FILED BY CLERK
JUN -8 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MARIPOSA ENTERPRISES, INC., an Arizona corporation, Plaintiff/Counter-Defendant/Appellee, v. LAWYERS TITLE OF ARIZONA, as Trustee under TRUST 7214-T, Defendant/Counterclaimant/Appellant.	2 CA-CV 2008-0157 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure
LAWYERS TITLE OF ARIZONA, as Trustee under TRUST 7214-T, Third-Party Plaintiff/Appellant, v. LAWYERS TITLE OF ARIZONA, as Trustee under TRUST 7443-T, Third-Party Defendant/Appellee.	

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CV-00-147

Honorable Anna M. Montoya-Paez, Judge

DISMISSED

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B R A M M E R, Judge.

¶1 Appellant, Lawyers Title of Arizona, as trustee under trust number 7214-T (Trust 7214), appeals both the trial court's judgment entered pursuant to this court's October 2007 mandate and its subsequent judgment awarding appellees, Mariposa Enterprises, Inc. (Mariposa) and Lawyers Title of Arizona, as trustee under trust number 7443-T (Trust 7443), approximately $97,000 in costs and attorney fees. We dismiss Trust 7214's appeal for lack of jurisdiction.

Factual and Procedural Background

¶2 The relevant facts are undisputed. In 1980, Mariposa's predecessor in interest, Alfredo Puchi, Jr., entered into a real estate sales and option agreement with Trust 7214 regarding several parcels of land in Santa Cruz County. The agreement provided that Trust 7214 would sell Puchi one parcel of land, parcel D, and granted Puchi the option to purchase other parcels, including parcels E-1 and E-2. Trust 7214 further agreed to grant Puchi an

easement over its parcel D-1, which is adjacent to parcel D. Puchi paid for parcel D in full, but Trust 7214 never executed an instrument granting him the easement over parcel D-1. Mariposa later became the beneficial owner of Puchi's interest in parcel D and this agreement.

¶3 Trust 7443, of which Mariposa was the beneficiary, purchased parcels E-1 and E-2 from George and Martha Barr, predecessors-in-interest to Trust 7214. As part of the transaction, Trust 7443 gave the Barrs a promissory note promising to pay for the parcels in two scheduled payments. To secure the debt, Mariposa collaterally assigned to the Barrs its beneficial interest in Trust 7443. Trust 7443 made the first scheduled payment to the Barrs, but never made the second.

¶4 In 2000, Mariposa sued Trust 7214, alleging it had breached the 1980 agreement by failing to convey to Mariposa the promised easement over parcel D-1. Trust 7214 counterclaimed, alleging Mariposa had breached the 1980 agreement by failing to perform various conditions required by the agreement. Trust 7214 also filed a third-party complaint against Trust 7443, seeking to foreclose the collateral assignment of beneficial interest because Trust 7443 had never made the second payment for parcels E-1 and E-2.

¶5 After the parties filed cross-motions for summary judgment, the trial judge, Judge Montoya-Paez, dismissed Mariposa's claim and Trust 7214's counterclaim. The court, however, entered judgment in favor of Trust 7214 on its third-party complaint against Trust 7443. Mariposa and Trust 7443 then filed motions for a new trial, to amend the judgment,

and to remove Judge Montoya-Paez from the case for cause. After an evidentiary hearing on the motion to remove Judge Montoya-Paez, Judge Harrington denied that motion. Judge Montoya-Paez then denied Mariposa and Trust 7443's motions for new trial and to amend the judgment, and entered an additional judgment granting Trust 7214 its attorney fees.

¶6 Mariposa and Trust 7443 appealed to this court, arguing the trial court had erred in dismissing Mariposa's complaint against Trust 7214 and granting Trust 7214 relief on its third-party complaint against Trust 7443. They also contended Judge Harrington had erred in denying their request to remove Judge Montoya-Paez for cause. Trust 7214 cross-appealed, contending that, if this court reversed the trial court's dismissal of Mariposa's complaint against it, we should also reverse the court's dismissal of Trust 7214's counterclaim against Mariposa. We reversed the court's grant of summary judgment in Trust 7214's favor on Mariposa's claim, as well as the judgment in Trust 7214's favor on its third-party claim against Trust 7443. *Mariposa Enters., Inc. v. Lawyers Title of Ariz.*, No. 2 CA-CV 2006-0086, ¶ 51 (memorandum decision filed July 24, 2007). We affirmed the court's dismissal of Trust 7214's counterclaim and Judge Harrington's denial of Mariposa and Trust 7443's motion to remove Judge Montoya-Paez. *Id.* ¶¶ 50-51. Because Trust 7214 was no longer the prevailing party on summary judgment, we vacated the court's judgment awarding it attorney fees. *Id.* ¶ 51. We also awarded Mariposa and Trust 7443 their attorney fees on appeal. *Id.*

¶7 On remand, the trial court entered a "Judgment Pursuant to Mandate of the Court of Appeals." In that judgment, the court reversed its dismissal of Mariposa's claim for an easement over parcel D-1. Because this court had affirmed the trial court's dismissal of Trust 7214's counterclaim against Mariposa, the court granted Mariposa its costs and attorney fees as the prevailing party on that issue. The court reversed its entry of summary judgment in favor of Trust 7214 on its third-party claim against Trust 7443 and dismissed that claim with prejudice. Trust 7214, however, had already sold parcels E-1 and E-2 at a sheriff's sale.[1] The court reasoned, therefore, "that reversal of the foreclosure without . . . setting aside the sheriff sale and an order to disgorge monies received would [be] meaningless." Accordingly, the court vacated the sheriff's sales, nullified the deeds resulting from the sales to restore title to Trust 7443, and ordered Trust 7214 to return to the purchasers all monies it had received for the property. The court also awarded Trust 7443 its costs and attorney fees as the prevailing party on Trust 7214's third-party complaint. Last, the court ordered Mariposa and Trust 7443 to file itemized affidavits of their costs and attorney fees for its review, and certified the judgment as final pursuant to Rule 54(b), Ariz. R. Civ. P.

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[1]As we noted in our July 2007 memorandum decision, although Trust 7443's property had already been sold at a foreclosure sale, it "was not sold to innocent third parties who took title without notice of Trust 7443's claim that the foreclosure was improper." *Mariposa Enters.*, No. 2 CA-CV 2006-0086, ¶ 16.

¶8 Trust 7214 moved to "Amend or Alter [the] Judgment" pursuant to Rules 59(a) and (*l*) and 60(c), Ariz. R. Civ. P. In two signed minute entries, the court denied Trust 7214's motion and awarded Mariposa and Trust 7443, jointly, $97,788 in costs and attorney fees. This appeal followed.

Discussion

¶9 In this appeal, Trust 7214 challenges those portions of the trial court's judgment pursuant to our mandate in which it set aside the sheriff's sales of parcels E-1 and E-2, ordered that title to those parcels revert to Trust 7443, required Trust 7214 to "disgorge" the proceeds from the sheriff's sales, and awarded Mariposa and Trust 7443 their costs and attorney fees for the issues on which they had prevailed. Trust 7214 also raises several arguments challenging the court's subsequent judgment awarding Mariposa and Trust 7443 approximately $97,000 in attorney fees and costs, because, it claims, Mariposa and Trust 7443 failed to file a sufficiently detailed affidavit of their costs and fees and several of the costs ultimately awarded were improper.

¶10 Mariposa and Trust 7443 assert this court lacks jurisdiction over Trust 7214's appeal. They contend a judgment on mandate may be challenged only by special action and, therefore, we should dismiss Trust 7214's attempt to challenge that judgment by appeal. Our supreme court has noted that "when a given cause has received the consideration of a reviewing court, has been decided on its merits and has been remanded with specific instructions, the court to which such mandate is directed has no power to do anything but to

obey." *Tovrea v. Superior Court*, 101 Ariz. 295, 297, 419 P.2d 79, 81 (1966). And, when the trial court on remand enters judgment inconsistent with the appellate court's mandate, "mandamus is the proper remedy." *Id.*; *see also* Ariz. R. P. Spec. Actions 1(a) (relief previously obtained by writ of mandamus now obtained by special action). Consistent with *Tovrea*, our courts have since held that a "[trial] court's entry of judgment based on [an appellate court's] specific mandate and opinion is not appealable." *Scates v. Ariz. Corp. Comm'n*, 124 Ariz. 73, 75, 601 P.2d 1357, 1359 (App. 1979). Rather, our jurisprudence emphasizes that "the appropriate method of seeking review of a trial court's judgment on remand entered pursuant to specific directions of an appellate court is through special action." *Id.* at 76, 601 P.2d at 1360; *see also Sepo v. Case*, 25 Ariz. App. 176, 180, 541 P.2d 1160, 1164 (1975).

¶11 Nonetheless, Trust 7214 insists the rule *Scates* announced does not bar this appeal. Trust 7214 suggests the reason the appellant in *Scates* could not challenge the trial court's judgment on mandate by appeal was because its appeal was, in fact, a veiled attempt to challenge the appellate court's decision. Trust 7214 asserts that, because the crux of its challenge to the trial court's judgment on mandate is that the court "ruled on numerous issues that were not included or addressed in the Mandate," *Scates* does not apply. But Trust 7214 misreads *Scates*.

¶12 The court in *Scates* cited a case dismissing an appeal in which the appellant's challenge to the trial court's judgment on mandate was "'in fact an attempt to appeal to [the

appellate] court from its own judgment.'" 124 Ariz. at 75-76, 601 P.2d at 1359-60, *quoting* *Gusick v. Eyman*, 81 Ariz. 182, 184, 302 P.2d 944, 945 (1956). However, the appellant in *Scates* did not indirectly attempt to challenge the appellate court's decision but, rather, argued the trial court had erred in denying it attorney fees the appellate court had given the trial court discretion to grant. 124 Ariz. at 75-76, 601 P.2d at 1359-60. Contrary to Trust 7214's suggestion, neither *Scates* nor the other cases we have discussed hold that challenges to a trial court's judgment on mandate must be brought by special action only when they are an indirect attempt to appeal from the appellate court's underlying decision. *See id.*; *Sepo*, 25 Ariz. App. at 180, 541 P.2d at 1164 (special action appropriate method "to test whether the trial court is acting contrary to the directives of the appellate court").

¶13 Trust 7214 next notes that *Sepo* merely stated a special action "could" be used to challenge a trial court's judgment pursuant to mandate. Therefore, Trust 7214 reasons, special action is merely one, but not the exclusive, method of challenging a trial court's judgment pursuant to mandate. In *Sepo*, the petitioner sought special action relief, arguing the trial court, on remand from the memorandum decision Division One of this court issued, had entered a judgment pursuant to mandate misapplying the appellate court's decision. 25 Ariz. App. at 179, 541 P.2d at 1163. The respondent argued "the proper remedy [w]as by appeal and not by special action." *Id.* at 179, 541 P.2d at 1163. Division One disagreed, concluding, based on *Tovrea*, that "special action can be utilized." *Sepo*, 25 Ariz. App. at 180, 541 P.2d at 1164. Although the court in *Sepo* used the word "can," nothing in that decision

suggests relief would be available alternatively by appeal. *See id.* Indeed, our courts have since clarified that special action is the only method to challenge the propriety of a trial court's judgment pursuant to an appellate court's mandate.[2] *See, e.g., Scates*, 124 Ariz. at 76, 601 P.2d at 1360.

¶14 This, however, does not end our inquiry. In addition to challenging the trial court's judgment on mandate, Trust 7214 also appeals from the court's subsequent judgment awarding Mariposa and Trust 7443 approximately $97,000 in costs and attorney fees. *See generally Egan-Ryan Mech. Co. v. Cardon Meadows Dev. Corp.*, 169 Ariz. 161, 172, 818 P.2d 146, 157 (App. 1990) (when trial court awards attorney fees in one final judgment and actual amount of attorney fees in another, each judgment separately appealable). However, other claims remain to be litigated below, and the trial court did not certify as final pursuant to Rule 54(b), Ariz. R. Civ. P., its judgment awarding the amount of fees. "[W]ithout the 54(b) certification, prior judgments which adjudicate some but not all claims in a given" action are not final and appealable until "entry of the judgment entered last in time—the judgment which effectively terminates all issues remaining in the litigation." *Hill v. City of*

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[2]We note Trust 7214 has already filed a petition for special action in this court, challenging the trial court's judgment on mandate and raising substantially the same arguments it has raised in this appeal. We declined to accept jurisdiction of the special action, and our supreme court has denied Trust 7214's petition for review of that decision. *See Lawyers Title of Ariz. v. Mariposa Enters.*, No. 2 CA-SA 2008-0056 (declining jurisdiction Sept. 30, 2008), *review denied*, No. CV-08-0368-PR (Mar. 17, 2009). Thus, although special action relief may have been available to Trust 7214, it has exhausted that remedy.

Phoenix, 193 Ariz. 570, ¶ 16, 975 P.2d 700, 704 (1999). Because litigation in this case is ongoing, and because the trial court's judgment granting Mariposa and Trust 7443 approximately $97,000 in costs and attorney fees did not include Rule 54(b) certification, that judgment is not yet appealable. *See Hill*, 193 Ariz. 570, ¶ 16, 975 P.2d at 704.

Disposition

¶15 For the aforementioned reasons, we dismiss Trust 7214's appeal for lack of jurisdiction. Pursuant to both the several contracts among the parties and A.R.S. § 12-341.01, we grant Mariposa and Trust 7443's request for attorney fees and costs on appeal, pending their compliance with Rule 21(c), Ariz. R. Civ. App. P.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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GARYE L. VÁSQUEZ, Judge

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

¶16 I join in the majority's well-reasoned decision in almost every respect and believe it correctly resolves the issues before us. *Scates* and *Tovrea* unambiguously identify special action as the exclusive procedural mechanism for challenging a trial court's judgment after mandate when the petitioner contends "'the trial court is acting contrary to the directives of the appellate court'" and therefore in excess of its jurisdiction. *Scates*, 124 Ariz. at 76, 601

P.2d at 1360, *quoting Sepo*, 25 Ariz. App. at 180, 541 P.2d at 1164. Because I believe the portion of the trial court's judgment challenged here was not left unaddressed by our mandate, but was, at minimum, contemplated by our mandate, I agree that the correct and exclusive procedural mechanism for that challenge was by special action.

¶17 However, I do not read our jurisprudence as categorically prohibiting an appellate challenge to portions of the trial court's judgment on mandate resolving issues that the appellate mandate did not address at all. In my view, such final resolutions of issues by the trial court—issues the appellate mandate did not purport to resolve—are properly understood as new judgments, subsequent to the mandate. At first blush, I can see no reason why an aggrieved litigant should be foreclosed from challenging this species of new judgment by way of appeal, simply because the trial court has erroneously embedded it in the judgment on mandate. *See* A.R.S. § 12-2101(B), (C) (allowing appeal from final judgment or special order made after final judgment). For this reason, to the extent the majority suggests all challenges to trial court judgments which appear in a judgment on mandate must be raised by special action, regardless of their relationship to the actual issues resolved in the appellate mandate, I am not yet ready to join in that particular conclusion.

PETER J. ECKERSTROM, Presiding Judge