IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE CBM GROUP, INC., A CALIFORNIA CORPORATION,
AS MANAGING AGENT FOR ANTHONY GARDENS APARTMENTS,
D/B/A DEL CORONADO APARTMENTS,
Plaintiff/Appellee,

v.

GAIL ABNER,
Defendant/Appellant.

No. 2 CA-CV 2016-0096
Filed June 6, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20160229
The Honorable Stephen C. Villarreal, Judge

APPEAL DISMISSED

COUNSEL

King & Frisch, P.C., Tucson
By James C. Frisch
Counsel for Plaintiff/Appellee

Southern Arizona Legal Aid, Tucson
By Julianne M. Yee
Counsel for Defendant/Appellant

MEMORANDUM DECISION

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

M I L L E R, Judge:

¶1 Gail Abner appeals the trial court's ruling finding her guilty of forcible entry and detainer ("FED"). Because her notice of appeal was premature, we lack jurisdiction and must dismiss the appeal.

Factual and Procedural Background

¶2 CBM Group, Inc. ("CBM") filed this FED action against Abner in January 2016. After a bench trial, in an unsigned minute entry filed February 25, the trial court found Abner guilty of FED and granted leave for CBM's attorney to submit an affidavit for attorney fees and costs pursuant to *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 673 P.2d 927 (1983). The next day, Abner filed a notice of appeal from the minute entry. On March 2, the court granted CBM's request for fees and costs and directed CBM's attorney to prepare a form of judgment. Counsel did so, and the signed judgment was filed on March 8. Abner did not file a new or amended notice of appeal.

Jurisdiction

¶3 CBM argues we lack jurisdiction over this appeal, pointing out our "jurisdiction is created by the legislature and limited by statute." *Camasura v. Camasura*, 238 Ariz. 179, ¶ 5, 358 P.3d 600, 602 (App. 2015). If we lack jurisdiction then we are without authority to entertain an appeal. *In re Marriage of Kassa*, 231 Ariz. 592, ¶ 3, 299 P.3d 1290, 1291 (App. 2013).

¶4 In a FED action originally commenced in superior court, an appeal is to be taken "as in other civil actions." A.R.S. § 12-1182(A); *see also Morgan v. Cont'l Mortg. Inv'rs*, 16 Ariz. App. 86, 91, 491 P.2d 475, 480 (1971) (interpreting § 12-1182 to apply to court of appeals when original action commenced in superior court). The statute governing appeals in other civil actions permits appeal from "a final judgment entered in an action or special proceeding commenced in a superior court." A.R.S. § 12-2101(A)(1).[1] "A judgment is not final until it is signed." *Lopez v. Food City*, 234 Ariz. 349, ¶ 2, 322 P.3d 166, 167 (App. 2014); *see* Ariz. R. Civ. P. 58(b)(1).

¶5 As a general rule, a notice of appeal is premature and ineffective if it is filed before a final judgment. *Lopez*, 234 Ariz. 349, ¶ 2, 322 P.3d at 167; *see Craig v. Craig*, 227 Ariz. 105, ¶ 13, 253 P.3d 624, 626 (2011). This court lacks jurisdiction to determine such an appeal "unless the prematurity of the notice of appeal is overcome by the narrow '*Barassi*[2] exception' or by [Rule 9(c), Ariz. R. Civ. App. P.]" *Camasura*, 238 Ariz. 179, ¶ 6, 358 P.3d at 602. Otherwise, "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."[3] *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).

¶6 Here, Abner filed a notice of appeal on February 26, but the trial court did not enter a signed judgment until March 8. Abner's notice was premature and ineffective unless one of the exceptions applies. *See Lopez*, 234 Ariz. 349, ¶ 3, 322 P.3d at 167.

¶7 The *Barassi* exception "applies only if the notice of appeal is 'filed after the trial court has made its final decision, but before it

---

[1]Section 12-2101(A)(1) contains an express exception for a FED action in which the annual rental value of the property is less than $300, but here, it is not.

[2]*See generally Barassi v. Matison*, 130 Ariz. 418, 421-22, 636 P.2d 1200, 1203-04 (1981).

[3]No time-extending motion was filed in this case.

has entered a formal judgment, if no decision of the court could change and the only remaining task is merely ministerial.'" *Id.* ¶ 4, *quoting Smith*, 212 Ariz. 407, ¶ 37, 132 P.3d at 1195. The amount of attorney fees and costs is a discretionary matter that is not merely ministerial. *See Camasura*, 238 Ariz. 179, ¶ 10, 358 P.3d at 603; *Ghadimi v. Soraya*, 230 Ariz. 621, ¶ 13, 285 P.3d 969, 971-72 (App. 2012). Because Abner appealed before the court had ruled on the amount of attorney fees and costs, the *Barassi* exception is inapplicable.[4] *See Camasura*, 238 Ariz. 179, ¶ 10, 358 P.3d at 603.

