IN THE

# ARIZONA COURT OF APPEALS

DIVISION TWO

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SYCAMORE HILLS ESTATES HOMEOWNERS ASSOCIATION, INC.,
AN ARIZONA NON-PROFIT CORPORATION,
*Plaintiff/Appellant,*

*v.*

KENNETH W. ZABLOTNY AND BARBARA K. ZABLOTNY, HUSBAND AND WIFE,
INDIVIDUALLY AND AS TRUSTEES OF THE KENNETH W. ZABLOTNY AND
BARBARA K. ZABLOTNY JOINT LIVING TRUST DATED AUGUST 29, 1995,
*Defendants/Appellees*.

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No. 2 CA-CV 2019-0200
Filed January 20, 2021

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Appeal from the Superior Court in Pima County
No. C20154533
The Honorable Charles V. Harrington, Judge

**AFFIRMED IN PART; VACATED IN PART AND REMANDED**

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COUNSEL

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By Gregory L. Miles and Marshall R. Hunt
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**OPINION**

Judge Brearcliffe authored the opinion of the Court, in which Presiding Judge Eppich and Chief Judge Vásquez concurred.

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B R E A R C L I F F E, Judge:

**¶1** The Sycamore Hills Estates Homeowners Association appeals from the trial court's order denying its motion for relief from judgment, the court's award of supplemental attorney fees to Kenneth and Barbara Zablotny, and the denial of its motion for relief from that fee award. We affirm in part, vacate in part and remand.

**Factual and Procedural Background**

**¶2** Sycamore Hills Estates is a residential community governed by an Amended and Restated Declaration of Covenants, Conditions, Restrictions, and Easements ("CC&Rs"), which establishes the Sycamore Hills Estates Homeowners Association ("the Association"). The Zablotnys are homeowners in Sycamore Hills Estates and bound by the CC&Rs. In 2015, the Zablotnys filed a complaint alleging that the Association had breached the CC&Rs. The parties settled the litigation, entered into a written settlement agreement, and stipulated to a form of final judgment, incorporating the terms of the settlement agreement by reference. In March 2017, the trial court approved the settlement agreement and signed and entered the stipulated final form of judgment.

**¶3** In May 2019, following other procedural steps we need not recount here, the Association filed a Rule 60(b)(4), Ariz. R. Civ. P., motion for relief from the March 2017 judgment. In the motion, the Association argued that the parties' settlement agreement was void in part because the Association did not have the authority to agree to certain provisions that conflicted with the CC&Rs. It also asserted that the March 2017 final judgment was void because the trial court did not have "jurisdiction to render the particular judgment or order entered."

**¶4** On August 9, 2019, in an unsigned order, the trial court denied the motion, and on September 5, the Association filed a notice of appeal of that order. Before the Association filed that notice of appeal, on

August 28, the Zablotnys filed an application for a supplemental award of attorney fees incurred in defending against the Rule 60(b)(4) motion. The court granted the Zablotnys' application, awarding them fees on September 13, before the Association filed any opposition. On September 17, the Association filed its response to the Zablotnys' supplemental fee application. It thereafter filed a Rule 59, Ariz. R. Civ. P., motion for relief from the fee award.[1] The Association then timely appealed from the court's supplemental attorney fees award.

**¶5** Because the August 2019 ruling denying the Rule 60(b)(4) motion was unsigned, we suspended that appeal to allow counsel to obtain a signed order and revested the trial court with jurisdiction. A final appealable order was thereafter signed, and the appeal reinstated. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(2).

## Analysis

### Requests for Relief from the Final Judgment and Settlement Agreement

**¶6** The Association argues the trial court erred in denying its Rule 60(b)(4) motion for relief from the final judgment because, as it argued below, the court lacked the "jurisdiction to render the particular judgment or order entered." It further argues that, once we have determined that the final judgment is void, we must relieve it from the settlement agreement because it did not have the authority to enter into certain of its provisions. "We review the denial of a Rule 60(b)(4) motion *de novo*." *Laveen Meadows Homeowners Ass'n v. Mejia*, 249 Ariz. 81, ¶ 10 (App. 2020). Whether a corporation has engaged in unauthorized—or, *ultra vires*—acts, such as to render those acts void, is a question of law, which we also review *de novo*. *Tovrea Land & Cattle Co. v. Linsenmeyer*, 100 Ariz. 107, 113-14 (1966).

