

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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GOE3, LLC, AN ARIZONA LIMITED LIABILITY COMPANY,  
*Plaintiff/Counterdefendant/Appellant,*

*v.*

HARK GENERAL CONTRACTING, LLC,  
AN ARIZONA LIMITED LIABILITY COMPANY,  
*Defendant/Counterplaintiff/Appellee.*

No. 2 CA-CV 2020-0135  
Filed March 26, 2021

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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NOT FOR PUBLICATION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).

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Appeal from the Superior Court in Pima County  
No. C20172732  
The Honorable Catherine M. Woods, Judge  
The Honorable Charles V. Harrington, Judge  
The Honorable Jeffrey T. Bergin, Judge

**APPEAL DISMISSED**

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Horne Slaton PLLC, Scottsdale  
By Thomas C. Horne  
*Counsel for Plaintiff/Counterdefendant/Appellant*

Lee & Travers PLC, Tucson  
By Brenda J. Lee  
*Counsel for Defendant/Counterplaintiff/Appellee*

**MEMORANDUM DECISION**

Vice Chief Judge Staring authored the decision of the Court, in which Presiding Judge Espinosa and Judge Eckerstrom concurred.

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STARING, Vice Chief Judge:

¶1 GOE3, LLC appeals from the trial court's grant of partial summary judgment in favor of Hark General Contracting, LLC, denial of its motion in limine, and dismissal of its breach of contract claim without prejudice. For the reasons stated below, we dismiss this appeal.

**Factual and Procedural Background**

¶2 In 2017, GOE3 filed a complaint against Hark, contending Hark had breached its contract with GOE3 by failing to install electrical charging stations, thereby causing GOE3 damages. Hark filed a counterclaim, alleging GOE3 had breached the contract and violated Arizona's Prompt Pay Act, A.R.S. §§ 32-1181 to 32-1188,<sup>1</sup> by failing to pay Hark for work performed in connection with the contract.

¶3 Before trial, Hark moved for partial summary judgment on its counterclaim. The trial court ultimately granted the motion but denied Hark's request to designate it a "final judgment" under Rule 54(b), Ariz. R. Civ. P. GOE3 filed a motion in limine, seeking an order "prohibiting any mention of the prompt pay act before the jury," and also requested reconsideration of the court's summary judgment ruling. The court denied both motions, and the case proceeded to trial.

¶4 After the jury found in favor of Hark, GOE3 moved for a new trial and relief from the judgment based, in part, on Hark's counsel's promise and eventual failure to obtain checks material to the issue of whether GOE3 had paid Hark for its work under the contract. GOE3 also argued that counsel did not inform it of this failure "until it [was] too late" for GOE3 to obtain the checks before trial. The trial court concluded defense counsel had committed misconduct and granted GOE3's motion for a new trial.

¶5 Before the second trial, Hark moved to dismiss the case based on GOE3's failure to file a preliminary expert opinion affidavit satisfying

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<sup>1</sup>Former A.R.S. §§ 32-1129 to 32-1129.07.

GOE3, LLC v. HARK GEN. CONTRACTING, LLC  
Decision of the Court

the requirements set forth in A.R.S. § 12-2602. In response, GOe3 filed an expert “[d]eclaration,” purporting to comply with the statutory requirements. The trial court found “the information submitted by [GOe3] relating to the preliminary expert opinion . . . insufficient to satisfy A.R.S. § 12-2602” and granted it an additional thirty days “to prepare and submit a compliant affidavit.” Alleging GOe3 had failed to file the required affidavit, Hark renewed its motion to dismiss, which the court granted without prejudice. GOe3 subsequently filed an untimely response to Hark’s motion, and the court affirmed its order dismissing GOe3’s complaint without prejudice. This appeal followed.

**Discussion**

¶6 GOe3 challenges the trial court’s grant of partial summary judgment in favor of Hark, denial of its motion in limine, and dismissal of its case without prejudice. As required by Rule 13(a)(4), Ariz. R. Civ. App. P., GOe3 has included in its opening brief a statement of our jurisdiction, asserting that “[t]his Court has jurisdiction pursuant to A.R.S. § 12-2101(A)(1).” This court, however, has an independent duty to determine whether it has jurisdiction over an appeal. *See Ruesga v. Kindred Nursing Ctrs., L.L.C.*, 215 Ariz. 589, ¶ 8 (App. 2007).

¶7 Appellate jurisdiction is limited by statute. *See Hall Fam. Props., Ltd. v. Gosnell Dev. Corp.*, 185 Ariz. 382, 386 (App. 1995). “If no statute makes an order appealable, there is no jurisdiction to consider the merits of an appeal from that order.” *Id.* Section 12-2101(A) lists the instances when “[a]n appeal may be taken to the court of appeals from the superior court.” Normally, an aggrieved party appeals from a trial court’s order upon entry of a “final judgment.” § 12-2101(A)(1); *see Harris v. Cochise Health Sys.*, 215 Ariz. 344, ¶ 8 (App. 2007).

¶8 Contrary to GOe3’s assertion, the trial court’s order dismissing its complaint without prejudice is not a final judgment. *See State ex rel. Hess v. Boehringer*, 16 Ariz. 48, 51 (1914); *McMurray v. Dream Catcher USA, Inc.*, 220 Ariz. 71, ¶ 4 (App. 2009); *L.B. Nelson Corp. v. W. Am. Fin. Corp.*, 150 Ariz. 211, 217 (App. 1986). And, GOe3 does not argue any statute of limitations bars the refiling of its claim such that the order of dismissal “in effect determine[d] the action and prevent[ed] final judgment from which an appeal might [have] be[en] taken.” *Boehringer*, 16 Ariz. at 51; *see also* § 12-2101(A)(3) (appeal may be taken from “any order affecting a substantial right made in any action when the order in effect determines the action and prevents judgment from which an appeal might be taken”). Because the order dismissing GOe3’s complaint without prejudice is not a final judgment, we have no jurisdiction. *See L.B. Nelson Corp.*, 150 Ariz. at 217.

GOE3, LLC v. HARK GEN. CONTRACTING, LLC  
Decision of the Court

¶9 Both parties request attorney fees pursuant to A.R.S. § 12-341.01. Because we dismiss on jurisdictional grounds not raised or briefed by either of the parties, we decline to award fees in this matter.

**Disposition**

¶10 The appeal is dismissed.