

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING, AND IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION

DIANE LOMBARDI,
Appellant,

v.

RONALD V. HOWARTH,
Appellee.

UCN: 512018AP000056APAXWS
Appeal No.: 18-AP-56
L.T. No.: 18-CC-00473

_____/

On appeal from Pasco County Court,
Honorable Paul Firmani

Nickolas C. Ekonomides, Esq.
Nickolas C. Ekonomides, P.A.,
for Appellant.

Edward C. Castagna, Jr., Esq.
Castagna Law Firm, P.A.,
for Appellee.

ON REMAND FROM THE SECOND DISTRICT COURT OF APPEAL

ORDER AND OPINION ON REMAND

On remand from the Second District Court of Appeal, we reconsider Appellant's appeal from the trial court's final judgment of eviction and order denying her motion to vacate. This Court now concludes that Appellant is not entitled to relief and affirms the trial court's orders.

STATEMENT OF THE CASE AND FACTS

Trial Court Proceedings

Appellee filed an action for residential eviction against Appellant for non-payment of rent. Appellant did not pay rent into the court registry and did not file a motion to determine rent. Appellant moved to dismiss the complaint alleging fraud upon the trial court and failure to state a cause of action and filed four counterclaims. Her counterclaims

sought damages in excess of \$15,000. In her third counterclaim, Appellant argued that she had entered into a rent-to-own agreement for the property in question and that her rent payments were actually installment payments. She argued that Appellee was “attempting to evict” her “from a property to which she may hold legal title.” *Paragraph 27, Counterclaim III.*

The trial court denied Appellant’s motion to dismiss the complaint and granted Appellee’s motion to dismiss Appellant’s counterclaims. The trial court’s order granted Appellant 20 days to file an answer and affirmative defenses and 10 days to file amended counterclaims. However, Appellant did neither prior to the issuance of the final judgment.

The trial court later issued a default judgment against Appellant for failing to pay rent into the court registry as required by section 83.60, Florida Statutes (2017). The trial court rendered a final judgment of eviction on July 6, 2018, and a writ of possession on July 9, 2018. On July 17, 2018, Appellant filed a motion under Florida Rule of Civil Procedure 1.540(b)(4) entitled “Verified Emergency Motion of Defendant, Diane Lombardi, to Vacate Final Eviction Judgment, Dissolve Writ, Reopen Case, and Dismiss the Eviction Action, and Memorandum of Law” (motion to vacate).

The motion raised the following arguments relevant to this appeal: that the parties entered into a rent-to-own agreement on the property and that Appellee failed to join his brother, Keith Howarth, as an indispensable party. Appellant did not raise a claim of fraud upon the trial court in the written motion to vacate. The motion to vacate was heard on August 3, 2018. It was not until Appellant’s closing argument before the trial court that she again referenced the previously denied fraud upon the trial court claim. On August 14, 2020, the trial court rendered an order denying the motion to vacate.¹

Circuit Appellate Court Proceedings

On September 7, 2018, Appellant filed a notice of appeal. During the proceedings before this Court, Appellee moved to dismiss the appeal. With regard to the final judgment of eviction, the motion argued that the notice of appeal was untimely. This Court denied the motion and proceeded to rule on the appeal.

¹ Appellant also filed a motion to vacate the default judgment and permit the late filing of an answer, affirmative defenses, and counterclaims. But Appellant never set that motion for hearing and never obtained a written order from the trial court ruling on the motion.

In an amended opinion, this Court held, in relevant part, that Appellant's counterclaims divested the county court of subject-matter jurisdiction. The opinion reversed the default judgment and final judgment of eviction and remanded the case to the county court to issue an order transferring the case to the circuit trial court.

Appellee's Petition for Writ of Certiorari to the Second District Court of Appeal

Appellee then filed a petition for writ of certiorari with the Second District Court of Appeal. The Second District issued an opinion quashing this Court's opinion and held that because Appellant filed a motion to vacate under Florida Rule of Civil Procedure 1.540(b)(4), the time to file a notice of appeal from the final judgment was not tolled. Therefore, the notice of appeal was timely as to the trial court's order denying the motion to vacate, but untimely as to the final judgment of eviction.

The Second District further held that this Court erred by finding that Appellant's counterclaims divested the county court of subject-matter jurisdiction because she did not deposit a service charge at the time the counterclaims were filed as required by Florida Rule of Civil Procedure 1.170(j). The Second District remanded the case back to this Court.