¶8 Nor does Rule 9(c), Ariz. R. Civ. App. P., overcome the prematurity of Abner's notice of appeal. Rule 9(c) provides: "A notice of appeal or cross-appeal filed after the superior court announces an order or other form of decision—but before entry of the resulting judgment that will be appealable—is treated as filed on the date of, and after the entry of, the judgment." In *Camasura*, we clarified that this rule, like its federal counterpart, applies "only when [the trial] court announces a decision that *would be* appealable if immediately followed by the entry of judgment." 238 Ariz. 179, ¶ 14, 358 P.3d at 604, *quoting FirsTier Mortg. Co. v. Inv'rs Mortg. Ins. Co.*, 498 U.S. 269, 276 (1991). Here, the trial court's rulings at the end of the last day of trial were not final and did not dispose of all the issues, such as the amount of attorney fees. Rule 9(c) does not preserve Abner's notice of appeal. *See Camasura*, 238 Ariz. 179, ¶ 15 & n.4, 358 P.3d at 604 & n.4. We have no jurisdiction.

Attorney Fees and Costs on Appeal

¶9 Both parties request attorney fees and costs in this court. Although we lack jurisdiction over the appeal, we nevertheless have authority to award appellate attorney fees. *See Lightning A Ranch*

---

[4]Abner argues this court should expand the *Barassi* exception and hold that an unresolved attorney fees claim does not defeat finality. Both *Camasura* and *Ghadimi* reject that position, and we see no compelling reason to overrule those precedents. *See State v. Hickman*, 205 Ariz. 192, ¶ 37, 68 P.3d 418, 426 (2003) ("Any departure from the doctrine of *stare decisis* demands special justification."), *quoting Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

Venture v. Tankersley, 161 Ariz. 497, 500, 779 P.2d 812, 815 (App. 1989) (appellees awarded attorney fees on appeal despite no jurisdiction over appeal); *but see Burke v. Ariz. State Ret. Sys.*, 206 Ariz. 269, ¶ 7, 77 P.3d 444, 447 (App. 2003) (court may award fees only where expressly authorized by statute or contract). Because she was not the successful party, we deny Abner's requests for fees and costs pursuant to the lease agreement and A.R.S. § 12-341.01(A), and, in our discretion, under A.R.S. § 33-1377(D). Section 33-1377(G) does not apply because Abner was found guilty; thus, we deny her request for costs under that subsection as well.

¶10 In our discretion, we deny CBM's requests for fees and costs pursuant to the lease agreement and § 12-341.01. We deny CBM's requests for costs pursuant to A.R.S. §§ 12-1181(A) and 12-1182(B) because Abner is not currently in possession of the property; therefore, those statutes are inapplicable.

¶11 CBM also requests attorney fees and costs pursuant to A.R.S. § 12-1178(A). We ordered the parties to submit supplemental briefs discussing the applicability of § 12-1178(A) to this appeal. The statute provides in relevant part:

> If the defendant is found guilty of forcible entry and detainer or forcible detainer, the court *shall* give judgment for the plaintiff for restitution of the premises, for all charges stated in the rental agreement and for damages, attorney fees, court and other costs and, at the plaintiff's option, all rent found to be due and unpaid through the periodic rental period, as described in § 33-1314, subsection C, as provided for in the rental agreement, and shall grant a writ of restitution.

§ 12-1178(A) (emphasis added). In her supplemental brief, Abner argues § 12-1178(A) does not require an award of attorney fees and costs in a FED action brought under the Arizona Residential Landlord and Tenant Act (ARLTA). We agree. Section 33-1377, which is part of ARLTA, provides that the procedures of Title 12, Chapter 8,

Article 4 of the Arizona Revised Statutes—including § 12-1178(A)—apply to residential special detainer actions "[e]xcept as provided in this section." § 33-1377(A). The statute continues: "In addition to determining the right to actual possession, the court *may* assess damages, attorney fees and costs as prescribed by law." § 33-1377(D) (emphasis added). The specific, discretionary attorney fees and costs provision of § 33-1377(D) controls over the general, mandatory attorney fees and costs provision of § 12-1178(A).[5] § 33-1377(A); *see also Democratic Party of Pima Cty. v. Ford*, 228 Ariz. 545, ¶¶ 15-17, 269 P.3d 721, 725-26 (App. 2012) (applying specific discretionary costs statute rather than general mandatory one). And CBM does not request attorney fees and costs under § 33-1377.

Disposition

¶12 Lacking jurisdiction, we dismiss the appeal.

[5]For the same reason, we deny CBM's request for costs on appeal pursuant to the general costs statute, A.R.S. § 12-341. *See Democratic Party of Pima Cty. v. Ford*, 228 Ariz. 545, ¶¶ 15-17, 269 P.3d 721, 725-26 (App. 2012).