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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| MM&A PRODUCTIONS, LLC, an Arizona limited liability company,<br><br>Plaintiff/Appellant,<br><br>v.<br><br>YAVAPAI-APACHE NATION, a federally recognized Indian tribe; YAVAPAI-APACHE NATION's CLIFF CASTLE CASINO, TRIBAL GAMING BOARD; and CLIFF CASTLE CASINO BOARD OF DIRECTORS,<br><br>Defendants/Appellees. | 2 CA-CV 2009-0042<br>DEPARTMENT B<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 28, Rules of Civil Appellate Procedure |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20085949

Honorable Paul E. Tang, Judge

APPEAL DISMISSED

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Snell & Wilmer L.L.P.
By Jeffrey Willis and Robert Bernheim
Tucson
Attorneys for Plaintiff/Appellant

Crowell Law Offices
By Scott Crowell
Kirkland, Washington
Attorneys for Defendants/Appellees

E C K E R S T R O M, Presiding Judge.

**¶1** Appellant MM&A Productions appeals from the trial court's dismissal of its action against the Yavapai-Apache Nation's Cliff Castle Casino ("the Tribe"). MM&A maintains the Tribe waived its sovereign immunity and the court erred in concluding it lacked subject matter jurisdiction over the action. It also maintains the court wrongly "accelerate[d] the date by which [it] needed to appeal," and erred in denying its motion for relief under Rule 60(c), Ariz. R. Civ. P. Because none of the orders from which MM&A appeals is appealable, we conclude we lack jurisdiction of this matter and dismiss the appeal.

**Background**

**¶2** In August 2008, MM&A brought this action against the Tribe alleging breach of contract, unjust enrichment, intentional interference with prospective business advantage, and fraud. The Tribe moved to dismiss the action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), Ariz. R. Civ. P. On December 19, 2008, the trial court issued a signed order granting the Tribe's motion to dismiss. Subsequently, on December 26, 2008, the trial court also apparently mistakenly signed a second order, which it later ordered "removed from the file and declared null and void" on January 14, 2009.

**¶3** After the trial court issued the January 14 order declaring the December 26 order null and void, MM&A made an "emergency motion for reinstatement of court's order," seeking to have the December 26 order reinstated, so as to "restore [its] time to file a notice

of appeal." MM&A's counsel stated that his firm had received an unsigned copy of the first order, a signed copy of the first order, and a copy of the signed second order. Only the second order was docketed by the firm. When counsel received the order nullifying the second order on January 16, the time for appeal had almost lapsed and MM&A had less days to appeal than it had believed. And, because counsel had been "out of Tucson and unavailable" until January 22, he did not discover how little time he had until after the time for appeal had passed. Citing Rule 60(a) and Rule 60(c)(1) and (6), Ariz. R. Civ. P., MM&A asked the court to reinstate the later order or to issue an order *nunc pro tunc* to amend the entry date of the December 19 order.

**¶4** MM&A filed its notice of appeal on January 23, 2009, appealing from the December 19 order, the December 26 order, "as well as any other related orders" and the order declaring the December 26 order void. The trial court subsequently denied MM&A's Rule 60 motion, finding it had not established the factors under Rule 60(c) because it had not established excusable neglect under Rule 60(c)(1). The trial court also denied MM&A's motion for reconsideration of the denial of the Rule 60 motion. MM&A thereafter filed an amended notice of appeal, appealing from the trial court's rulings on its Rule 60 motion and motion for reconsideration as well as the rulings from which it had originally appealed.

**¶5** The Tribe moved this court to dismiss the appeal, arguing that MM&A's notice of appeal had been untimely. MM&A argued, *inter alia*, that at a minimum the trial court's ruling voiding the December 26 order and its "failure to grant Rule 60 relief [were] . . .

issue[s] on appeal" and that its notice of appeal as to those rulings was timely. This court granted the Tribe's motion in part, stating that MM&A's notice of appeal had been untimely as to the December 19 order; that the December 26 order had been voided by the trial court and, therefore, could not be appealed; and that the trial court's orders denying MM&A's Rule 60 motion and motion for reconsideration had not been signed and therefore were not final, appealable orders. We stated, however, that we took no position on "whether [the January 14 order voiding the December 26] order is substantively appealable."

**¶6** MM&A moved for reconsideration, urging us to stay the appeal, to revest jurisdiction in the trial court, and to allow the trial court to issue signed orders on its Rule 60 motion and motion for reconsideration. We granted that motion in part, noting the trial court had "continuing jurisdiction with respect to" MM&A's post-judgment motions. We stayed this appeal and gave MM&A leave "to obtain signed, appealable orders in the trial court" so that any new appeal from those orders could be consolidated with the current appeal. MM&A apparently failed to obtain signed orders promptly in the trial court. It not only moved for signed orders, but asked the trial court again for *nunc pro tunc* relief and clarification of its January 14 order. We vacated the stay of this appeal, denied the remainder of MM&A's motion for reconsideration in this court and "returned [the appeal] to the regular docket for further proceedings."

