FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-113

GAIL SPENCER,

Appellant,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee of VENDEE MORTGAGE TRUST, 1994-1 and WILLIE L. SPENCER, et al.,

Appellees.

On appeal from the Circuit Court for Duval County.
Karen Cole, Judge.

December 4, 2019

BILBREY, J.

Appellant challenges the final judgment of foreclosure entered on Deutsche Bank National Trust Co.'s amended motion for summary final judgment. Because the notice of appeal failed to timely invoke this court's jurisdiction, the appeal must be dismissed.

The final judgment that is the subject of this appeal was entered on September 26, 2018. On October 11, 2018, Appellant filed a motion to set aside the final judgment. Appellant

specifically referred to rule 1.540, Florida Rules of Civil Procedure, and asserted that she was entitled to relief because her failure to appear at the final hearing was due to her mis-reading the time specified in the notice of hearing. She also alleged that Deutsche Bank had committed fraud on the court by failing to file documents favorable to her position and that she had paid the amounts owed under the note during the pendency of the litigation. These allegations constitute allegations of "mistake, inadvertence, surprise, or excusable neglect;" "fraud . . . or other misconduct of an adverse party;" and "that the judgment or decree has been satisfied." *See* Fla. R. Civ. P. 1.540(b)(1), (3), & (5). No order on the motion is contained in the record.

Appellant filed her notice of appeal on January 8, 2019. This was well beyond 30 days from September 26, 2018 — the date the final judgment was entered. "It is axiomatic that an appeal must be filed within thirty days of entry of the final judgment; this is jurisdictional and irremediable." *Helmich v. Wells Fargo Bank, N.A.*, 136 So. 3d 763, 764 (Fla. 1st DCA 2014); *see also* Fla. R. App. P. 9.110(b) (noting that jurisdiction of the appellate court is invoked by filing a notice of appeal "within 30 days of rendition of the order to be reviewed"). The merits of Appellant's motion to set aside and her subsequent filings in the trial court have no bearing on this Court's appellate jurisdiction over the final judgment.

We recognize that certain motions toll the rendition of a final order for purposes of the time to file an appeal, including motions for new trial and motions for rehearing. *See* Fla. R. App. P. 9.020(h)(1). While rule 9.020(h)(1) does not list a motion to set aside or a motion for relief from judgment as tolling motions, "the true nature of a motion must be determined by its content and not by the label the moving party has used to describe it." *Fire & Cas. Ins. Co. of Connecticut v. Sealey*, 810 So. 2d 988, 992 (Fla. 1st DCA 2002). For example, in *Olson v. Olson*, 704 So. 2d 208, 210 (Fla. 5th DCA 1998), the court found that the "motion to set aside final judgment" was "intended to operate as a motion for rehearing" and was timely filed as such. The court in *Olson* determined that the motion tolled rendition of the final order, and thus the appeal was timely. *Id.*

However, the unambiguous allegations in Appellant's motion to set aside establish that the motion was not simply a mislabeled motion for rehearing or for new trial. The contents of the motion demonstrate Appellant's intent to seek relief from judgment under rule 1.540, and this court is not at liberty to redraft the motion filed in the trial court as one tolling rendition, despite Appellant's pro se status. *See James v. Crews*, 132 So. 3d 896, 899 (Fla. 1st DCA 2014) ("leniency in construing pleadings does not allow a court to re-draft the substance of a claim"). Furthermore, Appellant in citing to rule 1.540 should have been aware that rule 1.540(b) provides, "A motion under this subdivision does not affect the finality of a judgment or decree or suspend its operation." A motion for relief from judgment under rule 1.540(b) does not suspend rendition of a final judgment or toll the time for taking an appeal. *Stubbs v. Fed. Nat'l Mortg. Ass'n*, 250 So. 3d 151, 152-153 (Fla. 2d DCA 2018).

Because the notice of appeal was filed more than 30 days after the entry of the final judgment and because rendition of the final judgment was not tolled, Appellant failed to timely invoke this Court's jurisdiction. The appeal must therefore be dismissed. *See Watts v. Watts*, 56 So. 3d 897 (Fla. 1st DCA 2011).

DISMISSED.

RAY, C.J., and LEWIS, J., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Gail Spencer, pro se, Appellant.

Christian J. Gendreau of Storey Law Group, P.A., Orlando, for Appellees.