#### *Relief from Final Judgment*

**¶7** Rule 60(b)(4) allows a party to seek relief from a "void" final judgment or order when "the court entering it lacked jurisdiction: (1) over

[1]The trial court's ruling on the Association's Rule 59 motion does not appear in the record on appeal. Nonetheless, as we discuss in the analysis below, it is unnecessary that the record contain it because we do not have jurisdiction to review the court's ruling.

the subject matter, (2) over the person involved, or (3) to render the particular judgment or order entered." *Martin v. Martin*, 182 Ariz. 11, 15 (App. 1994). The Association, citing *Andrews v. Andrews*, 126 Ariz. 55, 58 (App. 1980), asserts that the scope of a trial court's jurisdiction is limited by the pleadings, and, if it exceeds those limits, its judgment is void. If void, a court must vacate the judgment. *Martin*, 182 Ariz. at 14.

**¶8** In the judgment here, the trial court decreed that "[t]he terms of the Settlement Agreement are approved and the Agreement is attached hereto and incorporated herein." Notwithstanding that the Association stipulated to the form of judgment entered, it claims that this approval constituted a "declaratory judgment" of the settlement agreement's validity, which the court "did not have jurisdiction 'to render.'" For purposes of this decision, we will assume without deciding that the challenged "approval" language in the final judgment constitutes a declaratory judgment.

**¶9** As we stated in *Andrews*, "[t]he power of a court to render a valid judgment is limited by the nature of the suit, and the issues raised by the pleadings. If the court's judgment exceeds those limits it is void." 126 Ariz. at 58. In *Andrews*, a post-decree child support action, the trial court granted the husband an affirmative judgment against the wife for post-decree mortgage payments. *Id.* at 56. The husband had raised the claim for mortgage payments as an affirmative defense to the wife's demand for increased child support. *Id.* at 58. The wife objected to the judgment. *Id.* at 57. On review, this court vacated that judgment concluding the statutorily limited nature of the relief available to parties in such a case commensurately limited the power of the trial court to grant certain relief. *Id.* at 58. Accordingly, its damages award was void because the court, in a dissolution action, had no authority to enter a civil judgment for claims outside of the scope of the statutory dissolution action. *Id.* Additionally, the award was invalid because the husband had not sought a civil judgment. *Id.*; *see Byrer v. A. B. Robbs Tr. Co.*, 102 Ariz. 559, 561 (1967).

**¶10** While not challenging the trial court's general authority to enter declaratory judgments, the Association asserts the judgment is void because, as it correctly notes, neither party sought declaratory relief in their pleadings. Certainly, the Zablotnys' complaint did not expressly seek a declaratory judgment as to the validity of the settlement agreement (given, of course, that it did not yet exist). Nonetheless, the stipulation by the parties seeking the court's entry of a judgment approving the settlement

agreement—to the extent such was indeed declaratory relief—provided the court the power to grant it.

**¶11** *Industrial Park Corp. v. U.S.I.F. Palo Verde Corp.*, 19 Ariz. App. 342 (1973) is instructive. *Industrial Park Corp.* was a forcible entry and detainer action; in such an action, the right to possession is the primary contested issue. *Id.* at 345. During the course of the litigation, the landlord and tenant reached a settlement agreement in which the lease was terminated and the landlord received a money judgment against the tenant for breach of the lease. *Id.* at 343. That judgment included "further damages to be determined and added by Addendum" with payment of the judgment to be made in installments. *Id.* The trial court subsequently added additional sums to the money judgment by an addendum to which the parties had also stipulated. *Id.* The tenant later fell into arrears in the installment payments and the landlord gave notice that it was accelerating the judgment debt and would begin execution. *Id.* at 343-44. Following notice of the acceleration, the tenant filed a motion to vacate the acceleration of the debt and recording of the judgment for "accident and mistake." *Id.* at 344. The trial court denied the motion. *Id.*

