



Real Property Case Law Update

Recent Opinions of Interest to
Real Property Litigators and Practitioners

Week Ending August 17, 2012

By the Carlton Fields Real Property Litigation Practice Group

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I. FLORIDA STATE CASES – SARA WITMEYER

- **Rents:** in order concerning rents to be paid *pendente lite* by tenant of office condominium unit and shared between foreclosing condominium association and foreclosing mortgagee/assignee of rents, court erred in crediting association for attorneys' fees payable in its foreclosure and deducting sum from mortgagee-assignee's share of rents – [Ocean Bank v. 107 Ave. Office Park Condo Ass'n](#), No. 3D12-538 (Fla. 3d DCA Aug. 15, 2012) (reversing order on rents in part and remanding for adjustment of respective award)
- **Landlord-Tenant:** county court properly entered default judgment for possession where commercial tenant failed to abide by order requiring deposit of rent into court registry – [Famsun Invest, LLC v. Therault](#), No. 4D12-1642 (Fla. 4th DCA Aug. 15, 2012) (granting petition for writ of certiorari and quashing circuit court's opinion)

II. 11TH CIRCUIT CASES – JIN LIU

- **Forum Selection:** forum selection clause that limited venue to the counties where the subject property was located did not limit forum to state courts and thus contract could be litigated in federal district court having jurisdiction over such counties – [Mosaic Fertilizer, LLC v. Van Fleet International Airport Development Group, LLC](#), Case No. 11-15591 (11th Cir. Aug. 15, 2012) (affirming summary judgment)
- **Breach of Contract:** defendant's breach of contract claim failed because defendant could not show it was ready, willing and able to close the subject real estate transaction, as defendant had no cash to close and the financing commitment defendant provided was illusory and non-binding on the part of the proposed lender – [Mosaic Fertilizer, LLC v. Van Fleet International Airport Development Group, LLC](#), Case No. 11-15591 (11th Cir. Aug. 15, 2012) (affirming summary judgment)
- **RESPA:** borrower's claims against seven financial institutions for violations of RESPA were time barred when brought more than one year after mortgage loan closing -- [Beato v.](#)

[Morrison Financial Services of Florida, LLC](#), Case No. 8:12-cv-1233-T-23EAJ (M.D. Fla. Aug. 15, 2012) (dismissing RESPA violations with prejudice and declining supplemental jurisdiction over claims for wrongful foreclosure, fraud, declaratory relief, and to quiet title) **[Congratulations to The Weekly Update's own Chris Smart and Dana Blunt, who represented Wells Fargo Bank, N.A. in this action]**

III. TITLE INSURANCE CASES - CHRIS SMART

- **Class Action:** district court abused its discretion in finding that the requirements of Rule 23(b)(3) were satisfied and in certifying a class because, even if proxy indicators constituted evidence that a prior mortgage was insured, a jury would still have to engage in a file by file review to determine whether the individual plaintiffs had prior mortgages covered by title insurance and met the other requirements for a credit – [Ahmad v. Old Republic National Title Ins. Co.](#), Case No. 11-10695 (5th Cir. Aug. 13, 2012) (reversing class certification)
- **Recoupment:** title insurer has standing, not in its own capacity, but as subrogee of its insured, to recover under Virginia's consumer real estate settlement protection act surety bond – [First American Title Ins. Co. v. Western Surety Co.](#), Case No. 10-1802 (4th Cir. Aug. 8, 2012) (affirming summary judgment)
- **Recoupment:** for purposes of the Illinois 2 year statute of limitations, an insurer's indemnity claim against agent under agency agreement accrues when agent refuses to indemnify, not at the time the defective mortgage was recorded – [First American Title Ins. Co. v. Resource Real Estate Services, LLC](#), Case No. 11-C-8095 (N.D. Ill. Aug. 7, 2012) (order denying motion for summary judgment)
- **Equitable Subrogation:** lender entitled to equitable subrogation against wife who claimed her signature on lender's note and mortgage were forged to the extent the loan proceeds were used to pay off a prior mortgage whose authenticity she did not contest – [Shchekina v. Washington Mutual Bank](#), Case No. 08-C-6094 (N.D. Ill. Aug. 7, 2012) (order granting summary judgment)
- **Class Action:** for purposes of the Connecticut 3 year tort statute of limitations, plaintiff's claims for unjust enrichment, breach of implied contract, and money had and received were not cleverly disguised tort claims – [Mahon v. Chicago Title Ins. Co.](#), Case No. 3:09CV00690 (C. Conn. Aug. 16, 2012) (denying motion for judgment on pleadings)

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