

No. 1-17-0275

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

WESTERN SPRINGS NATIONAL BANK AND TRUST, N.A., a failed national banking association, by its successor assignee HEARTLAND BANK AND TRUST COMPANY, an Illinois state bank,)	
)	
Plaintiff/Appellee,)	Appeal from the
)	Circuit Court of
v.)	Cook County
)	
WESTERN SPRINGS NATIONAL BANK AND TRUST U/T/A #4040, etc.; KEVIN R. TIERNEY; et al.,)	No. 07 CH 16155
)	
Defendants/Appellees.)	The Honorable Lisa R.
)	Curcio, Judge Presiding.
)	
)	

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Lavin concurred in the judgment.

ORDER

¶ 1 Held: Appeal dismissed for lack of appellate jurisdiction where orders appealed from were not final and appealable orders.

¶ 2 Following the trial court's entry of an order of possession against defendant-appellant Kevin R. Tierney (defendant) with respect to certain property, plaintiff-appellee Heartland Bank and Trust Company (Heartland), as Assignee of Federal Deposit Insurance Corporation (FDIC) in its capacity as Receiver for Western Springs National Bank and Trust, N.A. (WSNB), filed a motion to extend the period of enforcement of that order. The trial court granted Heartland's motion on October 28, 2010, and entered an order extending the period of enforcement of the order for possession for an additional 120 days. Defendant appealed, and we dismissed for lack of jurisdiction, finding that the order extending the period of enforcement of the order for possession was not a final and appealable order. *Heartland Bank and Trust Co. v. Western Springs National Bank and Trust U/T/A #4040*, 2015 IL App (1st) 151190-U (unpublished order under Supreme Court Rule 23). Heartland filed another extension of the period of enforcement, and Tierney filed a motion to quash service of process. Subsequently, on October 24, 2016, the period of enforcement of the October 28, 2010, order was extended further. In November 2016, defendant filed a petition pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2016)), entitled "motion to vacate order void for lack of jurisdiction" regarding the extension of enforcement of the October 24, 2016 order, arguing that Heartland Bank's service of the notice of motion to extend upon defendant's attorney of record rather than on defendant himself rendered the trial court's October 24, 2016 order extending the period of enforcement void and unenforceable. On January 3, 2017, the trial court denied defendant's section 2-1401 petition. Defendant now appeals the October 24, 2016 extension of the period of enforcement of the October 28, 2010 order, the denial of his motion to quash, and the January 3, 2017 order denying his section 2-1401 petition to vacate. For the following reasons, we dismiss this appeal.

¶ 3

I. BACKGROUND

¶ 4

The facts of this case have a long history in our court, with the same delinquent loan and foreclosure having come before us on at least four previous occasions. See, e.g., *Heartland Bank and Trust Co. v. Western Springs National Bank and Trust*, No. 1-11-0831 (Nov. 23, 2011) (unpublished summary order under Supreme Court Rule 23(c)(2)); *Heartland Bank and Trust Co. v. Tierney*, 2015 IL App (1st) 142517-U (Sept. 16, 2015) (unpublished order under Supreme Court Rule 23); *Konstantinos D. Antoniou v. Heartland Bank and Trust Co.*, 2015 IL App (1st) 150015-U (Sept. 21, 2015) (unpublished order under Supreme Court Rule 23); *Heartland Bank and Trust Co. v. Western Springs National Bank and Trust U/T/A #4040*, 2015 IL App (1st) 151190-U (unpublished order under Supreme Court Rule 23); *Heartland Bank and Trust Co. v. Konstantina Antoniou*, 2015 IL App (1st) 142517-U (Sept. 30, 2016) (unpublished order under Supreme Court Rule 23). Accordingly, we recite here only those facts necessary to the appeal at hand.

¶ 5

In February 2004, Tierney allegedly entered into an oral agreement and, later, an unrecorded lease, with Konstantinos D. Antoniou,¹ the owner of real property located at 5221 Central Avenue in Western Springs, Illinois, to rent a portion of the property with an option to purchase. The next month, Antoniou sought to refinance his property mortgage from WSNB. As a condition of the refinance, WSNB required the property be conveyed into a WSNB land trust and mortgaged to WSNB. Antoniou did so, and signed a trust agreement on March 12, 2004, naming as trustee WSNB under trust agreement #4040. WSNB executed several loan documents, including a promissory note, an assignment of rents, and a mortgage to lender WSNB. On March

¹ Antoniou is not a party to this appeal.

