IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

U.S. BANK NATIONAL ASSOCIATION,
Plaintiff/Appellee,

v.

F. CHRISTOPHER ANSLEY; STARR PASS HOLDINGS, LLC; AND STARR PASS RESIDENTIAL, LLC,
Defendants/Appellants,

and

STARR PASS RESORT DEVELOPMENTS, LLC,
Defendant/Appellant/Counterclaimant.

No. 2 CA-CV 2015-0101
Filed December 28, 2016

Appeal from the Superior Court in Pima County
No. C20117682
The Honorable Charles V. Harrington, Judge

APPEAL DISMISSED

COUNSEL

Ballard Spahr, LLC, Phoenix
By Brian Schulman, Dean C. Waldt, and Craig C. Hoffman
Counsel for Plaintiff/Appellee

BurnsBarton LLP, Phoenix
By C. Christine Burns and Benjamin J. Naylor
Counsel for Defendants/Appellants Ansley, Starr Pass Holdings, LLC, Starr Pass Residential, LLC

EasonRohde LLC, Denver
By Bruce E. Rohde
Pro Hac Vice
and
Stephen J. Gonzalez, Tucson
Counsel for Counterclaimant/Appellant Starr Pass Resort Developments, LLC

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Staring concurred.

E S P I N O S A, Judge:

¶1 Appellants F. Christopher Ansley, Starr Pass Residential, LLC, Starr Pass Holdings, LLC and Starr Pass Resort Developments, LLC (SP Developments) appeal from the trial court's $180,853,741.97 judgment entered against Ansley in favor of appellee U.S. Bank National Association and "all prior Rulings and Orders subsumed by and forming the basis of the Judgment." Because we lack jurisdiction over this appeal, we dismiss.

Factual and Procedural Background

¶2 On August 11, 2006, SP Developments entered into a loan agreement with U.S. Bank's predecessor-in-interest, Column Financial Inc. Pursuant to that agreement, Lender [1] secured repayment of the promissory note through various liens, security interests, assignments of rent, and through the terms and provisions

[1] The Loan Agreement has been transferred to several successors-in-interest lenders. For ease of reference, we refer to the various banks generically as "Lender" except where there is a reason to distinguish between the parties.

included therein. Ansley executed a Guaranty Agreement, which "unconditionally guarantee[d]" to Lender the payment of "Guaranteed Obligations," including the full recourse obligations and liabilities of SP Developments under the Loan Agreement.

¶3 The Loan Agreement was secured by a deed of trust, which provides Lender with a security interest in the real property owned by SP Developments at the time the loan was issued, including the hotel, golf course, and "Block 14," which contained an overflow parking lot for the hotel and the maintenance facility for the golf course. When the parties entered into the agreement, SP Developments was constructing a new parking garage to replace the temporary parking lot on Block 14. Under the agreement's terms, Block 14 could eventually be released from Lender's collateral if the conditions set forth in Section 5.2.10 of the agreement were satisfied or if Lender provided consent to the transfer. Otherwise, the agreement prohibited SP Developments from encumbering or transferring the property secured by the deed of trust.

¶4 In August 2009, after completion of the new garage, SP Developments conveyed Block 14 to SP Residential by warranty deed without Lender's written consent and without fully satisfying all of the conditions set forth in Section 5.2.10 of the Loan Agreement. The warranty deed contained no deed restrictions and warranted SP Developments had "title against all persons whomsoever." Almost two years later in May 2011, SP Developments executed and recorded a Sixth Amendment to the Starr Pass Homeowners Association's (HOA) Master "Covenants, Conditions, Restrictions, and Easements" (CC&Rs) that subjected the resort to an annual HOA assessment obligation and secured the assessment obligation by imposing a lien on the resort.[2] The resort had previously been exempt from assessments under the terms of the Master CC&Rs.

[2]The CC&Rs existed at the time the Loan Agreement was made, but the resort and golf course were expressly exempted from its terms.

¶5 In October 2011, Lender, through a "special servicer," filed a complaint against SP Developments, alleging it had breached the terms of the "Loan Documents" and was in default. In June 2012, Lender filed a second amended complaint, asserting new claims against several additional defendants, including Ansley, SP Residential, and SP Holdings. Count Two of the amended complaint alleged that SP Developments committed several breaches of the Loan Agreement and requested repayment of "[a]ll amounts due and owing under the Loan Documents." Count Eight alleged, in part, that SP Developments' breach of the Loan Agreement triggered Ansley's "full recourse liability for all amounts due and owing under the Note."

¶6 Nearly a year later, Lender moved for partial summary judgment, requesting a declaration that SP Developments' conveyance of Block 14 constituted an impermissible transfer under the Loan Agreement and, "consequently, Block 14 remain[ed] as collateral for the loan and subject to the deed of trust." The trial court concluded that SP Developments materially breached the terms of the Loan Agreement by transferring Block 14 to SP Residential.

¶7 Lender moved for summary judgment regarding the HOA assessment in January 2014, requesting a declaration that the Sixth Amendment to the CC&Rs constituted a lien on and transfer of the loan collateral in violation of the Loan Agreement, which the trial court granted. In September 2014, the trial court also granted Lender "partial summary judgment regarding guaranty," finding SP Developments and Ansley liable under the terms of the Loan Agreement and the Guaranty Agreement respectively.

