



Real Property Case Law Update

Recent Opinions of Interest to
Real Property Litigators and Practitioners

Week Ending June 22, 2012

By the Carlton Fields Real Property Litigation Practice Group

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I. FLORIDA STATE CASES – BRIAN VAVRA

- **Statute of Limitations:** amendment did not relate back to original complaint where third-party defendant was made a primary defendant after limitations period had run and plaintiff had been aware of the identity and potential liability of third-party defendant – [Graney v. Caduceus Properties, LLC](#), 1D11-2700 (Fla. 1st DCA June 21, 2012) (reversing judgment)
- **Foreclosure:** trial court erred in dismissing amended mortgage foreclosure complaint as (1) amended complaint's verification language comported with requirements of Fla. R. Civ. P. 1.110(b), and (2) trial court determined amended complaint was untimely without considering grounds asserted by Wells Fargo's counsel regarding delay in filing – [Wells Fargo Bank, N.A. v. Taboada](#), 2D11-2961 (Fla. 2d DCA June 22, 2012) (reversing dismissal)
- **Foreclosure:** dismissal with prejudice of mortgage foreclosure complaint due to failure to verify complaint in accordance with §92.525, Florida Statutes, was erroneous in light of plain language of recently amended Fla. R. Civ. P. 1.110(b) – [BAC Home Loan Servicing, L.P. v. Stentz](#), 2D11-4643 (Fla. 2d DCA June 22, 2012) (reversing dismissal)
- **Foreclosure/Sanctions:** trial court's failure to consider whether dismissal with prejudice was an appropriate sanction for Bank's failure to provide a summary final judgment package prior to hearing on Bank's motion for summary judgment warranted remand so trial court could determine what sanction, other than dismissal, was appropriate – [Deutsche Bank Nat'l Trust Co. v. Waldorf](#), 2D11-1971 (Fla. 2d DCA June 22, 2012) (reversing dismissal)
- **Covenant Running With Land:** successor landowner entitled to compensation for damages to the remainder of property that became landlocked as a result of a prior taking, since the judgment requiring DOT to provide compensation for damages to the remainder was a

covenant running with land – [PGA North II of Florida, Inc. v. DOT](#), 4D10-1895 (Fla. 4th DCA June 20, 2012) (reversing and remanding for entry of judgment for appellant)

- **Landlord-Tenant: landlord without notice of fire ant infestation owed no duty to guard tenant against ants under concept of “ferae naturae”** – [Hanrahan v. Hometown America](#), 4D11-68 (Fla. 4th DCA June 20, 2012) (affirming summary judgment)
- **Foreclosure: although original note which had been assigned during pendency of foreclosure was not endorsed, it had been filed with the court and assigned by recorded assignment, so assignee became non-holder in possession of instrument entitled to enforce** – [Miller v. Kondaur Capital Corp.](#), 4D11-918 (Fla. 4th DCA June 20, 2012) (affirming order denying relief from foreclosure judgment)
- **Attorneys’ Fees: denial of motion for appellate attorneys’ fees during original appeal established law of the case; trial court erred when it awarded trial attorneys’ fees based on the same grounds raised by party in motion for appellate fees** – [Langer v. Fells](#), 4D11-1215 (Fla. 4th DCA June 20, 2012) (reversing award of fees)
- **Foreclosure: issues of material fact remained where (1) allonge to note was inconsistent with assignment of mortgage and contradicted plaintiff’s allegation that it was the holder of the note and (2) affidavits filed by plaintiff did not conclusively show plaintiff was the holder of the note** – [Richards v. HSBC Bank USA](#), 5D10-3895 (Fla. 5th DCA June 22, 2012) (reversing summary judgment)

II. 11TH CIRCUIT CASES – NONE

III. TITLE INSURANCE CASES – CHRIS SMART

- **Equitable Subrogation: lender who pays off first mortgage but negligently fails to intervene in second mortgagee’s foreclosure is not entitled to equitable subrogation against purchaser at foreclosure sale** – [Bank of New York Mellon v. Mulej](#), Case No. 11-cv-01477 (D. Colo. June 18, 2012) (order denying motion for summary judgment)
- **Escrow Agent: agent is not liable under policy or for negligent misrepresentation based on commitment because agent is not party to policy and commitment is not an abstract of title and is merely a statement of the terms and conditions upon which the insurer is willing to issue a policy** – [Barton v. Vallejos](#), Case No. 2:10-cv-181 (D. Utah June 15, 2012) (order granting motion for summary judgment)
- **Filed Rate Doctrine: nonjusticiability policy warrants application of filed rate doctrine to antitrust act claims** – [New Jersey Title Ins. Litigation](#), Case No. 10-3343 (3rd Cir. June 14, 2012) (affirming dismissal of action)
- **Filed Rate Doctrine: filed rate doctrine applies in regulated areas of industry even where industry has been partially deregulated and nonjusticiability policy warrants application of doctrine to antitrust claims** – [McCray v. Fidelity National Title Ins. Co.](#), Case No. 10-3576 (3rd Cir. June 14, 2012) (affirming dismissal of action)
- **Issuing Agent: insurer’s claim pursuant to agency agreement is not nondischargable based solely on the ground that agent certified his malpractice insurance was in effect when it was in fact canceled** – [In re McCarthy](#), Case No. 09-42842 (Bkrtcy. D. Mass. June 14, 2012) (order denying summary judgment)
- **Exclusions: claim based on city’s post-policy commencement of condemnation proceedings falls within express eminent domain exclusion of the policy** – [Property Hackers, LLC v. Stewart Title Ins. Co.](#), Case No. 04728 (N.Y. App. June 13, 2012) (affirming summary judgment)
- **Exceptions: exception in revised commitment applies to preclude liability where insured fails to refute that insurer sent revised commitment to it prior to closing even though insurer claimed it had never received revised commitment** – [Wilmington Plantation, LLC v. Fidelity National Title Ins. Co.](#), Case no. 3:10 C 01218 (M.D. Tenn. June 12, 2012) (order granting

summary judgment)

- **Equitable Subrogation: refinancing lender who pays off first mortgage and credit line but neglects to have borrower close credit line is not culpably negligent so as to preclude application of doctrine of equitable subrogation** – [Finance Center Federal Credit Union v. Brand](#), Case No. 49A02-11111-MF-1089 (Ind. App. May 24, 2012) (affirming partial summary judgment)
- **Coverage: when insured leaseholder transfers leasehold without covenant or warranty, leasehold is not longer vested in insured and insurer's obligations under policy cease to exist** – [Soldiers, Sailors, Marines and Airmen's Club, Inc. v. Carlton Regency Corp.](#), Case No. 03958 (N.Y. App. May 22, 2012) (affirming motion to dismiss)
- **Access: lack of physical access due to placement of bridge does not give rise to coverage for lack of legal access to insured property** – [Emmert v. Stewart Title Guaranty Co.](#), Case No. 3:11-cv-00003 (D. Or. May 17, 2012) (findings and recommendation of magistrate) (adopted by District Court on June 7, 2012)

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