**¶12** On appeal, the tenant asserted that, because the action was a forcible entry and detainer action, the trial court had no jurisdiction to enter the money judgment. *Id.* It argued that the nature of such an action was for possession only and "the award of damages was therefore beyond the subject matter jurisdiction of the trial court." *Id.* It also argued the judgment addendum was invalid because, although stipulated to, it "provided a remedy not requested in the pleadings." *Id.* at 345. As to the latter issue, we concluded, "[t]he law is quite clear that provisions of a consent judgment may be sustained and enforced, even where the relief sought was outside the pleadings, so long as the court has general jurisdiction over the matters adjudicated." *Id.* And, because the trial court had constitutional and statutory authority to hear the underlying matter, it had jurisdiction to enter the stipulated judgment. *Id.* The court "had the necessary requisites for jurisdiction, namely, it had jurisdiction of the subject matter, of the parties, and jurisdiction to render the particular judgment which was stipulated to between the parties."[2] *Id.* at 344.

[2] Section 12-1178, A.R.S., was amended in 2002 to provide for damages when a defendant is found guilty of forcible entry and detainer.

**¶13** Here, the Association does not contest the trial court's constitutional or statutory authority, that is, its jurisdiction, to hear the underlying contract action. And, despite the breadth of relief ultimately granted, because the parties agreed to that relief, the court properly entered the stipulated final judgment and it is not void. The court correctly denied the Association's Rule 60(b)(4) request to set aside the final judgment.

***Relief from Settlement Agreement***

**¶14** Although we do not find the final judgment void for lack of jurisdiction, we will address the Association's second argument: that entering into the settlement agreement was an *ultra vires* act thus rendering the settlement agreement void. In the settlement agreement reached below, the Association affirmed that "[t]he individual(s) who have signed this Agreement on behalf of their respective entities hereby certify that they have the right and full corporate authority to enter into this Agreement on behalf of their entities." Nonetheless, as it did below, the Association argues section III of the settlement agreement is void because its agreement to that provision was an "*ultra vires*" act under the CC&Rs.

**¶15** An *ultra vires* corporate act is an act taken outside the authority of the corporate officers. *See Trico Elec. Coop. v. Ralston*, 67 Ariz. 358, 367 (1948). The Association claims that the contractual rights granted to the Zablotnys under section III of the settlement agreement could only be granted by a vote of the Association members, and not by the Association only through its board. The Association further asserts it had no authority to give the benefit of section III to only the Zablotnys; rather, it either had to be uniformly granted to all Association members or none at all. Pursuant to A.R.S. § 10-3304, however, the Association is barred from denying its authority to enter into the settlement agreement.

**¶16** Section 10-3304(A) states that "[e]xcept as provided in subsection B of this section, the validity of the corporate action shall not be challenged on the ground that the corporation lacks or lacked power to

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*See* 2002 Sess. Laws, ch. 53, § 1. At the time of *Industrial Park*, however, there was no provision for damages in a forcible entry and detainer action.

act." [3] Subsection B of § 10-3304 provides, in pertinent part, that a "corporation's power to act may be challenged": (1) "In a proceeding by members of a corporation that is not . . . a planned community association as defined in [A.R.S.] § 33-1802 . . . against the corporation"; (2) "In a proceeding by any member of a . . . planned community association against the corporation to enjoin the act"; or (3) "In a proceeding by the corporation, directly, derivatively or through any receiver, trustee or other legal representative, against an incumbent or former director, officer, employee or agent of the corporation." The Association is a non-profit "planned community association as defined in § 33-1802." *See* § 10-3304(B)(1). Accordingly, the Association's corporate actions may not be challenged for a lack of authority except as provided in § 10-3304(B)(2) or (3)—that is, in a proceeding brought by a member against the corporation or by the corporation "against an incumbent or former director, officer, employee or agent of the corporation."

