 17 Ariz. App. at 119-20, 495 P.2d at 1326-27. The case did not imply that a trial court's "inten[t] to make [an] [o]rder appealable" determines its finality, as Schugg suggests.

¶15 In his third argument, Schugg claims the statute-of-limitations question posed by his current appeal is "distinct" from any issue presented by an appeal from the university's counterclaim, making jurisdiction proper under *GM Development Corp. v. Community American Mortgage Corp.*, 165 Ariz. 1, 795 P.2d 827 (App. 1990). In that case, we noted Rule 54(b) allows a "final judgment on any particular claim . . . only if the nature of the adjudicated claim is 'such that no appellate court would have to decide the same issues more than once even if there are subsequent appeals.'" *GM Dev. Corp.*, 165 Ariz. at 9, 795 P.2d at 835, *quoting Cont'l Cas. v. Superior Court*, 130 Ariz. 189, 191, 635 P.2d 174, 176 (1981). Schugg fails to appreciate that *GM Development* stated a necessary condition for bringing an appeal under Rule 54(b), not a sufficient condition for bringing an appeal, generally. In other words, the mere existence of a distinct or non-recurrent question does not render an interlocutory order appealable.

¶16 In his fourth argument, Schugg focuses on an isolated quotation from *Maria v. Najera* and contends we have jurisdiction over the present appeal if we simply "look to the 'character of the proceedings which resulted in the order appealed from' to ascertain jurisdiction in [the] particular case." 222 Ariz. 306, ¶ 9, 214 P.3d at 396, *quoting Kemble v. Porter*, 88 Ariz. 417, 419, 357 P.2d 155, 156 (1960). Again, however, Schugg overlooks the thrust of the case he cites as authority. *Maria* essentially held that an order must be both formally and substantively appealable under § 12-2101. 222 Ariz. 306, ¶¶ 4, 10, 214 P.3d at 395, 396; *see Green v. Lisa Frank, Inc.*, 221 Ariz. 138, ¶ 14, 211 P.3d 16, 24 (App. 2009). In short, a party may not transform a non-appealable order into an appealable one simply by filing a motion for a new trial and appealing its denial under what is now § 12-2101(A)(5)(a). *Maria*, 222 Ariz. 306, ¶¶ 7-11 & n.1, 214 P.3d at 395-96 & 396 n.1. When a party attempts such gamesmanship, we will look past the formal designation of the order to determine whether it is truly appealable. *Id.* We do not, however, have jurisdiction to consider appeals in the absence of an enumerated order under § 12-2101.

¶17 In his fifth and final argument, Schugg claims the dismissal order here is appealable pursuant to the current § 12-2101(A)(3), which allows appeals "[f]rom any order affecting a substantial right . . . when the order in effect determines the action and prevents judgment from which an appeal might be taken." As the university correctly points out, nothing about the dismissal order would prevent the trial court from ruling on the university's counterclaims and entering a final judgment disposing of all matters. Accordingly, this provision does not authorize the present appeal.

¶18 For the foregoing reasons, we conclude we lack jurisdiction to review the court's June 2011 order. We therefore order Schugg's appeal dismissed.

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

CONCURRING:

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

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge