



Real Property Case Law Update

Recent Opinions of Interest to
Real Property Litigators and Practitioners

Week Ending July 27, 2012

By the Carlton Fields Real Property Litigation Practice Group

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I. FLORIDA STATE CASES – SARA WITMEYER

- **Jurisdiction/Foreclosure:** court lacked jurisdiction to enter order declaring owner of foreclosed property liable to master association for certain fees and assessments, when order was entered upon motion for clarification filed more than three months after entry of final judgment of foreclosure – [14302 Marina San Pablo Place SPE, LLC v. VCP-San Pablo, Ltd.](#), No. 1D11-2927 (Fla. 1st DCA July 27, 2012) (quashing order on motion for clarification)
- **Bert J. Harris, Jr., Private Property Rights Protection Act (the “Act”):** deficient appraisal attached to landowner’s presuit notice to city and county rendered notice invalid and negated procedures of the Act, thus landowner could not state cause of action under the Act – [Turkali v. City of Safety Harbor](#), No. 2D11-3649 (Fla. 2d DCA July 25, 2012) (affirming final order of dismissal with prejudice)
- **Betterment:** court properly excluded evidence of developer’s permanent improvements to common areas in betterment action filed by homeowners association pursuant to section 66.041, et seq., Florida Statutes (2009), as homeowners association did not make permanent improvements in question and never held title to or “purchased the property improved” – [Centennial Homeowners Ass’n v. Dolomite Co.](#), No. 3D11-2966 (Fla. 3d DCA July 25, 2012) (affirming order granting motion in limine and final judgment in favor of defendant)
- **Jurisdiction/Foreclosure:** court had jurisdiction to allow purchaser from winning bidder at foreclosure sale to intervene to seek to enforce (i) order governing rent as to unit occupied by defendant tenant and (ii) provision of final judgment terminating tenant’s right of possession, where court had expressly retained jurisdiction over tenant and had subject matter jurisdiction to interpret and enforce the rent order – [Douglas D. Stratton, Stratton & Feinstein, P.A. v. 6000 Indian Creek, LLC](#), Nos. 3D11-2054 & 3D11-2053 (Fla. 3d DCA July 25,

2012) (affirming issues on appeal)

- **Attorney's Fees:** sanctions should have been allocated in equal parts against losing party and his attorney pursuant to section 57.105(1), Florida Statutes (2010), for frivolous and dilatory actions taken during last phase of foreclosure case – [Douglas D. Stratton, Stratton & Feinstein, P.A. v. 6000 Indian Creek, LLC](#), Nos. 3D11-2054 & 3D11-2053 (Fla. 3d DCA July 25, 2012) (reversing and remanding as to cross appeal)
- **Inverse Condemnation:** section 11.066, Florida Statutes (2000) prohibits issuance of writ of execution against Florida Department of Agriculture and Consumer Services – [Fla. Dep't of Agric. & Consumer Servs. v. Mendez](#), Nos. 4D11-4644 & 4D12-196 (Fla. 4th DCA July 25, 2012) (reversing non-final orders involving post-judgment proceedings)
- **Foreclosure:** borrower's affidavit created disputed issues of material fact in connection with whether payment of yield spread premium constituted kickback/referral fee in violation of RESPA, thus entry of final summary judgment of foreclosure was improper – [Good v. Deutsche Bank Nat'l Trust Co.](#), No. 4D11-1167 (Fla. 4th DCA July 25, 2012) (reversing final judgment of foreclosure)

II. 11TH CIRCUIT CASES – JIN LIU

- **Foreclosure:** counterclaim to foreclose mortgage filed more than 5 years after borrower stopped paying was not barred by 5-year statute of limitations where mortgage contained discretionary—as opposed to automatic—acceleration clause, and counterclaim was filed within 5 years of acceleration -- [Madura v. BAC Home Loans Servicing L.P.](#), No. 8:11-cv-2511-T-33TBM (M.D. Fla. July 20, 2012) (denying motion to dismiss counterclaim).
- **Bad Faith:** district court which excluded expert testimony regarding industry standards for handling insurance claims after concluding it would not be helpful to the jury did not abuse its discretion because (1) no Florida court has held that expert testimony is required to prove an insurer acted in bad faith and (2) plaintiffs made no showing that “any normal person” could not decide the issue without the assistance of expert testimony – [Tardiff v. Geico Indemnity Co.](#), No. 11-15450 (11th Cir. July 19, 2012) (affirming judgment in favor of defendant)

III. TITLE INSURANCE CASES – CHRIS SMART

- **Endorsements:** unless a use or other non-title restriction is individually listed Schedule B, and thus expressly excepted from coverage, the ALTA 9 endorsement covers loss arising from the entire instrument, including that restriction, and coverage is not limited to only the easements, liens, private charges, and options to purchase identified in the endorsement – [Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co.](#), Case No. 11-3123 (3rd Cir. July 24, 2012) (affirming summary judgment)
- **Recoupment:** title insurer entitled to recovery against principal of developer who executed “all bills paid” affidavit either falsely or with such recklessness as to be fraudulent – [Wasserberg v. Flooring Services of Texas, LLC](#), Case No. 14-11-00736 (Tex. App. July 24, 2012) (affirming judgment after trial)
- **Recoupment:** title insurer establishes conspiracy and damages against defaulted defendant entity through detailed affidavits, agent's escrow records, and bank statements – [Stewart Title Guaranty Co. v. Revolutionary Marketing, Inc.](#), Case No. 11-0620 (D. Md. July 19, 2012) (report and recommendation)
- **Consequential Damages:** title insurer satisfies its obligations under a policy by purchasing prior deed of trust which allows insured lender to foreclose its insured deed of trust and insured lender is not entitled to consequential damages due to the insurer's alleged delay in reconvening deed of trust where insured failed to give notice of impending sale of the property at which it allegedly sustained a loss – [Lewis and Clark Bank v. Stewart Title Guaranty Co.](#), Case No. 3:11-CV-848 (D. Or. July 18, 2012) (granting motion for summary judgment)

- **Liability for Agent: insurer is not liable under Florida’s defalcation statute for theft of funds by title issuing agent’s affiliate after the agent closes the transaction and is not liable for the title issuing agent’s acts at the closing that are outside the scope of the agent’s authority under the agency agreement – [Lowe v. Lawyers Title Ins. Corp.](#), Case No. 312009CA10974 (19th Judicial Circuit, Florida July 23, 2012) (order granting final summary judgment) [*Congratulations to Carlton Fields Shareholder, Marty Solomon, who represented Lawyers Title Insurance Corporation!*]**

THE WEEKLY UPDATE TEAM



Dana Blunt
dblunt@carltonfields.com
 813.229.4156
[bio](#)



Stefanie Lincoln
slincoln@carltonfields.com
 813.229.4148
[bio](#)



Jin Liu
jliu@carltonfields.com
 813.229.4209
[bio](#)



Brian B. Vavra
bvavra@carltonfields.com
 813.229.4385
[bio](#)



Ilan Nieuchoicz
inieuchoicz@carltonfields.com
 305.539.7381
[bio](#)



Lauren Sembler
lsembler@carltonfields.com
 813.229.4384
[bio](#)



Chris Smart
csmart@carltonfields.com
 813.229.4142
[bio](#)



Sara Witmeyer
switmeyer@carltonfields.com
 813.229.4267
[bio](#)



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