**¶17** Here, in its Rule 60(b)(4) motion below and in its appeal of the trial court's denial of that motion, the Association challenges its own authority to act. In its motion below, it claimed "Section III of the Settlement Agreement is void as *ultra vires* because [the Association] lacked authority to enter into an agreement in conflict with its governing documents," the CC&Rs. And further, that "[b]y its own terms, the ADR apparatus in Section III applies only to the Zablotnys" and "[t]he Association lacks any authority to enter into an agreement that purports to alter the [CC&Rs] without uniform application."

**¶18** The Association is plainly challenging its authority to enter into the settlement agreement, or, at least, a key provision of it. The Association, however, is not a "member" of the Association but the Association itself, and neither Zablotny is an "incumbent, former director, officer, employee or agent of the corporation." Consequently, the Association is not authorized by § 10-3304(B) to raise a claim denying its authority here.

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[3] Because neither party mentioned § 10-3304 in their briefs, we ordered supplemental briefing on the issue. *See Meiners v. Indus. Comm'n*, 213 Ariz. 536, n.2 (App. 2006).

**¶19** In its supplemental briefing on this question, however, the Association argues that § 10-3304 is no bar because its claim "is not a generalized claim regarding the 'validity of corporate action;' it is [a] specific challenge to a purported amendment governed by the planned community statutes and the [CC&Rs]." It further asserts that "[a]n amendment to the [CC&Rs] is not 'corporate action' by the corporation within the meaning of A.R.S. § 10-3304, but it is 'member action' reserved solely to the members of the planned community association" under a different statutory scheme, A.R.S. §§ 33-1801 to 33-1818 (governing planned communities). Barring this claim under § 10-3304, it asserts, "would undermine the purposes of the planned communities statutes to construe the general 'corporate action' statute to somehow preclude a challenge to validity of [the CC&Rs] that is addressed by" other "highly specific" statutes. And "it would allow an illegal amendment to remain in force despite failure to comply with the highly specific requirements."

**¶20** Although the statutory bar of § 10-3304 could allow impermissible corporate action to stand, it does not mean that such corporate action is unchallengeable. It simply means the Association may not bring this challenge. Although neither party raised § 10-3304, and the trial court did not deny the Association's motion on this ground, the court could have correctly done so. Consequently, we affirm the court's denial of the Association's motion to set aside the settlement agreement as void on this basis. *See Forszt v. Rodriguez*, 212 Ariz. 263, ¶ 9 (App. 2006) ("We may affirm the trial court's ruling if it is correct for any reason apparent in the record.").

**Supplemental Attorney Fees**

**¶21** On appeal, the Association argues that the trial court erred in awarding supplemental attorney fees because, given its September 5, 2019 notice of appeal, the court lacked jurisdiction to do so, the fee request was untimely, and the court deprived the Association of due process by ruling on supplemental attorney fees before it could file a timely response. It further asserts that the court abused its discretion in denying its Rule 59 motion concerning supplemental attorney fees.

***Due Process***

**¶22** The Association claims a deprivation of due process when the trial court ruled on the Zablotnys' request for supplemental attorney fees before it could file a timely response. Based on the August 28 filing date of

the Zablotnys' supplemental fee application, under Rule 54(g), Ariz. R. Civ. P., the Association would have had until September 17 in which to file a response in opposition. Rule 54(g)(4) provides that attorney fee motions are governed by Rule 7.1, Ariz. R. Civ. P., and all motions under Rule 7.1 are controlled by Rule 6, Ariz. R. Civ. P. Under Rule 7.1(a)(3), "an opposing party must file any responsive memorandum within 10 days after the motion and supporting memorandum are served." Rule 6(c), however, extends the specified time to file a responsive memorandum by five days when service is made by mail, as it was here, under Rule 5(c)(2)(C), Ariz. R. Civ. P. The court's fee award was, therefore, premature.

