IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE THE ESTATE OF
ANDREW MANNINA, DECEASED

ANJANETTE SCHILDHORN, AS PERSONAL REPRESENTATIVE
FOR THE ESTATE OF ANDREW MANNINA,
Petitioner/Appellant,

v.

ANTHONY BADALUCCO AND JANINE BADALUCCO, INDIVIDUALLY AND AS TRUSTEES OF THE ANDREW MANNINA LIVING TRUST, DATED JULY 7, 2016; AND 349 E. CALLE CRIBA GREEN VALLEY, AZ 85614 LLC, AN ARIZONA LIMITED LIABILITY COMPANY,
Respondents/Appellees.

No. 2 CA-CV 2021-0094
Filed June 1, 2022

Appeal from the Superior Court in Pima County
No. PB20180906
The Honorable Kenneth Lee, Judge

APPEAL DISMISSED

COUNSEL

Giordano & Heckele PLLC, Tucson
By Gerald F. Giordano Jr. and Mark W. Heckele
Counsel for Petitioner/Appellant

Mesch Clark Rothschild, Tucson
By J. Emery Barker, Robert Michael Way, Nathan S. Rothschild, and Bernardo M. Velasco
Counsel for Respondents/Appellees

MEMORANDUM DECISION

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

E S P I N O S A, Judge:

¶1 In this probate dispute, Anjanette Schildhorn filed an appeal from the trial court's grant of summary judgment in favor of appellees/respondents Anthony and Janine Badalucco and 349 E. Calle Criba LLC (jointly referred to as respondents). Because this court derives its jurisdiction by statute, in every appeal we have an independent obligation to ensure we have jurisdiction. *Deal v. Deal*, 252 Ariz. 387, ¶ 6 (App. 2021). Because it appeared that we lacked jurisdiction here, we directed the parties to submit simultaneous memoranda on that issue. Having considered those memoranda, we dismiss the appeal.

Factual and Procedural Background

¶2 In July 2018, Schildhorn filed an application seeking her informal appointment as personal representative of her father's estate, claiming he died intestate and she was his sole heir. In November 2018, the Badaluccos filed a demand for notice, and in December they filed a will that directed the residuary of Mannina's estate to be held and disposed of according to the terms of the Andrew Mannina Living Trust dated July 7, 2016.[1] In March 2020, Schildhorn filed a petition seeking a declaratory judgment invalidating the will, trust, and a quitclaim deed conveying Mannina's home to the trust. She also requested recovery of other assets. The Badaluccos filed an objection to the petition and filed a counter-

[1] Mannina had previously conveyed real property, financial instruments, and "[a]ll other personal property" to the trust.

petition, seeking a declaration that the will and trust were valid and enforceable, requesting that the will be admitted to formal probate, and asking the court to appoint one of them as personal representative. Thereafter, the Badaluccos successfully moved for summary judgment, and the trial court dismissed Schildhorn's petition with prejudice. On May 25, 2021, the court entered a purportedly final judgment that recited the finality language required by Rule 54(c), Ariz. R. Civ. P., but failed to resolve the Badaluccos' request to admit the will to probate. On June 23, 2021, Schildhorn filed a notice of appeal.

¶3 In October 2021, the parties filed a joint motion in this court, acknowledging that the finality certification under Rule 54(c) was incorrect and requesting that we suspend the appeal and revest jurisdiction in the trial court to "consider and determine whether to make the necessary findings under Rule 54(b) and enter judgment thereunder." This court granted the motion, suspending the appeal and revesting jurisdiction in the trial court pursuant to Rule 3(b), Ariz. R. Civ. App. P., "to allow the trial court to consider entering a final, appealable order under Rule 54(c)[, Ariz. R. Civ. P.] which does in fact leave no issue unresolved."[2] The trial court subsequently entered an appealable judgment pursuant to Rule 54(b); Schildhorn did not file a new or amended notice of appeal following the entry of that judgment.

Discussion

¶4 A notice of appeal filed in the absence of a final judgment is premature. *Craig v. Craig*, 227 Ariz. 105, ¶ 13 (2011). "Ordinarily, a premature notice of appeal is a nullity." *McCleary v. Tripodi*, 243 Ariz. 197, ¶ 8 (App. 2017). Schildhorn's notice of appeal was premature because it was filed before a final judgment was entered. Notwithstanding the

[2] Contrary to Schildhorn's contention, our order did not violate *Madrid v. Avalon Care Ctr.-Chandler, L.L.C.*, 236 Ariz. 221, ¶¶ 5, 10 (App. 2014). There, a different department of this court held that an appellate court has jurisdiction to suspend an appeal and revest jurisdiction in the trial court to permit the entry of a Rule 54(c) judgment but does not have jurisdiction to suspend and revest for Rule 54(b) language. Although the parties had specifically requested that we revest for purposes of Rule 54(b), as noted above, we revested jurisdiction to allow the trial court to enter an order addressing all claims, thereby permitting the court to enter an order substantively certifiable as final under Rule 54(c), not Rule 54(b), as Schildhorn contends.

certification of the order as final pursuant to Rule 54(c), it was not a final judgment because at least one outstanding claim remained when it was entered. *See Madrid v. Avalon Care Ctr.-Chandler, L.L.C.*, 236 Ariz. 221, ¶ 6 (App. 2014) ("A statement that a judgment is final pursuant to Rule 54(c) when, in fact, claims remain pending does not make a judgment final and appealable.").