## Discussion

**¶7** As discussed above, this court previously determined it lacks jurisdiction of all orders from which MM&A appeals except the January 14 order voiding the December 26 order. In granting the Tribe's motion to dismiss the appeal, we specifically reserved judgment as to whether or not that order was substantively appealable. We must now address that question. *See Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304, 812 P.2d 1119, 1122 (App. 1991) ("This court has the duty to review its jurisdiction and, if jurisdiction is lacking, to dismiss the appeal.").

**¶8** As our supreme court has explained:

> [A]bsent a pertinent provision in the Arizona Constitution, the right of appeal exists only by statute. If there is no statute which provides that a judgment or order is appealable, the appellate courts of this state do not have jurisdiction to consider the merits of the question raised on appeal.

*Musa v. Adrian*, 130 Ariz. 311, 312, 636 P.2d 89, 90 (1981). In this case, although MM&A asserts that "the propriety of the January 14 . . . Order . . . is a primary issue under appeal," it did not cite any statute supporting the proposition that the order was appealable. And, based on our review of the statutory provisions designating the scope of our jurisdiction, we conclude it is not.

**¶9** Our appellate jurisdiction is governed by A.R.S. § 12-2101. *Grand v. Nacchio*, 214 Ariz. 9, ¶ 12, 147 P.3d 763, 769 (App. 2006); *see also Green v. Lisa Frank, Inc.*, 221 Ariz. 138, ¶ 11, 211 P.3d 16, 23 (App. 2009). Section 12-2101 provides that "[a]n appeal

may be taken to the court of appeals from the superior court" from certain enumerated types of orders. Among those orders are, *inter alia*, final judgments, "final order[s] affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment," and certain interlocutory orders. The order at issue here clearly does not fit into any of these categories. Section 12-2101(C), however, also allows for an appeal "[f]rom any special order made after final judgment." Because the order here was entered after the final judgment, we consider whether it was an appealable "special order" within the meaning of the statute.

**¶10** To determine whether the January 14 order qualifies as a special order after judgment, we must consider three factors: (1) does the order "raise different issues than those that would be raised by appealing the underlying judgment"; (2) does the order "affect the underlying judgment, relate to its enforcement, or stay its execution"; and (3) is the order "'merely "preparatory" to a later proceeding that might affect the judgment or its enforcement.'" *In re Marriage of Dorman*, 198 Ariz. 298, ¶ 3, 9 P.3d 329, 331 (App. 2000), *quoting Arvizu v. Fernandez*, 183 Ariz. 224, 227, 902 P.2d 830, 833 (App. 1995). Here, even assuming an appeal of the January 14 order would raise issues different from those that would be raised in an appeal of the December 19 judgment dismissing the action,[1] the order

[1]MM&A's arguments about the propriety of the January 14 order are different from the jurisdictional arguments that would arise in an appeal of the final judgment. But, by attacking the January 14 order MM&A is clearly seeking to revive its ability to appeal the underlying order and the trial court's decision on subject matter jurisdiction. Thus, although the first requirement of the test may not be met here, the policy concerns it arises from,

does not affect that judgment or relate to its enforcement. Indeed, the January 14 order only voided the trial court's mistakenly entered December 26 order and had no impact on the December 19 judgment.

**¶11** MM&A argues, however, that "the December 19 Order was made void and of no effect by the Superior Court's subsequent signature on the December 26 Order" and that, therefore, the time for appeal could not begin to run until it was "reinstate[d]" by the January 14 order. But, the authorities MM&A rely on in support of its contention that the December 26 order voided the December 19 order involve res judicata issues in situations where the second judgment entered included substantive changes from the original. *See Casillas v. Ariz. Dep't of Econ. Sec.*, 153 Ariz. 579, 581, 739 P.2d 800, 802 (App. 1986) (when there exist inconsistent factual determinations in two actions, second action controls for collateral estoppel); Restatement (Second) of Judgments § 15 (1982) ("When in two actions inconsistent final judgments are rendered, it is the later, not the earlier, judgment that is accorded conclusive effect in a third action under the rules of res judicata."). We do not find these authorities applicable in this case, which does not involve res judicata issues and in which the two judgments were identical.[2]

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particularly the need to prevent delayed appeals, are implicated. *See Arvizu*, 183 Ariz. at 227, 902 P.2d at 833 ("This requirement prevents a delayed appeal from the judgment, and also prevents multiple appeals raising the same issues.").

[2]We note that if the December 26 order had been substantively different from the order the trial court had signed on December 19, the January 14 order might arguably be substantively appealable on that basis. But, MM&A does not contend the December 26 order contained any substantive changes from the earlier-signed order. And, although the

**¶12** Thus, because the January 14 order does not relate to the substance of the final judgment or its enforcement nor affect a substantial right, it is not appealable as a special order entered after judgment under § 12-2101(C). In sum, MM&A has not provided, nor have we found, any statutory basis for an appeal from the January 14 order.

**Disposition**

**¶13** MM&A's appeal is dismissed for lack of jurisdiction.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge

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December 26 order is not part of the record on appeal because the trial court ordered it removed from the record, the parties have both included copies of the document in their appendixes. It does not vary from the December 19 order in any respect other than the date accompanying the trial court judge's signature.