STANDARD OF REVIEW

Generally, an order ruling on a motion under rule 1.540(b) is reviewed for abuse of discretion. *State Farm Mut. Auto. Ins. Co. v. Statsick*, 231 So. 3d 528, 531 (Fla. 2d DCA 2017) (citing *Belk v. McKaveney*, 903 So. 2d 337, 337 (Fla. 2d DCA 2005)). However, an order ruling on whether an order or judgment is void under rule 1.540(b)(4) is reviewed *de novo* where the trial court's conclusion presents a pure question of law. *Statsick*, 231 So. 3d at 531.

LAW AND ANALYSIS

Appellant raises four issues in her Initial Brief: (1) that the trial court erred by issuing a final judgment of eviction without first conducting an evidentiary hearing, (2) that the trial court erred by denying Appellant's motion to vacate because the facts revealed that Appellee committed fraud upon the trial court, (3) that the trial court erred by denying the motion to vacate because Appellee failed to join an indispensable party, and (4) that Appellant's notice of appeal was timely-filed as to the final judgment of eviction because

her motion to vacate also functioned as a motion for rehearing which tolled the rendition date of the final judgment.

1. Final Judgment of Eviction

Appellant argues that the trial court erred by issuing a final judgment of eviction for failing to pay rent into the court registry without first holding an evidentiary hearing because Appellant had raised a question regarding title to the property. Because Appellant's notice of appeal was untimely as to the final judgment of eviction, this Court cannot address the merits of this argument.

A notice of appeal must be filed within 30-days of the rendition date of a final order. Fla. R. App. P. 9.110(b). Where a notice of appeal is not timely-filed, an appellate court lacks jurisdiction to review the order. *Peltz v. Dist. Court of Appeal*, 605 So. 2d 865, 866 (Fla. 1992).

While a motion for rehearing under Florida Rule of Civil Procedure 1.530 tolls the date of rendition of an order, a motion for relief from judgment under Florida Rule of Civil Procedure 1.540 does not. See Fla. R. App. P. 9.020(h)(1)(B); *Potucek v. Smeja*, 419 So. 2d 1192, 419 So. 2d 1192, 1193-94 (Fla. 2d DCA 1982).

In this case, Appellant's motion to vacate was a motion for relief from judgment under rule 1.540(b)(4). Therefore, it did not toll the rendition date of the trial court's final judgment of eviction. The trial court rendered its final judgment on July 6, 2018. However, Appellant did not file a notice of appeal until September 7, 2018. Accordingly, the notice of appeal was untimely as to the final judgment of eviction and this Court does not have jurisdiction to review the order.

2. Motion to Vacate – Fraud Upon the Trial Court

Appellant next argues that the trial court erred by denying her motion to vacate because Appellee committed fraud upon the trial court with regard to whether Appellant had title to the property in question. Appellant asserts that she raised the fraud issue before the trial court during the hearing on her motion to vacate. She argues that fraud upon the court renders a final judgment void.

The trial court record reflects that prior to the issuance of the final judgment of eviction, Appellant raised the fraud upon the court issue in her motion to dismiss Appellee's complaint. However, that motion was denied in an order issued on May 8,

2018. Because Appellant's motion to dismiss alleging fraud upon the trial court was denied prior to the final judgment of eviction and Appellant's notice of appeal was untimely with regard to the final judgment of eviction, this Court is without jurisdiction to address Appellant's claim of fraud upon the trial court.

To the extent Appellant argues that her brief reference to fraud upon the trial court during her closing argument at the hearing on her motion to vacate constituted a motion to reconsider the trial court's previous ruling on her pre-final judgment motion to dismiss for fraud upon the court, such claim must fail. First, a trial court loses its inherent authority to reconsider non-final orders once a final order is issued. *Zakak v. Broida & Napier, P.A.*, 545 So. 2d 380, 381 (Fla. 2d DCA 1989). In this case, fraud upon the court was not re-raised until the hearing on her motion to vacate which occurred after the final judgment was issued. Furthermore, no new facts in support of fraud upon the trial court were asserted.

