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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MM&A PRODUCTIONS, LLC, an Arizona limited liability company, Petitioner, v. HON. PAUL E. TANG, Judge of the Superior Court of the State of Arizona, in and for the County of Pima, Respondent, and YAVAPAI-APACHE NATION, a federally recognized Indian tribe; YAVAPAI-APACHE NATION'S CLIFF CASTLE CASINO; TRIBAL GAMING BOARD; and CLIFF CASTLE CASINO BOARD OF DIRECTORS, Real Parties in Interest.	2 CA-SA 2011-0078 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION PROCEEDING

Pima County Cause No. C20085949

JURISDICTION ACCEPTED; RELIEF GRANTED

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H O W A R D, Chief Judge.

¶1 In this special action, petitioner MM&A Productions, LLC (MM&A) challenges respondent Judge Paul E. Tang's denial of its request to sign a proposed order memorializing the denial, in unsigned minute entry orders, of MM&A's motion filed pursuant to Rule 60(c), Ariz. R. Civ. P., and its motion for reconsideration. We accept jurisdiction and grant relief.

¶2 The procedural history of this matter is explained in more detail in this court's memorandum decision dismissing MM&A's appeal. MM&A brought an action against the Yavapai-Apache Nation's Cliff Castle Casino (the Tribe) alleging breach of contract, unjust enrichment, intentional interference with prospective business advantage, and fraud. The respondent judge granted the Tribe's motion to dismiss, concluding the Tribe had not waived its sovereign immunity. MM&A did not appeal that judgment timely, ultimately requesting that the respondent grant it relief from the judgment pursuant to Rule 60(c), Ariz. R. Civ. P., to modify the judgment's effective date to permit MM&A to file a timely notice of appeal. In unsigned minute entry orders, the respondent denied the motion and MM&A's subsequent motion for reconsideration. In 2009, MM&A appealed the judgment and several other orders entered after judgment, including

the respondent's denial of MM&A's Rule 60(c) motion and motion for reconsideration. We stayed the appeal to provide MM&A the opportunity to obtain signed, appealable orders. We dismissed the appeal for lack of jurisdiction, however, when MM&A failed to do so and instead again sought substantive relief.

¶3 MM&A then lodged with the respondent judge a "form of order" denying MM&A's Rule 60(c) motion and its motion for reconsideration and requested the court sign it in order to "convert[]" the respondent's previous minute entry orders "into appealable orders." Concluding MM&A "had its opportunity two years ago to obtain a signed order when directed to do so, and it failed to do so," the respondent declined to sign the proposed order. MM&A now seeks special action relief and requests that we order the respondent to sign the proposed order.

¶4 In its special action petition, MM&A named the Tribe as the real party in interest. The Tribe has filed a special appearance and motion to dismiss asserting that, because the Tribe has sovereign immunity, we lack subject matter jurisdiction over it and therefore must dismiss MM&A's special action. *See White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 5, 480 P.2d 654, 655 (1971) ("[A]n Indian tribe is a dependent sovereign not subject to the jurisdiction of the courts of this state absent its consent or the consent of Congress."). We need not decide, however, whether the Tribe's sovereign immunity prevents it from being joined as a party to this special action because, as we explain, the Tribe's refusal to be joined does not abrogate our authority to accept jurisdiction of this special action and grant relief.

¶5 As the Tribe correctly points out, Rule 2(a)(1), Ariz. R. P. Spec. Actions, states that, in addition to joining "as a defendant the body, officer, or person against whom relief is sought," the "real party or parties in interest shall also be joined as defendants." The Tribe's argument assumes, however, that it is, in fact, a real party in interest as contemplated by Rule 2(a)(1) and that its refusal to be joined is a fatal defect in MM&A's petition. Our supreme court has defined a "real party in interest" as "'[a]ny person interested in the subject-matter of the suit who has a personal interest in the judgment.'" *Mosher v. Hiner*, 62 Ariz. 110, 112, 154 P.2d 372, 373 (1944), *quoting Curry v. County of Gila*, 6 Ariz. 48, 53 P. 4 (Terr. 1898).

