



Real Property Case Law Update

Recent Opinions of Interest to
Real Property Litigators and Practitioners

Week Ending August 31, 2012

By the Carlton Fields Real Property Litigation Practice Group

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I. FLORIDA STATE CASES - ILAN NIEUCHOWICZ

- **Foreclosure: surprise, accident, or mistake, and irregularity in the conduct of the sale are each independent grounds for vacating a foreclosure sale; foreclosure sale was properly set aside where parties entered into a settlement agreement on eve of foreclosure sale and bank failed to timely cancel sale** – [Josecite v Wachovia Mortgage Corp.](#), Case No. 5D11-3313 (Fla. 5th DCA August 31, 2012)(reversed and remanded)
- **Foreclosure: case should have been dismissed where bank became aware that a notice of dismissal for lack of prosecution had been issued and had sufficient time to establish record activity before expiration of 60 days grace period provided by Florida Rule of Civil Procedure 1.420(e)** - [Spencer v EMC Mortgage Corp.](#), Case No. 3D11-136 (Fla. 3d DCA August 29, 2012)
- **Foreclosure: foreclosure action may be barred by the statute of limitations if lender fails to file action within 5 years after of accelerating** – [Spencer v EMC Mortgage Corp.](#), Case No. 3D11-136 (Fla. 3d DCA August 29, 2012)
- **Service of Process: service of process held invalid where process server failed to strictly comply with statutory requirement requiring process server to include the date and time of service, identification number, and initials on any of the documents served** – [Schofield v Wells Fargo Bank, N.A.](#), Case No. 5D11-1935 (Fla. 5th DCA August 31, 2012)
- **Construction lien: trial court did not depart from the essential requirements of the law by reducing transfer bond where trial court held non-evidentiary bond hearing and lienor had an opportunity to present evidence prior to the hearing, but failed to serve its affidavit a reasonable time before the hearing** – [Bayview Construction Corp. v Jomar Properties, LLC](#), Case No. 4D11-4426 (Fla. 4th DCA August 29, 2012)

II. 11TH CIRCUIT CASES - LAUREN SEMBLER

- **Fair Debt Collection Practices Act:** debtors' FDCPA claims were not rendered moot and a live controversy remained where lenders' settlement offers did not include entry of judgment as debtors had requested in their complaints – [Zinni v. ER Solutions, Inc.](#), Case No. 11-12413 (11th Cir. August 27, 2012) (reversing district court's dismissal of debtors' claims and remanding)
- **Truth in Lending Act:** mortgage owner can be vicariously liable for a mortgage servicer's failure to properly respond to a § 1641(f)(2) request for information, even where the servicer corrects such error before the borrower institutes an action or servicer receives notice of the error from the borrower – [Galeano v. Federal Home Loan Mortgage Corp.](#), Case No. 12—61174-CIV (S.D. Fla. August 21, 2012) (order granting in part and denying in part motion to dismiss)

III. TITLE INSURANCE CASES - CHRIS SMART

- **Liability for Agent:** where insurer verifies that title company is its agent, without specifying the scope of that agency, it may be liable for agent's misappropriation of escrow funds on theory of apparent agency and direct liability in negligence – [Gondeck v. A Clear Title and Escrow Exchange, LLC](#), Case No. 11 C 6341 (E.D. Ill. Aug. 22, 2012) (granting in part, denying in part, motion to dismiss)
- **Agent Liability:** fraud claim that agent sold illusory insurance policy because paragraph 8(a) allowed insurer to reduce the amount of insurance, thus making the policy misleading, was properly dismissed as provision was in policy for all to see – [Levy Gardens Partners 2007, LP v. Commissioner of Administration Paul W. Rainwater](#), Case No. 12-1340 (E.D. La. August 21, 2012) (granting motion to dismiss and denying motion to remand)
- **Class Action:** common law claims for money had and received and unjust enrichment were precluded under Pennsylvania's Insurance Department Act but statutory claim under Pennsylvania's unfair trade practices and consumer protection law was not precluded – [White v. Conestoga Title Ins. Co.](#), Case No. 30 EAP 2010 (E.D. Pa. Aug. 20, 2012) (affirming in part, reversing in part)

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