NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

EDMUND KRASINSKI, JR., Plaintiff/Appellant, v. GARY I. GOLDSTEIN and JESSICA GOLDSTEIN, husband and wife, Defendants/Appellees.	2 CA-CV 2009-0072 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20076323

Honorable Michael O. Miller, Judge

APPEAL DISMISSED

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H O W A R D, Chief Judge.

¶1 Appellant Edmund Krasinski appeals from the superior court's order compelling arbitration and dismissing his complaint without prejudice. Because we do not have jurisdiction over Krasinski's appeal, we dismiss it.

¶2 Krasinski sued appellees Gary and Jessica Goldstein (the Goldsteins). The Goldsteins later moved to dismiss Krasinski's action or, in the alternative, to stay the case and compel arbitration. The superior court granted the Goldstein's motion, directed the Goldsteins to arrange for arbitration, and dismissed the case without prejudice. Krasinski appeals from that order.

¶3 Krasinski contends this court has jurisdiction pursuant to A.R.S. § 12-2101(B). *See* Ariz. R. Civ. App. P. 13(a)(3) (requiring appellant to state basis for court's jurisdiction). Section 12-2101(B) states that an appeal may be taken from "a final judgment entered in an action or special proceeding commenced in a superior court." Krasinski asserts that, because the trial court dismissed his complaint when it granted the Goldsteins' application for arbitration, the judgment was procedurally final and appealable, despite the fact that it lacked the language required by Rule 54(b), Ariz. R. Civ. P., before an interlocutory judgment may be regarded as final.

¶4 Pursuant to A.R.S. § 12-1502(D), when an application for arbitration is granted in a case pending in superior court, "[a]ny action or proceeding involving an issue subject to arbitration *shall* be stayed" rather than dismissed. (Emphasis added.) But here, the Goldsteins requested that the court dismiss or stay the action, and Krasinski did not object to the dismissal of the case based on the statute. Therefore, as Krasinski points out, the superior court did not stay the action, and instead dismissed the case without prejudice.

¶5 Nevertheless, the superior court's order in this case is not final and appealable. In *Ruesga v. Kindred Nursing Centers, L.L.C.*, 215 Ariz. 589, ¶¶ 10-11, 161 P.3d 1253, 1257 (App. 2007), this court concluded that an order granting a motion to compel arbitration that would have

been procedurally a final order nevertheless was not an appealable order for purposes of § 12-2101. The *Ruesga* court stated that

> the substance or effect of an order determines its character for appeal purposes. The trial court's order [being appealed] . . . merely compelled arbitration. The legislature has not made such orders appealable. To hold that the trial court's final order is appealable based on the procedural anomaly that it was entered after a previous order that had refused to refer the case to arbitration would defeat the legislature's intent in making orders compelling arbitration nonappealable.

215 Ariz. 589, ¶ 12, 161 P.3d at 1257 (citations omitted); *cf. S. Cal. Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, ¶ 16, 977 P.2d 769, 774 (1999) (even in an "independent proceeding" raising only issue of arbitrability, order compelling arbitration does not decide all issues because trial court should retain jurisdiction to confirm award).

¶6 As in *Ruesga*, the superior court's order in this case could only be considered final based upon a "procedural anomaly." Although the trial court dismissed the case without prejudice, it was required to stay the case and compel arbitration. *See* § 12-1502(D). To conclude that a procedurally improper dismissal makes an otherwise non-appealable order compelling arbitration appealable would defeat the legislative intent that orders compelling arbitration be non-appealable. *See S. Cal. Edison Co.*, 194 Ariz. 47, ¶ 16, 977 P.2d at 774 ("By expressly listing those judgments and orders that may be appealed in §§ 12-2101 and 12-2101.01, our legislature has made its intent clear that most interlocutory orders, including those compelling arbitration, are not appealable."). Accordingly, the trial court's order is not final and is instead an interlocutory order compelling arbitration.

¶7 Because the order in this case is, in effect, interlocutory, we also reject Krasinski's argument that Rule 54(b) language was not required to make the order appealable. Our supreme court has adopted a specific procedure for making an order compelling arbitration

appealable—a party can request that the trial court include Rule 54(b) language in the order. *See S. Cal. Edison Co.*, 194 Ariz. 47, ¶ 18, 977 P.2d at 775; *see also Dusold v. Porta-John Corp.*, 167 Ariz. 358, 361, 807 P.2d 526, 529 (App. 1990) (without discussion of § 12-1502(D) requirement to stay case, court concluded order dismissing all claims, ordering arbitration, and containing Rule 54(b) language appealable). But "a trial judge should enter a Rule 54(b) judgment when forcing arbitration before conclusively determining the arbitrability of the dispute would not serve the ends of justice, as when a bona fide dispute exists as to the scope of the arbitration clause and when arbitration would require a significant expenditure of time and money." *S. Cal. Edison Co.*, 194 Ariz. 47, ¶ 19, 977 P.2d at 775. And if the trial court refuses to include the language, the party must challenge that decision by special action, but not by appeal. *Id.* ¶ 20.

¶8 Here, the trial court was not asked to make a determination that an appeal concerning arbitrability would serve the ends of justice and its order did not include Rule 54(b) language. Accordingly, the order is not appealable and this court lacks jurisdiction in this case. The appeal is dismissed.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

PETER J. ECKERSTROM, Judge