



Real Property Case Law Update

Recent Opinions of Interest to
Real Property Litigators and Practitioners

Week Ending July 20, 2012

By the Carlton Fields Real Property Litigation Practice Group

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I. FLORIDA STATE CASES - ILAN NIEUCHOWICZ

- **Foreclosure: when lender moves for summary judgment before borrower answers complaint, burden is on lender to establish by record evidence that no answer/defense which borrower may raise could present an issue of fact that would preclude summary judgment** – [Zeras v Wells Fargo Bank, N.A.](#), No. 2D11-750 (Fla. 2d DCA July 18, 2012) (reversing final judgment of foreclosure)
- **Foreclosure: summary judgment was improper where lender failed to conclusively refute borrower's affirmative defense that lender did not give notice of default as required under mortgage** - [Cerron v GMAC Mortgage, LLC](#), No. 2D11-3425 (Fla. 2d DCA July 18, 2012) (summary judgment reversed and remanded)
- **Standing: summary judgment was improper where plaintiff failed to establish that it was the holder of the note** - [Henderson v Litton Loan Servicing, LP](#), No. 4D10-1167 (Fla. 4th DCA July 18, 2012) (summary judgment reversed and remanded)
- **Due Process: where the court allowed withdrawal of defendant's counsel and permitted defendant thirty days to secure new counsel, it was improper for court to enter summary final judgment of foreclosure within those thirty days** - [Bonilla v Bank United](#), No. 4D11-3209 (Fla. 4th DCA July 18, 2012) (summary judgment reversed)

II. 11TH CIRCUIT CASES – LAUREN SEMBLER & DANA BLUNT

- **Federal Debt Collection Practices Act ("FDCPA"): loan servicer could be deemed a "debt collector" under the FDCPA where it attempted to both enforce a security interest and collect a debt** - [Birster v. American Home Mortgage Servicing, Inc.](#), No. 11-13574 (11th Cir. July 18, 2012) (reversing and remanding)
- **Offer of Judgment: FDCPA: defendant's offer of judgment for the amount of plaintiff's actual and statutory damages, plus reasonable attorneys' fees, to which plaintiff never responded, did not moot plaintiff's FDCPA claim where defendant failed to file the offer of judgment and move to dismiss the action as moot immediately upon the expiration of its**

14-day deadline and, instead, continued to aggressively litigate for almost a year before bringing the offer to the court's attention – [Abby v. Paige](#), No. 10-23589-CV-JLK (S.D. Fla. July 6, 2012) (denying motion for partial summary judgment and motion to dismiss)

III. TITLE INSURANCE CASES – CHRIS SMART

- **Liability for Agent: insurer not liable for agent's theft of loan proceeds and failure to record mortgage when insurer did not receive premium and no closing protection letter was issued** – [Fidelity Nat'l Title Ins. Co. v. Cole Taylor Bank](#), Case No. 11-4497 (S.D.N.Y. July 10, 2012) (order granting declaratory judgment)
- **Liability for Agent: settlement agent's theft of loan proceeds and failure to record mortgage are imputed to lender where agency agreement prohibits settlement agent from acting on insurer's behalf in closing transactions** – [Fidelity Nat'l Title Ins. Co. v. Cole Taylor Bank](#), Case No. 11-4497 (S.D.N.Y. July 10, 2012) (order granting declaratory judgment)
- **Equitable Subrogation: a title commitment is not an abstract of title and a title insurer's negligence in performing a search for a title commitment is irrelevant to whether insured lender is entitled to equitable subrogation** – [United Community Bank v. Prairie State Bank & Trust](#), Case No. 4-11-0973 (Ill. App. July 11, 2012) (affirming in part and reversing in part order granting summary judgment)
- **Tort: insured's claims for tortious interference with the attorney-client relationship between insured and its counsel retained by the insurer are distinct from the policy between the insured and insurer and thus are not barred by the existence of the policy** – [Fidelity Nat'l Title Ins. Co. v. Captiva Lake Investments, LLC](#), Case No. 4:10-CV-1890 (E.D. Mo. July 9, 2012) (order denying motion for judgment on the pleadings)
- **Antitrust: insureds' claims that insurers and Ohio rating bureau violated state and federal antitrust acts fails because the McCarran-Ferguson does not apply, since title insurance is a business regulated by the state and the state act permits the alleged collusive activities** – [Katz v. Fidelity Nat'l Title Ins. Co.](#), Case No. 10-3545 (6th Cir. July 17, 2012) (affirming dismissal with prejudice)
- **Equitable Subrogation: in Kentucky, a lender is not entitled to equitable subrogation if the lender has actual or constructive notice of an existing lien** – [MERS, Inc. v. Roberts](#), Case No. 2012-SC-69 (Ky. May 24, 2012) (affirming order granting summary judgment)
- **Closing Protection Letter: the terms of the Michigan CPL do not limit lender's actual loss to the full amount of the subject loan and what insurer pays to cure title is of no legal significance and may not be used to reduce lender's actual loss under a CPL** – [JP Morgan Chase Bank, N.A. v. FDIC](#), Case No. 09-14891 (S.D. Mich. June 20, 2012)

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