



Real Property Case Law Update

Recent Opinions of Interest to
Real Property Litigators and Practitioners

Week Ending June 29, 2012

By the Carlton Fields Real Property Litigation Practice Group

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I. FLORIDA STATE CASES - ILAN NIEUCHOWICZ

- **Takings:** property owner was entitled to recover damages from county where county's regulations, actions, and inaction caused substantial deprivation of the economic use of owner's property and denied owner reasonable investment-backed expectations in violation of Article X, Section 6 of the Florida Constitution - [Charlotte County v. Rotonda Project, LLC](#), Case No. 2D10-4110 (Fla. 2d DCA June 27, 2012) (affirming final judgment)
- **Premises Liability:** whether a party has a duty of care does not depend on ownership or title to the premises, but instead is depends on whether a party has the ability to exercise control over the premises - [Metsker v. Carefree/Scott Fetzer Co.](#), Case No. 2D10-5867 (Fla. 2d DCA June 27, 2012) (reversing and remanding summary judgment)
- **Homestead:** heirs of a deceased person that owned a leasehold interest in real property are entitled to claim an exemption from its forced sale to pay creditors of the decedent's estate - [Geraci v. SunStar EMS](#), Case No. 2D11-1234 (Fla. 2d DCA June 27, 2012) (trial court's order reversed and remanded)
- **Deficiency Judgment:** determination that a deficiency judgment should be denied must be supported by established equitable principles and the record must disclose sufficient facts and circumstances to support that judgment - [The Royal Palm Bank of Florida v. Hunters Property, LLC](#), Case No. 2D11-917 (Fla. 2d DCA June 29, 2012) (reversed and remanded)
- **Ad Valorem Tax:** property owner cannot maintain an action contesting a tax assessment and any such action must be dismissed if property owner fails to pay all uncontested taxes assessed on the property in the years after an action is brought, before they become delinquent - [Wilkinson v. Klark](#), Case No. 2D 11-3231 (Fla. 2d DCA June 29, 2012) (reversing summary judgment)
- **Jurisdiction/Waiver of Service of Process:** property owner's letter to his/her lender is not an answer if it does not contain the caption of the foreclosure action, is written for a purpose other than answering the complaint, and does not authorize the mortgage holder or its attorney to file the letter as the defendant's answer, and cannot constitute a waiver

of service of process – [Vives v. Wells Fargo Bank, N.A.](#), Case No. 3D11-1453 (Fla. 3d DCA June 27, 2012) (final judgment of foreclosure remanded with instructions)

II. 11TH CIRCUIT CASES – JIN LIU

- **Foreclosure: borrower's motion to dismiss foreclosure counterclaim based on arguments extraneous to the four corners of the counterclaim required analysis beyond the face of such counterclaim and was not the proper subject of a Rule 12(b)(6) motion to dismiss --** [Madura v. BAC Home Loans Servicing L.P.](#), No. 8:11-cv-2511-T-33TBM (M.D. Fla. June 22, 2012) (denying motion to dismiss)
- **HAMP: lender's motion to dismiss on the basis that the Home Affordable Modification Program ("HAMP") does not provide private right of action for alleged breach of the "trial period plan" ("TPP") was denied because borrower sufficiently alleged that defendant repudiated a valid modification agreement, rather than merely a TPP --** [Pena v. American Home Mtg. Servicing, Inc.](#), No. 6:12-cv-797-Orl-31KRS (M.D. Fla. June 22, 2012) (denying motion to dismiss)
- **Force-placed Insurance: homeowner had standing to sue insurer under insurance policy that was force-placed by the loan servicer even though the policy named the servicer as the insured and the homeowner only as an additional insured with respect to residual amounts of insurance over and above the servicer's insurable interest in the property --** [Mitchell v. Balboa Insurance Co.](#), No. 8:11-cv-02580-EAK-TGW (M.D. Fla. June 20, 2012) (denying defendant's motion to dismiss for lack of subject matter jurisdiction and granting plaintiff's motion for leave to amend complaint)

III. TITLE INSURANCE CASES – CHRIS SMART

- [Are Consequential Damages Recoverable Under a Title Insurance Policy for the Time It Takes to Attempt to Cure a Title Defect](#), by Mark A. Brown and Christopher W. Smart, [Fla. Bar Journal](#), Vol. 86, No. 7 (July/August 2012)
- **Class Action: plaintiff's claims lack Article III standing against insurers where no damages are alleged, even though insurers may be juridically linked to insurer against which damages are alleged –** [Mahon v. Tigor Title Ins. Co.](#), Case No. 10-3005 (2nd Cir. June 25, 2012) (affirming judgment dismissing insurers)
- **Right to Cure: insurer who violates local subdivision ordinance while curing title and thereby diminishes the property value and claims the subdivision violation is excluded under the policy breaches the policy's duty of good faith and fair dealing –** [In re Evans](#), Case No. 09-03763 (Br. S.D. Miss. June 22, 2012) (order on liability trial)
- **Notice: in order to rely on late notice provision, insurer must show insured had actual knowledge of defect not merely constructive notice that may be imputed based on insured's foreclosure title search –** [U.S. Bank Nat. Ass'n v. Tigor Title Ins. Co.](#), Case No. 295735 (Mich. App. June 21, 2012) (affirming summary judgment)
- **Limitation on Liability: upon total failure of title, insurer's liability is not necessarily policy limits but is limited by section 7 to the value of the insured estate as insured if less than policy limits –** [U.S. Bank Nat. Ass'n v. Tigor Title Ins. Co.](#), Case No. 295735 (Mich. App. June 21, 2012) (reversing summary judgment)
- **Recoupment: insurer's claim that agent was negligent was duplicative of its breach of agency agreement and thus barred by the economic loss rule –** [Stewart Title Guar. Co. v. Summit Escrow and Title Agency, LLC](#), Case No. 2:11-CV-1061 (C.D. Utah June 21, 2012) (order denying motion to dismiss)

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