¶6 If we grant relief in this special action, MM&A undoubtedly will appeal the respondent judge's signed order denying its post-judgment motions. Thus, the Tribe arguably has an interest in the resolution of this special action because it then would have to litigate that appeal. But a party has no legally cognizable interest in preventing a trial court from engaging in a ministerial act that it has no discretion to refuse to perform—such as, as we explain below, signing an otherwise-appealable denial of a post-judgment motion.[1] *See State Bar of Texas v. Heard*, 603 S.W.2d 829, 831-32 (Tex. 1980) (attorney

[1]MM&A did not request that the respondent judge sign the order until eighteen months after this court dismissed its appeal and more than a year after our mandate issued. It is conceivable the Tribe could suffer some prejudice resulting from that delay. *Cf. McComb v. Superior Court*, 189 Ariz. 518, 524-25, 943 P.2d 878, 884-85 (App. 1997) (laches may bar delayed claim if delay unreasonable and change in circumstances caused by delay prejudiced opposing party); *Cooper v. Odom*, 6 Ariz. App. 466, 469, 433 P.2d 646, 649 (1967) (dismissal based on abandonment of claim proper under laches doctrine). That question, however, is distinct from the question whether the Tribe has a cognizable interest in preventing the respondent from fulfilling its duty to sign the order

subject to state bar sanction not necessary party to mandamus action when respondent judge refused to suspend license as required by statute; act required "is merely ministerial" and "no discretion or judgment was necessary"); *Benavides v. Garcia*, 687 S.W.2d 397, 399 (Tex. App. 1985) (trial court had no discretion to decline to dismiss divorce action and adverse parties need not be joined "in mandamus proceeding which involves only the ministerial and nondiscretionary duties of the trial court").

¶7 That the Tribe need not be joined as the real party in interest in this special action is demonstrated further by an examination of the history and purpose of Arizona's Rules of Special Action Procedure. A special action encompasses relief formerly sought via writs of mandamus, prohibition, or certiorari. Ariz. R. P. Spec. Actions 1(a). The special action rules were promulgated in 1970 to simplify and clarify the frequently confusing technical and procedural aspects of those writs. Ariz. R. P. Spec. Actions 1(a) cmt. (a); *State ex rel. Neely v. Rodriguez*, 165 Ariz. 74, 76, 796 P.2d 876, 878 (1990). The rules, however, were not intended to substantively alter those remedies. Ariz. R. P. Spec. Actions 1(a) cmt. (a). Before the Rules of Special Action Procedure were adopted, the joinder of parties in a mandamus action was governed by Rule 19, Ariz. R. Civ. P.[2] *See City of Mesa v. Killingsworth*, 96 Ariz. 290, 297, 394 P.2d 410, 415 (1964) (applying Rule 19 in mandamus action). And an examination of Rule 19 demonstrates the Tribe need not be joined here.

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at issue here. And the Tribe did not assert below that MM&A's delay in seeking a signed order had prejudiced the Tribe.

[2]The text of Rule 19 has not changed substantively since its adoption in 1966. *See* 154 Ariz. LXXI-LXXII (1987).

¶8 Rule 19(a), Ariz. R. Civ. P., governs the determination of parties to be joined if feasible. A person "shall be joined as a party in the action" if joinder "will not deprive the court of jurisdiction over the subject matter" and

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede the person's ability to protect that interest (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Ariz. R. Civ. P. 19(a).

¶9 If that person cannot be made a party, the court, pursuant to Rule 19(b) must determine whether the action properly may proceed absent that party, or whether that party is "indispensable." In making that determination, the court shall consider:

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Ariz. R. Civ. P. 19(b).