¶8 In April 2015, at Lender's request, the trial court entered judgment against Ansley pursuant to Rule 54(b), Ariz. R. Civ. P. The judgment certified that claims between U.S. Bank and Ansley as to "the Guaranty have been fully resolved" and that there is "no just reason for delay of entry of judgment in favor of [U.S. Bank] as to its claims against [Ansley] under the Guaranty." The trial court did not enter judgment against SP Developments for its liability under the

Loan Agreement. Ansley and all the SP defendants filed a timely joint notice of appeal.

¶9 Though neither party raised the issue on appeal, we ordered supplemental briefing addressing our appellate jurisdiction, specifically whether the SP defendants are proper parties to this appeal from a judgment entered against Ansley only, and whether the trial court's certification of the judgment as final was proper. *See Santee v. Mesa Airlines, Inc.*, 229 Ariz. 88, ¶ 2, 270 P.3d 915, 915-16 (App. 2012) ("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.") (citation omitted). The SP defendants contend they are proper parties to the appeal because they were all aggrieved by the judgment, and they argue jurisdiction is proper because "the Judgment and Predicate Rulings were Final." Lender asserts the SP defendants were not aggrieved by the judgment, and "based on the issues raised by appellants in the appeal, the judgment should not be deemed final under Rule 54(b)."

Jurisdiction

¶10 Generally, our appellate jurisdiction is limited to final judgments that dispose of all claims and parties. *Kim v. Mansoori*, 214 Ariz. 457, ¶ 6, 153 P.3d 1086, 1088 (App. 2007). Rule 54(b), Ariz. R. Civ. P., provides an exception to that rule, and permits the trial court to designate as final a judgment that disposes of fewer than all claims or parties "upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." A proper Rule 54(b) judgment is immediately appealable, *Madrid v. Avalon Care Ctr.-Chandler, L.L.C.*, 236 Ariz. 221, ¶ 8, 338 P.3d 328, 331 (App. 2014), but the inclusion of Rule 54(b) language does not automatically make it final and appealable; the certification must also be substantively warranted, *Sw. Gas Corp. v. Irwin*, 229 Ariz. 198, ¶ 12, 273 P.3d 650, 654 (App. 2012); *see also Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304, 812 P.2d 1119, 1122 (App. 1991) (trial court's Rule 54(b) certification does not give appellate court jurisdiction if judgment in fact is not final). We review de novo the trial court's certification of a judgment as "final" under Rule 54(b). *See Davis*, 168 Ariz. at 304, 812 P.2d at 1122.

¶11 A purported Rule 54(b) judgment that does not dispose of at least one separate claim of a multi-claim action or one separate party is not final. *Id.*; *see also Sisemore v. Farmers Ins. Co. of Ariz.*, 161 Ariz. 564, 565, 779 P.2d 1303, 1304 (App. 1989) (Rule 54(b) language only makes judgment final and immediately appealable if "judgment completely disposes of an entire claim"). A "claim" for Rule 54(b) purposes is "generally understood to include all factually or legally connected elements of a case." *Okla. Tpk. Auth. v. Bruner*, 259 F.3d 1236, 1242 (10th Cir. 2001); *see also Davis*, 168 Ariz. at 305, 812 P.2d at 1123 (two distinct claims are treated as one for purposes of Rule 54(b) if there is "significant factual overlap" between them). Separability depends on "the degree of factual overlap between the issue certified for appeal and the issues remaining in the [trial] court," *Davis*, 168 Ariz. at 305, 812 P.2d at 1123, *quoting Ind. Harbor Belt R.R. Co. v. Amer. Cyanamid Co.*, 860 F.2d 1441, 1444-45 (7th Cir. 1988), and a claim is separable from others remaining when "the nature of the claim already determined is 'such that no appellate court would have to decide the same issues more than once even if there are subsequent appeals,'" *Cont'l Cas. v. Superior Court*, 130 Ariz. 189, 191, 635 P.2d 174, 176 (1981), *quoting Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1 (1980).

¶12 Here, as noted above, Count Two of Lender's amended complaint asserts a breach of contract claim against SP Developments for its breach of the Loan Agreement, and Count Eight asserts a breach of contract claim against Ansley for his breach of the Guaranty.[3] Count Eight alleges that SP Developments' breach of the Loan Agreement triggered Ansley's liability under the Guaranty, and Lender sought the same relief under both counts—"All amounts due and owing under the Loan [Agreement] and the Guaranty."

[3] Although Count Eight also alleges Ansley violated other provisions of the Guaranty, the trial court specifically determined Ansley's liability under the Guaranty was triggered by SP Developments' breaches of the Loan Agreement.