31, 2004, WSNB executed a deed in trust, conveying the property into the land trust and giving WSNB, as trustee, full title to the property, both legal and equitable.

¶ 6 Antoniou defaulted on the mortgage loan and, in June 2007, WSNB filed a foreclosure action against him and the land trust. WSNB obtained a judgment of foreclosure on the property, and thereafter purchased the property. The property sale to WSNB was approved by the trial court on March 23, 2010. Antoniou did not appeal this decision.

¶ 7 Thereafter, WSNB discovered that two parties not named as defendants in the foreclosure action were, in fact, living at the property: Antoniou's mother, who is not a party to this appeal, and defendant Tierney. On March 31, 2010, defendant Tierney recorded the purported February 2004 lease with option to purchase with the county recorder.

¶ 8 In April 2010, after prevailing in the foreclosure action against Antoniou and the land trust, WSNB filed a supplemental petition for possession against defendant. On October 28, 2010, the trial court awarded possession of the property to WSNB, declaring that "any interest claimed or held by Kevin R. Tierney be and is hereby terminated." Specifically, the October 28, 2010 order provides:

"IT IS HEREBY ORDERED:

1. That any interest claimed or held by Kevin R. Tierney be and is hereby terminated.
2. This order of possession is only effective as to Kevin R. Tierney.
3. This order shall be enforceable after thirty (30) days.
4. Western Springs National Bank and Trust, the holder of certificate of sale and deed, or assignees thereof, shall be entitled to possession of the subject premises, on

November 30, 2010 days [*sic*] after the entry of this order without further order of court as provided in 735 ILCS 5/15-1701.

* * *

7. That the Sheriff of Cook County is further ordered to evict Kevin R. Tierney, now in possession of the property located at 5221 S. Central, Western Springs, Illinois, 60558 on November 29, 2010.

8. There is no reason to delay enforcement of or appeal from this final appealable order."

¶ 9 Defendant appealed this decision to our court², and we affirmed the trial court's decision awarding possession of the property to WSNB and, now, to its receiver and assignee Heartland Bank. *Heartland Bank and Trust Co. v. Western Springs National Bank and Trust*, No. 1-11-0831 (Nov. 23, 2011) (unpublished summary order under Supreme Court Rule 23(c)(2)).

¶ 10 Defendant filed a petition for leave to appeal before the Illinois Supreme Court, which was subsequently denied. See *Heartland Bank & Trust Co. v. Western Springs National Bank & Trust*, No. 113610 (Ill. Mar. 28, 2012) (table). Although the appellate had confirmed that his interest in the property was terminated, and while the petition for leave to appeal was pending, defendant recorded a "Notice of Exercise of Option to Purchase" and, within days, an "Amended Notice of Exercise of Option to Purchase." Heartland Bank then filed a declaratory action against defendant, requesting that the trial court declare defendant had no interest in the subject property. In December 2012, the trial court held that defendant had no interest in the property and that any purported lease agreement or option to purchase he held was "null and void." Defendant then appealed this decision to our court and, in September 2015, we affirmed, again finding that

² While his appeal was pending, WSNB failed financially and, following its closure, the FDIC named Heartland Bank WSNB's receiver and assignee in interest, including its interest in the property at issue.

defendant has no viable interest in the subject property. See *Heartland Bank and Trust Co. v. Tierney*, 2015 IL App (1st) 142517-U (Sept. 16, 2015) (unpublished order under Supreme Court Rule 23).

¶ 11 After the trial court entered the October 28, 2010 order for possession and before our September 16, 2015 decision affirming Heartland's declaratory judgment action, defendant remained at the subject property and possession in Heartland's favor was never enforced. In January 2015, Heartland filed a motion to extend the period of enforcement of the order for possession. Defendant objected, asserting that all orders with respect to the property, beginning with the underlying foreclosure and sale and including the order for possession, were void for lack of subject matter jurisdiction, that Heartland failed to provide proper notice of its motion to extend, and that the order for possession should not be enforced because Heartland had unclean hands. On April 14, 2015, the trial court granted Heartland's motion to extend enforcement of the order, and entered an order extending the period of enforcement of the October 28, 2010 order for possession an additional 120 days.

¶ 12 Defendant Tierney appealed this motion to extend, arguing on appeal that the decision was in error because: (1) Heartland failed to comply with statutory requirements for notice of its motion; (2) Heartland has "unclean hands" and is barred equitably from prevailing on this motion; and (3) the lack of subject matter jurisdiction renders the trial court's judgment legally void. *Heartland Bank and Trust Co. v. Western Springs National Bank and Trust U/T/A #4040*, 2015 IL App (1st) 151190-U (unpublished order under Supreme Court Rule 23). Specifically, Tierney argued that, in his view, the order for possession's viability had lapsed because over four years had passed between the time of entry of the order and Heartland's filing of its motion to extend. He characterized Heartland's motion to extend the time of enforcement as the revival of

an unenforceable order rather than as mere compliance with a viable order which had retained force and effect. Heartland argued that the trial court's decision was not a final and appealable order conferring jurisdiction on this court because the trial court's April 14, 2015 order "does not change or set aside the final judgment because defendant's substantial rights under the judgment had already been determined and appealed." *Heartland Bank and Trust Co. v. Western Springs National Bank and Trust U/T/A #4040*, 2015 IL App (1st) 151190-U, ¶ 14 (unpublished order under Supreme Court Rule 23). We agreed with Heartland and dismissed the appeal for lack of jurisdiction, finding that the April 14, 2015 order extending the period of enforcement of the order for possession was not a final and appealable order and there was no appellate jurisdiction. We stated:

"In the instant cause, the trial court's April 14, 2015 order extending the period of enforcement of the October 28, 2010 order for possession for an additional 120 days in no way sets aside the prior judgment nor does it affect the substantial rights of the parties in the enforcement of the judgment. Rather, the prior judgment and the rights of the parties stand—possession of the property belongs to Heartland and not to defendant. That was what the trial court ordered on October 28, 2010, and that did not change when the trial court entered the instant order of April 14, 2015, from which defendant appeals. In other words, contrary to defendant's mischaracterization, nothing that was 'unenforceable' was made 'enforceable.' It was never as if, due to Heartland's lack of enforcement, the trial court's prior ruling awarding it possession of the property over defendant was going to somehow lose its viability and result in a reversion of possession of the property back to defendant. Instead, the parties' substantial rights had already been determined and, in fact, appealed by defendant himself. Possession belongs to Heartland and any interest

defendant may have had in the property is, and repeatedly has been, declared null and void." *Heartland Bank and Trust Co. v. Western Springs National Bank and Trust U/T/A #4040*, 2015 IL App (1st) 151190-U, ¶ 17 (unpublished order under Supreme Court Rule 23).

¶ 13 On April 28, 2016, Heartland Bank filed another motion to extend period of enforcement of October 28, 2010 order of possession against Tierney. The court granted this motion, extending the period of enforcement to September 9, 2016. Then, on October 5, 2016, Heartland Bank filed another motion to extend the period of enforcement of the October 28, 2010 order for possession against Tierney, explaining that it was unable to enforce the order of possession during the previous extension of time because:

"[D]ue to the pendency of a separate appeal by another occupant at the property, Konstantina Antoniou, and a separate stay of enforcement in that case 14 M1 706310 pending Appeal No. 1-14-3931, Heartland was unable to execute the possession order against Tierney before it expired on September 9, 2016."

¶ 14 On October 20, 2016, Tierney filed a motion to quash alleged service of the notice of motion to extend, arguing that he "did not receive proper service because "Heartland never noticed the defendant party Tierney. Instead, it noticed an attorney."

¶ 15 On October 24, 2016, the trial court entered an order granting Heartland Bank's motion to extend and denying Tierney's motion to quash. The October 28, 2010 order for possession against Tierney was extended for an additional 120 days. Tierney's attorney requested "appealable language like 304 language" and the court denied the request, stating, "This is not a 304 finding situation at all."

¶ 16 On November 30, 2016, Tierney filed a section 2-1401(f) "motion to vacate order void for lack of jurisdiction" regarding the order entered on October 24, 2016. By that motion, Tierney argued that Heartland Bank erred when it served notice of the motion to extend upon Tierney's alleged former attorney rather than on Tierney himself.³ He argued in his section 2-1401 motion that the October 24, 2016 denial of the motion to quash should instead be granted, the court should find that Heartland had failed to properly serve Tierney with notice, the court should find that Heartland is not entitled to a further extension of time to enforce the October 28, 2010 order of possession, and should find the October 24, 2016 order void and unenforceable for lack of jurisdiction. The trial court denied Tierney's section 2-1401 motion on January 3, 2017.

¶ 17 Tierney appeals.

¶ 18 II. ANALYSIS

¶ 19 On appeal, Tierney contends that the trial court erred in denying his motion to quash service where Heartland Bank failed to comply with the notice requirements of sections 15-1701 and 9-117 of the Code of Civil Procedure (735 ILCS 5/15-1701(h)(4) (West 2016); 735 ILCS 5/9-117 (West 2016)) when seeking the extension of the period of enforcement of the October 28, 2010 order for possession. Specifically, Tierney argues that sending notice to his "former attorney" McCollam was "improper and insufficient." He says, "The fact that Tierney's former attorney received Heartland's notice of motion and informed Tierney is no substitute for proper statutory notice." Tierney argues that "Heartland's most recent Motion to Extend Enforcement

³ Tierney argues vigorously on appeal that his previous attorney, Brian McCollam, no longer represented him at this time, and states that McCollam merely informed him of this motion for extension of time, apparently out of courtesy. We note here that Tierney does not direct us to a motion to withdraw filed by his attorney, nor to any court document reflecting McCollam's withdrawal as Tierney's counsel. Our search of the record has found none, either. The document relied upon by Tierney is a personal letter addressed to himself from attorney McCollam, dated May 10, 2016, in which McCollam describes various motions that have been denied and informs Tierney that he will no longer be representing him until he "receive[s] a substantial retainer and directions from you to do so." There is no indication that any motion to withdraw as counsel was filed with the court.

was a new matter before the court unaffected by prior [] motions." Therefore, argues Tierney, the trial court erred when it denied the motion to quash, and the October 24, 2016 order extending the October 28, 2010 order for possession against Tierney was void. Accordingly, argues Tierney, the trial court again erred when it denied his section 2-1401 petition to vacate these void orders. Tierney prays for the following relief: (1) a finding that Heartland has not served Tierney with the requisite notice and is therefore not entitled to relief; (2) to have service quashed; (3) denial of the motion to extend the period of enforcement for the order of possession; (4) the October 24, 2016 order ruled "void and unenforceable; (5) the section 2-1401 motion granted; and (6) Tierney restored to possession of the property.

¶ 20 A motion to vacate under section 2-1401 provides the procedure by which orders entered in a cause, having become final after 30 days from their entry, may nonetheless be vacated. See 735 ILCS 5/2-1401 (West 2014). The purpose of a section 2-1401 petition is to bring facts to the attention of the trial court which, if known at the time the court entered the order, would have prevented the order's entry. See *In re Marriage of Gorman*, 284 Ill. App. 3d 171, 182 (1996). To obtain this relief, the petitioner must set forth in her section 2-1401 petition specific factual allegations concerning: (1) the existence of a meritorious claim; (2) due diligence in presenting this claim to the trial court in the original action; and (3) due diligence in filing the petition for relief. See *S.C. Vaughan Oil Co. v. Caldwell, Trout & Alexander*, 181 Ill. 2d 489, 496 (1998); *Smith v. Airroom, Inc.*, 114 Ill. 2d 209, 220-21 (1986). The petitioner must demonstrate each of these three elements by a preponderance of the evidence. See *Smith*, 114 Ill. 2d at 221. Ultimately, whether a section 2-1401 petition is granted and a final order vacated lies within the sound discretion of the trial court and will not be disturbed unless it is apparent that the court abused its discretion. See *Smith*, 114 Ill. 2d at 221.

¶ 21 Prior to reaching the merits of Tierney's contentions, however, we must first consider whether we have jurisdiction to review this appeal. See *North Community Bank v. 17011 South Park Avenue, LLC*, 2015 IL App (1st) 133672, ¶ 24; accord *Almgren v. Rush-Presbyterian-St. Luke's Medical Center*, 162 Ill. 2d 205, 210 (1994) (before considering the merits of any appeal, our first duty is to consider our own jurisdiction over the matters presented). Ultimately, without jurisdiction, we must dismiss the appeal. See *North Community Bank*, 2015 IL App (1st) 133672, ¶ 24.

¶ 22 The appellate court has jurisdiction to hear an appeal of a final judgment. Ill. Const. 1970, art. VI, § 6; *Gardner v. Mullins*, 234 Ill. 2d 503, 510 (2009). A party may appeal any final judgment as a right under Supreme Court Rule 301. Ill. S.Ct. R. 301 (eff. Feb. 1, 1994); *Gardner*, 234 Ill. 2d at 510. The filing of a notice of appeal is jurisdictional and must be filed within 30 days of final judgment or within 30 days after an order is entered "disposing of the last pending postjudgment motion directed against that judgment or order." Ill. S.Ct. R. 303(a)(1) (eff. May 30, 2008). A postjudgment motion is one that requests a hearing, retrial, modification or vacation of the judgment and must be "directed against the judgment." *Miller v. Penrod*, 326 Ill. App. 3d 594, 596 (2001) (citing *Giammanco v. Giammanco*, 253 Ill. App. 3d 750, 755 (1993)). Whether this court has jurisdiction is an issue of law we decide *de novo*. *Gardner*, 234 Ill. 2d at 508.

¶ 23 Tierney cites Illinois Supreme Court rules 301 and 303 as conferring jurisdiction on this court over this cause. These rules apply only to final orders. Rule 301 provides:

"Every final judgment of a circuit court in a civil case is appealable as of right. The appeal is initiated by filing a notice of appeal. No other step is jurisdictional. An appeal is a continuation of the proceeding." Ill. S.Ct. R. 301 (eff. Feb. 1, 1994)

¶ 24 Rule 303 provides, in pertinent part:

"(1) The notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from, or, if a timely posttrial motion directed against the judgment is filed, whether in a jury or a nonjury case, within 30 days after the entry of the order disposing of the last pending postjudgment motion directed against that judgment or order, irrespective of whether the circuit court had entered a series of final orders that were modified pursuant to postjudgment motions." IL S.Ct .R. 303 (eff. May 30, 2008).

¶ 25 "A final order is one that 'disposes of the rights of the parties either with respect to the entire controversy or some definite and separate portion thereof.' " *In re Estate of Pawlinski*, 407 Ill. App. 3d 957, 962 (2011) (quoting *In re Estate of Yucis*, 382 Ill. App. 3d 1062, 1069 (2008)). Orders subsequent to a final judgment or decree that are only incidental to the ultimate rights of the parties as already adjudicated, such as those entered "merely for the purpose of carrying out or executing the matters which had been determined by the previous orders," are not considered final and appealable. *Bank of Ravenswood v. Maiorella*, 104 Ill. App. 3d 1072, 1074 (1982) (writ of assistance from which appeal was taken was only incidental to the ultimate rights already adjudicated, and appeal was dismissed where no timely notice of appeal was filed as to orders which finalized rights); accord *Perrell v. Liebman*, 257 Ill. App. 133, 137 (1930). This is because such subsequent orders do not change or set aside the prior judgment, and do not affect the substantial rights of the parties via their enforcement. *Bank of Ravenswood*, 104 Ill. App. 3d at 1074.

¶ 26 In the case at bar, the orders appealed from merely extend the period of enforcement of the October 28, 2010 order for possession, and do not attempt to set aside the prior judgment.