¶10 First, the Tribe does not appear to be a party that must be joined if feasible under Rule 19(a). As we noted above, the Tribe has no cognizable legal interest in preventing the respondent judge from performing a nondiscretionary, ministerial function. *See Heard*, 603 S.W.2d at 832; *Garcia*, 687 S.W.2d at 399. And, because

granting relief in this matter would require only that the respondent sign a written order in the Tribe's favor, the Tribe need not be joined for us to accord complete relief.

¶11 Moreover, even if we assume the Tribe should be joined if feasible under Rule 19(a), it plainly is not an indispensable party under Rule 19(b). Other than the Tribe potentially having to participate in an appeal, there is no discernable prejudice to the Tribe if we accord MM&A relief in its absence. And, again, because our grant of relief here will require only that the respondent judge act in the Tribe's favor, the relief awarded is adequate despite the Tribe's absence from the proceeding. Finally, as we explain in more detail below, because the respondent's refusal to sign the order as requested renders unappealable the trial court's denial of MM&A's request for Rule 60(c) relief, MM&A has no other remedy should this special action be dismissed.[3] *See Zwack v. Kraus Bros. & Co.*, 237 F.2d 255, 259 (2d Cir. 1956) (court "will properly strain to avoid" finding that foreign sovereign indispensable party when sovereign "not subject to the jurisdiction of the court"). For these reasons, we conclude the Tribe is not a

[3]The Tribe also asserts we lack jurisdiction over this special action "because MM&A chose to forego a plain, speedy, and adequate remedy at law" by failing to promptly request that the respondent judge sign an order denying MM&A's motions. Rule 1(a), Ariz. R. P. Spec. Actions, states that "the special action shall not be available where there is an equally plain, speedy, and adequate remedy by appeal." But it is not disputed that MM&A currently has no such remedy. The Tribe cites no authority, and we find none, suggesting that we may not accept special action jurisdiction when a party has failed to timely obtain an appealable order. Although MM&A's failure to act promptly certainly weighs in our discretionary decision whether to accept jurisdiction, it does not require that we decline to do so. *See Grand v. Nacchio*, 214 Ariz. 9, ¶ 21, 147 P.3d 763, 771 (App. 2006) ("'The acceptance of special action jurisdiction is highly discretionary in this court.'"), *quoting Harris Trust Bank of Ariz. v. Superior Court*, 188 Ariz. 159, 162, 933 P.2d 1227, 1230 (App. 1996).

necessary party to this special action, deny its motion to dismiss MM&A's petition for special action and dismiss it from this action.

¶12 The issue MM&A raises is primarily a question of law and, as we noted above, MM&A has no remedy by appeal. We therefore accept jurisdiction of this special action. *See* Ariz. R. P. Spec. Actions 1(a); *S. Cal. Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, ¶ 20, 977 P.2d 769, 775 (1999) ("In the proper case, . . . the refusal to enter an appealable order may be reviewed for abuse of discretion by special action proceedings."); *see also Haywood Sec., Inc. v. Ehrlich*, 214 Ariz. 114, ¶¶ 5-6, 8, 149 P.3d 738, 739 (2007) (special action review appropriate to determine whether court's use of electronic signature sufficient under Rule 58(a), Ariz. R. Civ. P.). And we agree with MM&A that the respondent judge had no discretion to refuse to convert its minute entry order denying MM&A's request for relief pursuant to Rule 60(c) to a signed, appealable order.

¶13 Pursuant to A.R.S. § 12-2101(A)(2), a party may appeal from a "special order made after final judgment." We conclude the order denying MM&A's Rule 60(c) motion is such an appealable order because that motion sought relief not available on appeal and the court's denial of the motion related to the enforcement of the original judgment. *See Arvizu v. Fernandez*, 183 Ariz. 224, 226-27, 902 P.2d 830, 832-33 (App. 1995); *see also Haroutunian v. ValueOptions, Inc.*, 218 Ariz. 541, ¶ 20, 189 P.3d 1114, 1122 (App. 2008) (under specified circumstances, "a trial court may vacate and reenter a judgment to effectively extend the time for appeal" pursuant to Rule 60(c)); *M&M Auto Storage Pool, Inc. v. Chem. Waste Mgmt., Inc.*, 164 Ariz. 139, 141, 791 P.2d 665, 667

