

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

SOL JAFFE, *Plaintiff/Appellant*,

v.

MICHAEL PATRICK BROWN, et al., *Defendants/Appellees*.

No. 1 CA-CV 17-0164
FILED 3-6-2018

Appeal from the Superior Court in Maricopa County
No. CV2016-009431
The Honorable James T. Blomo, Judge, *Retired*
The Honorable Margaret R. Mahoney

APPEAL DISMISSED

COUNSEL

Sol Jaffe, Phoenix
Plaintiff/Appellant

O'Connor & Campbell PC, Tempe
By J. Daniel Campbell, Kristopher L. Smith
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Jennifer B. Campbell joined.

M c M U R D I E, Judge:

¶1 Sol Jaffe appeals a superior court order dismissing his complaint for failing to comply with Arizona Rule of Civil Procedure 8. For the following reasons, we dismiss the appeal.

FACTS AND PROCEDURAL BACKGROUND

¶2 Michael Brown is the owner of Can Do Moving, LLC, a moving company retained by Jaffe in 2016 to help him move to a new residence in Phoenix. Afterwards, based on disagreements between Jaffe and Brown, Jaffe filed a complaint in superior court in July 2016.

¶3 Jaffe’s complaint was 65 pages long, and raised claims of fraud, conversion, negligence, negligent misrepresentation, breach of contract, concealment, and breach of express warranty against Brown and Can Do Moving. In September 2016, Brown filed a motion to dismiss Jaffe’s complaint for failure to comply with Arizona Rule of Civil Procedure 8. Brown’s motion requested that the superior court dismiss Jaffe’s complaint with leave for Jaffe to amend his complaint “in such a manner that complies with [Rule 8].” Jaffe responded to the motion, and Brown replied, again requesting that Jaffe’s complaint be dismissed with leave to amend. After declining to hold oral argument on the motion, the court granted Brown’s motion to dismiss in a minute entry dated October 10, 2016. Jaffe filed a motion to reconsider, which the superior court denied. Jaffe then filed a notice of appeal to this court.

¶4 Eventually, Jaffe filed a request in superior court for a signed minute entry. The superior court issued a signed minute entry on February 23, 2017, and Jaffe filed an amended notice of appeal to this court on March 7, 2017. On April 5, 2017, this court stayed Jaffe’s appeal to allow him to apply to the superior court for a signed order with a certification of finality pursuant to Arizona Rule of Civil Procedure 54(c). Jaffe requested such an order and the superior court entered a signed minute entry with Rule 54(c) finality language on July 13, 2017.

DISCUSSION

¶5 Jaffe argues the superior court’s dismissal of his complaint pursuant to Rule 8 was inappropriate, and that because Rule 9 governs the additional requirements for pleadings, which allege fraud or mistake, his complaint should not have been dismissed under Rule 8. However, because the superior court granted Brown’s motion to dismiss without stating such dismissal was with prejudice, and Brown’s motion requested the court to allow Jaffe to file an amended complaint in compliance with Rule 8, we hold the superior court orders were not final, and therefore dismiss Jaffe’s appeal.

¶6 “[T]his court has an independent duty to determine whether it has jurisdiction to consider an appeal.” *Sorensen v. Farmers Ins. Co. of Ariz.*, 191 Ariz. 464, 465 (App. 1997). We have jurisdiction over final judgments or orders. A.R.S. § 12-2101(A)(1); *Green v. Lisa Frank, Inc.*, 221 Ariz. 138, 146, ¶ 14 (App. 2009). A dismissal of a complaint without prejudice is not a final judgment and is therefore unappealable. See *Kool Radiators, Inc. v. Evans*, 229 Ariz. 532, 534, ¶ 8 (App. 2012). “Whether an order is final and appealable depends not on its form but on ‘its substance or effect.’” *Green*, 221 Ariz. at 146, ¶ 14 (quoting *Props. Inv. Enters., Ltd. v. Found. For Airborne Relief*, 115 Ariz. 52, 54 (App. 1977)). We review a finality determination *de novo*. *Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304 (App. 1991).

¶7 From the record, it appears the court dismissed Jaffe’s complaint without prejudice to amend and refile the complaint. Brown’s original motion to dismiss requested the complaint be dismissed without prejudice and that Jaffe be directed to amend his complaint to conform to the requirements of Rule 8. The court granted Brown’s motion without comment, apparently agreeing with Brown that Jaffe could amend and refile the complaint. While eventually the superior court included finality language in accordance with Rule 54(c) and signed its minute entry, such an inclusion is not dispositive. See *Davis*, 168 Ariz. at 304 (“A trial court’s [finality] certification does not give this court jurisdiction to decide an appeal if the judgment in fact is not final”); see also *Eng’rs v. Sharpe*, 117 Ariz. 413, 416 (1977) (“[T]he appealability of an order ‘turns on the character of the proceedings which resulted in the order appealed from.’” (quoting *Kemble v. Porter*, 88 Ariz. 417, 419 (1960))); *Ruesga v. Kindred Nursing Ctrs., L.L.C.*, 215 Ariz. 589, 593, ¶ 12 (App. 2007) (“[T]he substance or effect of an order determines its character for appeal purposes.”). The superior court granted Brown’s motion to dismiss without stating such dismissal was with prejudice, and the relief requested was for dismissal without prejudice with leave to amend the complaint. Therefore, we find the superior court’s order

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lacks finality as Jaffe may still amend and refile his complaint. Accordingly, we must dismiss the appeal. *See Davis*, 168 Ariz. at 304 (this court has a duty to dismiss an appeal where jurisdiction is lacking).

ATTORNEY'S FEES

¶8 Brown requests attorney's fees and costs on appeal pursuant to Arizona Rule of Civil Appellate Procedure 21 and A.R.S. § 12-349. In our discretion, we decline to award either party its attorney's fees or taxable costs.

CONCLUSION

¶9 For the foregoing reasons, we dismiss the appeal.



AMY M. WOOD • Clerk of the Court
FILED: AA