¶5 There are two narrow exceptions to the general rule that a premature notice of appeal is a nullity, one of which is the *Barassi* exception. *Barassi v. Matison*, 130 Ariz. 418, 422 (1981); *McCleary*, 243 Ariz. 197, ¶¶ 9-11. That exception allows an appellate court to exercise jurisdiction when a premature notice of appeal is "filed after the trial court has made its final decision, but before it has entered a formal judgment, if no decision of the court could change and the only remaining task is merely ministerial." *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, ¶ 37 (2006); *McCleary*, 243 Ariz. 197, ¶ 9. That exception, however, does not apply here. The parties agree that the trial court's May 2021 order was not a final judgment under Rule 54(c), despite its recital to the contrary, because it failed to resolve the Badaluccos' request to admit the will to probate. Thus, the remaining tasks were not merely ministerial—given that a substantive claim remained unresolved. *See Smith*, 212 Ariz. 407, ¶ 37; *cf. Baker v. Bradley*, 231 Ariz. 475, ¶ 26 (App. 2013) (entry of judgment containing contents of minute entry was a "ministerial act" under *Barassi*).

¶6 A premature notice of appeal may also be cured by the narrow exception provided in Rule 9(c), Ariz. R. Civ. App. P. *McCleary*, 243 Ariz. 197, ¶¶ 11-16. That rule states: "[a] notice of 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." It allows a premature notice of appeal to be regarded as timely if the order from which the appeal is taken "could form the basis of a final judgment" and "actually resulted in final judgment." *Id.* ¶ 19. The May 2021 judgment clearly did not announce a final judgment pursuant to Rule 54(c), Ariz. R. Civ. P., because, notwithstanding its certification to the contrary, not all claims were resolved. And although "[a] decision resolving 'fewer than all' claims against all parties in an action is a 'final judgment'" if it includes the requisite findings, *Banner Univ. Med. Ctr. Tucson Campus, LLC v. Gordon*, 252 Ariz. 264, ¶ 11 (2022), the May order did not announce a judgment that could have been final under Rule 54(b) because it did not include the required findings.

¶7 Respondents assert that a premature notice of appeal of a Rule 54(b) judgment may never be salvaged under Rule 9(c), Ariz. R. Civ. App. P. We disagree. Here, however, the May judgment recited it was a decision on all claims, albeit erroneously, and it lacked any findings reflecting the court's deliberate decision to direct the entry of judgment as to less than all claims and permit that part of the litigation to be appealable. Lacking that language or any language reflecting the court's intent to enter such a judgment, the subsequently entered Rule 54(b), Ariz. R. Civ. P., judgment did not cure the prematurity of the notice of appeal. Schildhorn was thus required to file a new or amended notice of appeal from the December 6, 2021, Rule 54(b) judgment to preserve her right to appeal from that judgment. *Cf. McCleary*, 243 Ariz. 197, ¶¶ 15-16.[3]

Costs & Attorney Fees

¶8 The Badaluccos request their attorney fees and costs on appeal. Pursuant to A.R.S. § 12-341, they are entitled to their costs upon compliance with Rule 21, Ariz. R. Civ. App. P., but in our discretion we decline their request for attorney fees. *See* A.R.S. § 14-1105(A) (court may award estate or trust attorney fees it deems just resulting from unreasonable conduct).

Disposition

¶9 For the reasons stated above, the appeal is dismissed for lack of jurisdiction.

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[3]Schildhorn also claims no new or amended notice of appeal was required, citing Rule 3(b), Ariz. R. Civ. App. P., and *Brumett v. MGA Home Healthcare, L.L.C.*, 240 Ariz. 420 (App. 2016), particularly relying on ¶ 34 of *Brumett*. But the case discussed there is inapposite; jurisdiction was suspended and revested so that the court could enter a Rule 54(c), Ariz. R. Civ. P., judgment because no judgment certified under Rule 54(b) or (c) had ever been entered in that case. *See Brumett*, 240 Ariz. 420, ¶ 34. Here, there ultimately was a final, appealable judgment, but appellant failed to file a timely new or amended notice of appeal, which was necessary to confer jurisdiction. *See* Ariz. R. Civ. App. P. 9(a) (must file notice of appeal within thirty days of entry of judgment from which appeal is taken); *In re Marriage of Thorn*, 235 Ariz. 216, ¶ 5 (App. 2014) (failure to file timely notice of appeal deprives appellate court of jurisdiction).