¶13 Though Lender's claim against Ansley under the Guaranty is separately enforceable from its claim against SP Developments under the Loan Agreement, *see Provident Nat'l Assurance Co. v. Sbrocca*, 180 Ariz. 464, 466, 885 P.2d 152, 154 (App. 1994) (guaranty contract separately enforceable and independent of obligation of principal debtor), they are not separable for Rule 54(b) purposes, *cf. Curtiss-Wright*, 446 U.S. at 8 (not all resolved claims should be immediately appealable, "even if they are in some sense separable from the remaining unresolved claims"). Both counts seek the same relief—repayment of the note—and necessarily require proof of the same underlying facts, namely, that SP Developments materially breached the Loan Agreement; the only additional evidence needed to prove Count Eight is the Guaranty. *See Wells Fargo Bank, NA v. MPC Inv'rs, LLC*, 705 F. Supp. 2d 728, 739 (E.D. Mich. 2010) (plaintiff's complaint for damages on unpaid note against maker and guarantors amounted to single claim under Rule 54(b)); *cf. GE Capital Mortg. Servs., Inc. v. Pinnacle Mortg. Inv. Corp.*, 897 F. Supp. 854, 875 (E.D. Pa. 1995) (claim against debtor under credit agreement and guarantor under guaranty agreement were single claim under Rule 54(b) because to prove guarantor's liability, plaintiff "necessarily had to prove that [debtor] defaulted under the Credit Agreement"). Thus, the claims for breach of the Loan Agreement and the Guaranty arise from a single set of facts and are so intertwined that there has been but a partial adjudication of a single claim for Rule 54(b) purposes.

¶14 Furthermore, if this appeal is not dismissed, there is a real possibility this court could be faced with having to decide the same issues more than once. *See Cont'l Cas.*, 130 Ariz. at 191, 635 P.2d at 176. Ansley's appeal directly challenges the trial court's legal conclusions that SP Developments' "transfer of Block 14 and its imposition of a lien on the Loan collateral constituted breaches of the Loan Agreement." Since these breaches were also the bases of SP Developments' liability under the Loan Agreement—which is not yet directly at issue on appeal—we could be required to decide the same issues in a later appeal if SP Developments challenges the judgment that has yet to be entered against it. This is precisely the sort of uneconomical approach that weighs strongly against Rule

54(b) certification. *Cf.* 10 Charles A. Wright et al., Federal Practice and Procedure § 2659 (3d ed. April 2016 Update) ("It is uneconomical for an appellate court to review facts on an appeal following a Rule 54(b) certification that it is likely to be required to consider again when another appeal is brought after the [trial] court renders its decision on the remaining claims or as to the remaining parties."). And though the issue of repetitive appeals might be avoided if we conclude the SP defendants are proper parties to this appeal, affirm the trial court's judgment, and apply the doctrine of issue preclusion to the interpretation of the Loan Agreement to any later appeal by SP Developments, this court has historically declined to do so in the Rule 54(b) context. *See Grand v. Nacchio*, 214 Ariz. 9, ¶ 19, 147 P.3d 763, 771 (App. 2006) (declining to apply issue preclusion and law of the case doctrine to Rule 54(b) certification).

¶15 Finally, we note that Ansley continues to be heavily involved in the litigation process, having had additional claims asserted against him, including an alter ego claim, and having an outstanding counterclaim that could result in an offset in his favor. These factors also render 54(b) certification questionable. *Cf. CapitalSource Fin., LLC v. Delco Oil, Inc.*, 608 F. Supp. 2d 655, 669 (D. Md. 2009) (finding 54(b) certification against defendant inappropriate where defendant was still involved in litigating alter ego claim and "fully enmeshed in almost every aspect of th[e] suit"); *Egan-Ryan Mech. Co. v. Cardon Meadows Dev. Corp.*, 169 Ariz. 161, 171, 818 P.2d 146, 156 (App. 1990) (Rule 54(b) certification appropriate where trial court waited until after resolution of counterclaims that might have resulted in significant offset); *Stephens v. Fines Recycling, Inc.*, 84 So.3d 867, 878 (Ala. 2011) (although not dispositive in and of itself, claim that could result in setoff is not insignificant in evaluating Rule 54(b) certification).

¶16 The SP defendants alternatively request that if we determine we lack jurisdiction, we should suspend and revest jurisdiction to allow the trial court to cure the "jurisdictional deficiency" and enter a new Rule 54(b) judgment certifying the entire claim. Though this court routinely revests jurisdiction to allow the trial court to certify a judgment as final pursuant to Rule

54(c), Ariz. R. Civ. P., *see, e.g.*, *In re Guardian of Somner*, No. 2 CA-CV 2016-0111-FC, 2016 WL 7210050 (Ariz. Ct. App. Dec. 12, 2016), we lack jurisdiction to stay and remand for consideration of certification under Rule 54(b), *Brumett v. MGA Home Healthcare, L.L.C.*, 240 Ariz. 421, n.13, 380 P.3d 659, 672 n.13 (App. 2016); *see also Madrid*, 236 Ariz. 221, ¶ 10, 338 P.3d at 331 (when presented with a Rule 54(b) deficiency in an appeal from putative Rule 54(b) judgment, this court lacks jurisdiction to suspend appeal to allow entry of proper Rule 54(b) judgment).

Disposition

¶17 For all the foregoing reasons, we lack jurisdiction to decide Ansley's and the SP defendants' appeal, and it is therefore dismissed.