(App. 1990) (order denying Rule 60(c) motion appealable pursuant to § 12-2101(A)(2)). But, to be appealable, that order must be signed and filed with the clerk of the court. *Eaton Fruit Co. v. Cal. Spray-Chem. Corp.*, 102 Ariz. 129, 130, 426 P.2d 397, 398 (1967). That is, the order is not effective until it is signed and filed in compliance with Rule 58(a), Ariz. R. Civ. P. *State v. Birmingham*, 96 Ariz. 109, 112, 392 P.2d 775, 777 (1964). Rule 58(a) "procedurally establishes what acts of the superior court are necessary—the manner in which the superior court must act—to create an effective and hence appealable order, decree or judgment." *Id.* Thus, Rule 58(a) applies to a court's orders, as well as its final judgments, if those orders "settl[e] the rights of litigants to the extent an appeal lies." *Id.* Moreover, the language of Rule 58(a) is not permissive; it requires that all judgments—and, pursuant to *Birmingham*, all appealable orders—"shall be in writing and signed by a judge or a court commissioner duly authorized to do so." In light of the plain language of Rule 58(a) requiring that any judgment "shall" be signed before it is effective, we conclude the respondent judge had no authority to simply refuse to act and require the parties to remain in limbo because his order denying MM&A's request for post-judgment relief had never been made effective. *See* Ariz. R. P. Spec. Actions 3(a) (special action relief appropriate when defendant "has failed . . . to perform a duty required by law as to which he has no discretion"); *cf. In re Taumoepeau*, 523 F.3d 1213, 1217 (10th Cir. 2008) (federal rule requiring judgment in "separate document" before appeal permitted must be applied "mechanically" when doing so is required to preserve a party's opportunity to appeal). And, although we understand the respondent's frustration with the petitioner's prior actions in this case, we find no authority suggesting

a trial court may refuse to sign an otherwise-appealable order based on a party's delay in requesting that signature. Rule 58(a) does not require a party to demand that a trial court perform its ministerial duty to make its own order effective. *Cf. Tripati v. Forwith*, 223 Ariz. 81, ¶ 17, 219 P.3d 291, 295 (App. 2009) (entering signed order denying new trial motion "ministerial act").

¶14 MM&A's request that the respondent judge sign an order denying MM&A's motion for reconsideration is a different matter. The denial of such a motion generally is not an appealable order. *See In re Estate of Balcomb*, 114 Ariz. 519, 522, 562 P.2d 399, 402 (App. 1977). We recognize that the denial of a motion for reconsideration may, in some circumstances, be appealable as a special order entered after judgment. *See Eng'rs. v. Sharpe*, 117 Ariz. 413, 416, 573 P.2d 487, 490 (1977). But MM&A has cited no authority and developed no argument suggesting the respondent's denial of its motion for reconsideration would be an appealable order if signed. Thus, we find no reason to order the respondent to sign an order denying MM&A's motion for reconsideration.

¶15 For the reasons stated, we accept jurisdiction of this special action and grant relief. We dismiss the Tribe from this action. We instruct the respondent judge to sign a proper order denying MM&A's motion made pursuant to Rule 60(c). MM&A requests that we award it attorney fees "pursuant to the provisions of the contract" between it and the Tribe and pursuant to A.R.S. § 12-341.01. Even assuming we have the authority to order the Tribe to pay attorney fees based on its special appearance in this matter, MM&A has not provided this court with the relevant provisions of the contract

justifying an award of fees. And the prevailing party is yet to be determined. We therefore deny its request for attorney fees under the contract and, in our discretion, deny its request for fees pursuant to § 12-341.01.

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

CONCURRING:

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

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