**¶23** The Zablotnys do not dispute that the trial court ruled on their request for attorney fees before the time had run for the Association to respond. The Zablotnys, however, contend that there was no "surprise" in its request for supplemental attorney fees because the court had already granted its initial application for attorney fees, and furthermore, the Association had the opportunity to be heard in its Rule 59 motion for a new trial. We review constitutional due process claims *de novo*. *Emmett McLoughlin Realty, Inc. v. Pima Cnty.*, 212 Ariz. 351, ¶ 16 (App. 2006).

**¶24** "Procedural due process means that a party had the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Comeau v. Ariz. State Bd. of Dental Exam'rs*, 196 Ariz. 102, ¶ 20 (App. 1999) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). A party opposing attorney fees is entitled to be heard on the reasonableness and appropriateness of the claimed fees and expenses. *See Reed v. Reed*, 154 Ariz. 101, 108 (App. 1987) (reversing attorney fees award on due process grounds when trial court had "effectively refused to allow petitioner to be heard on the subject of the reasonableness and appropriateness of the fees and expenses claimed"). The Association was not afforded that opportunity here, and we see no reason why the rules should give one opposing a supplemental fee request less consideration. The trial court erred in prematurely granting the Zablotnys' supplemental fee request, and the error was not remedied by the Association filing a motion for a new trial. *Cf. Morrison v. Shanwick Intern. Corp.*, 167 Ariz. 39, 43 (App. 1990) (motion for reconsideration does not rectify deprivation of notice and opportunity to be heard).[4]

[4]Because we conclude that the trial court erred in granting the fee award prematurely and remand for a redetermination of the fee award, we do not address the Association's remaining contentions. Those

***Rule 59 Motion***

**¶25** Lastly, the Association argues the trial court erred in denying its Rule 59 motion for relief from the judgment awarding attorney fees. The Zablotnys counter—and we agree—that, because the order denying the Rule 59 motion was entered after the Association filed its notice of appeal, the Association, consequently, did not properly appeal the trial court's ruling on the Rule 59 motion, and this court does not have jurisdiction to address the claim. Rule 8(c)(3), Ariz. R. Civ. App. P., requires that a notice of appeal must designate the judgment from which the party is appealing. We do not have "jurisdiction to review matters not contained in the notice of appeal." *Lee v. Lee*, 133 Ariz. 118, 124 (App. 1982). Thus, "[i]n the absence of a timely notice of appeal following entry of the order sought to be appealed, we are without jurisdiction to determine the propriety of the order sought to be appealed." *Id.* Thus, because the trial court's ruling on the Rule 59 motion was entered after the Association filed its notice of appeal, we lack jurisdiction to address the court's denial of the Rule 59 motion.

**Attorney Fees and Costs Incurred on Appeal**

**¶26** Both parties have requested an award of attorney fees and costs on appeal pursuant to Rule 21, Ariz. R. Civ. App. P., and A.R.S. § 12-341.01, which provides that the court may award reasonable attorney fees to the successful party in a contested action arising out of a contract. An appeal of a Rule 60 ruling to set aside a stipulated judgment incorporating a settlement agreement constitutes a "contested action arising out of contract" for purposes of § 12-341.01. *See, e.g.*, *Lamb v. Ariz. Country Club*, 124 Ariz. 32 (App. 1979). But, because neither party completely prevailed on appeal, in our discretion, we decline to award fees to either party. *See Murphy Farrell Dev., LLLP v. Sourant*, 229 Ariz. 124, ¶ 38 (App. 2012). We further conclude that neither party is a prevailing party for purposes of an award of costs, and we award none. *See* A.R.S. § 12-341; *Compassionate Care Dispensary, Inc. v. Ariz. Dep't of Health Servs.*, 244 Ariz. 205, ¶ 44 (App. 2018).

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contentions—that the fee motion was untimely or that the Association's notice of appeal deprived the trial court of jurisdiction—if reasserted, may be addressed by the trial court on remand.

## Disposition

**¶27** For the foregoing reasons, we affirm the trial court's denial of the Association's Rule 60(b)(4) motion. We vacate its order awarding supplemental attorney fees and costs to the Zablotnys and remand with direction that the court address again whether to award supplemental attorney fees and costs.