Rather, the prior judgment and the rights of the parties remain unchanged: possession of the property belongs to Heartland and not to defendant. The October 28, 2010 order specifically provided as such:

"IT IS HEREBY ORDERED:

1. That any interest claimed or held by Kevin R. Tierney be and is hereby terminated."

Tierney appealed this decision to our court, and we affirmed the trial court's decision awarding possession of the property to WSNB and, now, to its receiver and assignee Heartland Bank. *Heartland Bank and Trust Co.*, No. 1-11-0831 (Nov. 23, 2011) (unpublished summary order under Supreme Court Rule 23(c)(2)). Tierney again appealed that decision, essentially, when he appealed the April 14, 2015 decision granting Heartland's motion to extend the period of enforcement of the October 28, 2010 order for possession, and we affirmed, finding we lacked jurisdiction to address the nonfinal order. See *Heartland Bank & Trust*, 2015 IL App (1st) 151190-U (unpublished order under Supreme Court Rule 23) ("Ultimately, because neither a prior judgment nor the parties' substantial rights were set aside or affected in any way by the trial court's order extending the period of enforcement, this order is not appealable, and we have no jurisdiction to hear this cause.") The October 28, 2010 directive did not change when the trial court entered the instant orders on October 24, 2016, granting Heartland Bank's motion to extend and denying Tierney's motion to quash. In other words, Heartland's lack of enforcement did not render the trial court's prior ruling awarding it possession of the property over Tierney less viable, and possession of the property did not revert back to Tierney. Instead, the parties' substantial rights had already been determined and even appealed by defendant. See *Heartland Bank and Trust Co.*, No. 1-11-0831 (Nov. 23, 2011) (unpublished summary order under Supreme

Court Rule 23(c)(2)); *Heartland Bank & Trust*, 2015 IL App (1st) 151190-U (unpublished order under Supreme Court Rule 23). Possession belongs to Heartland and any interest defendant Tierney may have had in the property has already been declared null and void.

¶ 27 Heartland Bank argues that Tierney's purported section 2-1401 petition was, in actual fact, merely a revival of the precise argument he has already made before this court in *Heartland Bank & Trust*, 2015 IL App (1st) 151190-U (unpublished order under Supreme Court Rule 23), his prior appeal of Heartland Bank's possession action against him in which the trial court confirmed Tierney's interest in the property was "null and void." We agree.

¶ 28 It is the content rather than the caption of a motion that determines its character. See *Sarkissian v. Chicago Bd. Of Educ.*, 201 Ill. 2d 95, 103 (2002) (the character of a pleading is determined from its content, not its label) (citing *Padilla v. Vazquez*, 223 Ill. App. 3d 1018 (1991)); accord, *In re Haley D.*, 2011 IL 110886, ¶ 67 ("[W]e have emphasized that the character of the pleading should be determined from its content, not its label. Accordingly, when analyzing a party's request for relief, courts should look to what the pleading contains, not what it is called.").

¶ 29 We find that Tierney's purported section 2-1401 motion seeks only to have this court reconsider the trial court's October 24, 2016 order by which the court granted Heartland Bank's motion to extend the time to enforce the October 28, 2010 order of possession and denied Tierney's motion to quash service of process. The January 3, 2017 denial of Tierney's purported section 2-1401 motion was not made a "final judgment" simply because it was brought pursuant to section 2-1401. The relief granted in the October 24, 2016 and January 3, 2017 orders was relief subsequent to a final judgment—the October 28, 2010 order of possession. The October 24, 2016 and January 3, 2017 orders did not change or set aside the final judgment; defendant's

substantial rights under the judgment had already been determined and appealed. These subsequent orders merely seek to enforce the rights that have already been determined. Possession belongs to Heartland, and any interest defendant Tierney may have had in the property is, and has been, declared null and void. The orders challenged in the instant appeal do not involve a prior judgment being set aside, nor the parties' substantial rights being affected in any way. They are, therefore, not appealable and we have no jurisdiction to hear this cause. See *Bank of Ravenswood*, 104 Ill. App. 3d at 1074 (Orders subsequent to a final judgment or decree that are only incidental to the ultimate rights of the parties as already adjudicated, such as those entered "merely for the purpose of carrying out or executing the matters which had been determined by the previous orders," are not considered final and appealable).

¶ 30

III. CONCLUSION

¶ 31

Accordingly, because the trial court's October 24, 2016 order granting Heartland Bank's motion to extend the period of enforcement of the order of possession and denying Tierney's motion to quash service of process, and the January 3, 2017 denial of Tierney's motion, from which Tierney appeals, were not final and appealable, we dismiss the instant appeal.

¶ 32

Appeal dismissed.