

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

OCT 29 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

BANK OF AMERICA, N.A.,)	2 CA-CV 2012-0029
)	DEPARTMENT B
Plaintiff/Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
AARON C. RUBIN,)	Appellate Procedure
)	
Defendant/Appellee.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20106599

Honorable Jeffrey T. Bergin, Judge

DISMISSED

Miles, Bauer, Bergstrom & Winters, LLP
By Jeremy T. Bergstrom and Steven E. Stern

Henderson, NV
Attorneys for Plaintiff/Appellant

Butler, Oden & Jackson, P.C.
By Michael J. Butler

Tucson
Attorneys for Defendant/Appellee

K E L L Y, Judge.

¶1 Appellant Bank of America, N.A., appeals from the trial court's order denying its motion for summary judgment, granting appellee Aaron Rubin's cross-motion

for summary judgment, and dismissing its complaint.¹ Because we lack jurisdiction over the appeal, we dismiss it.

¶2 The relevant facts are undisputed. In 2006 Rubin obtained a loan from Bank of America secured by a deed of trust on his residential property. Rubin failed to make the payments as required by the loan agreement and Bank of America filed a complaint in superior court alleging Rubin had breached the agreement. The trial court denied the motion for summary judgment filed by Bank of America but granted the cross-motion for summary judgment filed by Rubin. Following the court's entry of judgment, Bank of America filed a motion for new trial and Rubin filed a response. While the motion for new trial was still pending, Bank of America filed a notice of appeal, the court entered an amended judgment specifying the interest rate for its award of attorney fees, and Bank of America filed a supplemental notice appealing from that judgment.

¶3 We have an independent duty to determine whether we have jurisdiction over an appeal. *See Robinson v. Kay*, 225 Ariz. 191, ¶ 4, 236 P.3d 418, 419 (App. 2010). When a motion for a new trial is filed, the time for appeal is extended and runs from the date of the order denying the motion. *See Ariz. R. Civ. App. P. 9(b)*. Here, Bank of America filed both notices of appeal while its motion for a new trial was still pending. In the first notice of appeal it had suggested that, because the notice was filed while the motion for new trial was pending, we lacked jurisdiction. Bank of America asked that we

¹Bank of America's notice of appeal purports to appeal also from the denial of its "post-trial motions"; however, the amended judgment to which it refers does not resolve its motion for new trial, nor does the record indicate the trial court has issued such a ruling.

hold the appeal “in abeyance until . . . the trial court has ruled on [the] motion for new trial.” But a notice of appeal filed while such a motion is pending is a nullity and we therefore lack jurisdiction over the appeal and can only dismiss it. *See Craig v. Craig*, 227 Ariz. 105, ¶ 13, 253 P.3d 624, 626 (2011) (A notice of appeal filed while a time-extending motion is pending before the trial court must be dismissed.); *Smith v. Ariz. Citizens Clean Elections Comm’n*, 212 Ariz. 407, ¶¶ 38, 39, 132 P.3d 1187, 1195 (2006) (same). Bank of America and Rubin request their attorney fees and costs on appeal pursuant to A.R.S. § 12-341.01 and Rule 21(c), Ariz. R. Civ. App. P. In our discretion we decline to award attorney fees or costs to either party. The appeal is dismissed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

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

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge