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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **DANIEL J. HERBISON,**

3 Plaintiff-Appellant,

4 v.

NO. 34,585

5 **MARIE SCHWANER, Personal**

6 **Representative of the Estate of**

7 **Robert Montgomery,**

8 Defendant-Appellee.

9 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

10 **Nan G. Nash, District Judge**

11 Daniel J. Herbison

12 Albuquerque, NM

13 Pro Se Appellant

14 Michael L. Danoff & Associates, PC

15 Michael L. Danoff

16 Albuquerque, NM

17 for Appellee

18 **MEMORANDUM OPINION**

19 **GARCIA, Judge.**

1 {1} Plaintiff/Counterdefendant (Appellant) seeks to appeal from an order finding
2 a settlement memorandum to be binding and ordering the parties to take further action.
3 We previously issued a notice of proposed summary disposition in which we proposed
4 to dismiss on grounds that the district court's order is not final. Appellant has filed a
5 memorandum in opposition, which we have duly considered. Because we remain
6 unpersuaded that this matter is properly before us, we dismiss the appeal.

7 {2} As we observed in the notice of proposed summary disposition, the right to
8 appeal is generally restricted to final judgments and decisions. *See* NMSA 1978, §
9 39-3-2 (1966). Generally, “an order or judgment is not considered final unless all
10 issues of law and fact have been determined and the case disposed of by the trial court
11 *to the fullest extent possible.*” *Clinesmith v. Temmerman*, 2013-NMCA-024, ¶ 35, 298
12 P.3d 458 (emphasis added) (internal quotation marks and citation omitted).

13 {3} The order entered below does not satisfy this standard. Although it appears to
14 resolve the central issue, it clearly contemplates further significant action, including
15 the preparation and execution of a settlement document, to be followed by a formal
16 order of dismissal. [RP 385] Clearly, such an order of dismissal would constitute a
17 final judgment, from which appeal could be taken. *See generally State v. Montoya*,
18 2008-NMSC-043, ¶ 11, 144 N.M. 458, 188 P.3d 1209 (“An order of dismissal is a
19 type of appealable final order.”). However, insofar as no order of dismissal has been

1 entered, we conclude that the appeal is premature. *See generally Thornton v. Gamble*,
2 1984-NMCA-093, ¶ 9, 101 N.M. 764, 688 P.2d 1268 (holding that a judgment did not
3 constitute a final, appealable order where it specifically contemplated the entry of a
4 further order).

5 {4} In his memorandum in opposition Appellant invokes the doctrine of practical
6 finality. [MIO 2, 5] Appellant contends that the matters which remain pending before
7 the district court merely pertain to enforcement. [MIO 5] *See State v. Heinsen*,
8 2005-NMSC-035, ¶ 15, 138 N.M. 441, 121 P.3d 1040 (“We will review a court’s
9 decision when an order effectively disposes of the issues in a case, even though
10 supplementary proceedings are necessary to enforce the order.”) To the extent that
11 subsequent matters “involve proceedings to carry out or give effect to a judgment”
12 such that the present procedural posture of the case falls within the “twilight zone” of
13 finality, *Trujillo v. Hilton of Santa Fe*, 1993-NMSC-017, ¶¶ 3, 5, 115 N.M. 397, 851
14 P.2d 1064, Appellant contends that the appeal is properly before us. [MIO 2]

15 {5} We remain unpersuaded. By its very nature, the entire dispute between the
16 parties pertains to enforcement. Moreover, while the district court’s order reflects that
17 critical determinations have been made relative to the enforceability of the putative
18 settlement agreement, and although the exhibits suggest that the settlement documents
19 are sufficiently comprehensive as to address the substantive issues between the

1 parties, the fact remains that a final version of this document remains to be formally
2 memorialized and signed. The district court’s order plainly reflects that it shall to
3 retain jurisdiction over the parties and the proceedings until that is accomplished. [RP
4 385] By expressly so providing, the district court remains in a position to address
5 additional substantive complications that may arise. Dismissal is explicitly
6 contemplated *thereafter*. [RP 385] Under the circumstances, we conclude that the
7 underlying proceedings have not been sufficiently concluded to permit the application
8 of the doctrine of practical finality. *See generally Heinsen*, 2005-NMSC-035, ¶15
9 (observing that “practical finality is the exception, rather than the rule” and the
10 doctrine is applied only “cautiously, in limited circumstances”); *and see, e.g., State*
11 *v. Candy L.*, 2003-NMCA-109, ¶ 6, 134 N.M. 213, 75 P.3d 429 (holding that an order
12 requiring restitution and contemplating the preparation of a restitution plan to be filed
13 with the district court was not final for purposes of appeal where no such plan had yet
14 been filed; the preparation and filing of a specific plan was not a ministerial act, but
15 rather a substantive determination; and ultimately, although the finality issue was
16 debatable, the Court elected to err on the side of avoiding piecemeal appeals and
17 enhancing judicial efficiency).

18 {6} In closing, we acknowledge Appellant’s concern that he may be effectively
19 denied supersedeas relief if he is compelled to sign the settlement agreement and

1 fulfill his obligations thereunder before pursuing an appeal. [MIO 5] Although this is
2 anomalous, it does not alter our assessment of the threshold jurisdictional question.
3 We further note that insofar as the district court retains jurisdiction over the
4 proceedings it is at liberty to address the problem by amending its order or taking
5 other appropriate action. *See generally Universal Constructors, Inc. v. Fielder,*
6 *1994-NMCA-112, ¶ 6, 118 N.M. 657, 884 P.2d 813* (observing that “an interlocutory
7 order, by definition, is open for revision, and the district court, upon further reflection
8 or examination, [i]s at liberty to change it” (internal quotation marks and citation
9 omitted)).

10 {7} Accordingly, for the reasons stated above and in the notice of proposed summary
11 disposition, we conclude that the district court’s order is not immediately reviewable.
12 The appeal is therefore summarily dismissed.

13 {8} **IT IS SO ORDERED.**

14
15

TIMOTHY L. GARCIA, Judge

16 **WE CONCUR:**

17
18

M. MONICA ZAMORA, Judge

19

1 **J. MILES HANISEE, Judge**