Second, Appellant's claim of fraud upon the trial court was not raised in her written motion to vacate and therefore not properly before the trial court during the hearing on her motion to vacate. A trial court violates a non-moving party's due process rights when it considers issues and matters not raised in a written motion and not noticed for hearing. *Assimakopoulos v. Assimakopoulus-Panuthos*, 228 So. 3d 709, 715 (Fla. 2d DCA 2017). To the extent it may be argued that Appellant's brief reference to fraud upon the trial court during her closing argument in the motion hearing was sufficient to constitute re-raising the issue, fraud upon the trial court was not raised in her written motion and was not noticed for the hearing. Therefore, the trial court did not err by not granting the motion to vacate on that basis.

And because Appellant waited until the last minute to raise the issue in a conclusory sentence just prior to the trial court ruling on the motion to vacate, Appellee did not have the opportunity to object to Appellant re-raising the fraud upon the trial court issue or make an argument against it. See *Smith v. Mogelvang*, 432 So. 2d 119, 122 (Fla. 2d DCA 1983) (describing the test to determine whether an issue has been tried by implied consent).

3. Motion to Vacate – Failure to Join and Indispensable Party

Within the same section of her Initial Brief as her fraud upon the trial court argument, Appellant argues that the trial court erred because the final judgment was void due to Appellee's failure to join an indispensable party. In her motion to vacate before the trial court, Appellant argued that Appellee failed to join his brother, Keith Howarth, as an indispensable party because this case involved a question of title to the property and Keith Howarth "is in title of the property and has not been joined as a necessary party." *Motion to Vacate, page 2.*

Failure to join an indispensable party renders a judgment void. See *FL Homes 1 LLC v. Kokolis*, 271 So. 3d 6, 10 (Fla. 4th DCA 2019); *Biden v. Lord*, 147 So. 3d 632, 637 (Fla. 1st DCA 2014) (addressing whether the Delaware Attorney General was an indispensable party in a trust modification proceeding and writing that "the fact that the Delaware Attorney General does not now argue that the 1993 judgment is void demonstrates that it is not impossible to completely adjudicate a modification of the Trust without the presence of the Delaware Attorney General"). Therefore, failure to join an indispensable party can be raised in a motion for relief from judgment under Florida Rule of Civil Procedure 1.540(b)(4) (providing that a party may be relieved from a judgment, decree, or order that is void). An indispensable party is "one whose interest in the subject matter is such that if he is not joined a complete and efficient determination of the equities and rights between the other parties is not possible." *Allman v. Wolfe*, 592 So. 2d 1261, 1263 (Fla. 2d DCA 1992) (quoting *Grammar v. Roman*, 174 So. 2d 443, 445 (Fla. 2d DCA 1965)).

Contrary to Appellant's assertion, Keith Howarth was not an indispensable party in this case. The complaint alleged that Appellant and Appellee had entered into a residential lease agreement as tenant and landlord, respectively. Because Appellant neither filed an answer and affirmative defenses nor amended her dismissed counterclaims prior to the issuance of the final judgment of eviction, there was no title or ownership issue pending before the trial court when the final judgment was issued. Assuming *arguendo* that both Appellee and Keith Howarth had a title interest in the property in question, Appellant's eviction as a tenant for nonpayment of rent had no effect on Keith Howarth's title interest. Therefore, he was not an indispensable party.

4. Timeliness of Notice of Appeal

Appellant finally argues that her notice of appeal was timely-filed after the final judgment of eviction because her motion to vacate also functioned as a timely-filed motion for rehearing, thereby tolling the rendition date of the final judgment. In its opinion quashing this Court's prior opinion, the Second District Court of Appeal held that Appellant's motion to vacate was a Rule 1.540(b)(4) motion. Accordingly, this Court now holds that the notice of appeal was not timely-filed as to the final judgment of eviction for the reasons detailed in Section 1 of this opinion.

CONCLUSION

Because Appellant's motion to vacate did not toll the rendition date of the final judgment of eviction, Appellant's notice of appeal was untimely as to the final judgment of eviction and this Court is without jurisdiction to review the final judgment or any orders issued prior to the final judgment. Because Keith Howarth was not an indispensable party to Appellee's residential eviction complaint, the trial court's order denying Appellant's motion to vacate is affirmed.

It is therefore ORDERED and ADJUDGED that the orders of the trial court are hereby AFFIRMED.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida
this ____ day of _____, 2020.

Original Order entered on December 28, 2020, by Circuit Judges Shawn Crane,
Lauralee Westine, and Kimberly Campbell.

Copies to:

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