



Real Property & Title Insurance Case Law Update

Recent Opinions of Interest to
Real Property Litigators and Practitioners

Weeks Ending December 21 & 28, 2012
By the Carlton Fields Real Property Litigation Practice Group

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I. FLORIDA STATE CASES – SARA WITMEYER & BRIAN VAVRA

- **Turnover:** under declaration of condominium, limited common elements did not become property of association upon turnover, and developer retained right to assign exclusive use of limited common elements until such time as it had “sold all Units owned by it” – [Courvoisier Courts, LLC v. Courvoisier Courts Condo. Ass'n](#), No. 3D12-709 (Fla. 3d DCA Dec. 19, 2012) (reversing partial final summary judgment in favor of association)
- **Foreclosure Sale:** objection to foreclosure sale was facially deficient because it did not challenge any conduct that occurred at, or which related to, foreclosure sale – [IndyMac Fed. Bank, FSB v. Hagan](#), No. 12-1153 (Fla. 3d DCA Dec. 19, 2012) (reversing order declining to issue certificate of title)
- **Vacating Judgment:** motion to vacate final judgment of foreclosure that was filed outside of one-year window set forth in Fla. R. Civ. P. 1.540(b) was time-barred – [IndyMac Fed. Bank, FSB v. Hagan](#), No. 12-1153 (Fla. 3d DCA Dec. 19, 2012) (reversing order declining to issue certificate of title)
- **Foreclosure Sale:** trial court had discretion to deny motion to vacate foreclosure sale despite lack of publication of notice of sale, where local administrative order established that failure to provide proof of publication was not grounds for cancelling foreclosure sale – [HSBC Bank USA, Nat'l Ass'n v. Nixon](#), No. 4D11-3038 (Fla. 4th DCA Dec. 19, 2012) (affirming denial of motion to vacate foreclosure sale, motion for rehearing, and motion for relief from judgment)
- **Lis Pendens:** court lacked jurisdiction to foreclose condominium association's lien in separate action where lien recorded after first mortgagee's supplemental lis pendens in re-foreclosure action; to recover on its lien, association should have timely intervened in re-foreclosure action under F.S. § 48.23(1)(d) – [U.S. Bank Nat'l Ass'n v. Quadomain Condo. Ass'n](#), No. 4D12-422 (Fla. 4th DCA Dec. 19, 2012) (reversing order denying motion to vacate

final judgment of lien foreclosure)

- **Equitable Vendor's Lien:** lender entitled to equitable vendor's lien on property for full amount of loan, less payments received, and homestead status of property did not preclude foreclosure of equitable vendor's lien against owner and non-owner spouse – [Spikes v. OneWest Bank, FSB](#), No. 4D11-2549 (Fla. 4th DCA Dec. 19, 2012) (reversing denial of imposition and foreclosure of equitable vendor's lien)
- **Foreclosure:** unsworn allegations by husband that his wife actively concealed foreclosure proceedings from him and that wife may have been the subject of some degree of mental incapacity during the course of the foreclosure action did not create sufficient showing of mistake, inadvertence, surprise or excusable neglect to warrant vacating final judgment – [Chase Home Loans, LLC v. Sosa](#), No. 3D12-1783 (Fla. 3d DCA Dec. 26, 2012) (reversing order vacating judicial sale and remanding)
- **Foreclosure:** ex-parte default judgment entered in one foreclosure action was void because mortgagee obtaining default judgment knew that second mortgagee intended to defend foreclosure based on allegations relating to priority of mortgages in second mortgagee's amended complaint filed in a parallel foreclosure action relating to same property – [JP Morgan Chase Bank, N.A. v. Wells Fargo Bank, N.A.](#), No. 5D12-208 (Fla. 5th DCA Dec. 28, 2012) (vacating default judgment and remanding)

II. 11TH CIRCUIT CASES – JIN LIU & LAUREN SEMBLER

- **FDCPA:** management company that collected debts on behalf of homeowners' association (HOA) fell within the §1692a(6)(F)(i) exemption because the company owed a fiduciary duty to the HOA and the collection of unpaid assessments on behalf of the HOA was incidental to the company's bona fide fiduciary obligations to the HOA – [Harris v. Liberty Cmty. Mgmt., Inc.](#), No. 11-14362 (11th Cir. Dec. 19, 2012) (affirming the district court's grant of summary judgment)
- **RESPA & TILA:** plaintiff's RESPA and TILA claims were time barred where brought over one year after the mortgage closing -- [Lehmann v. American Home Mortgage Corp.](#), Case No. 6:12-cv-1077-Orl-37TBS (M.D. Fla. Dec. 19, 2012) (granting defendants' motion to dismiss)
- **Lis Pendens:** potential land purchaser who filed lis pendens in connection with action to specifically enforce purchase contract was required to post a bond to maintain lis pendens, since the lis pendens was not based on a recorded instrument and might prevent the owner from selling the property -- [Skymark Real Estate Investors, LLC v. 7L Capital, LLC](#), Case No. 6:12-cv-1300-Orl-18TBS (M.D. Fla. Dec. 19, 2012) (ordering posting of lis pendens bond within 14 days or discharging and extinguishing notice of lis pendens)

III. TITLE INSURANCE CASES - CHRIS SMART

- **CPL:** allegations of lack of access fail to state a claim under closing protection letter — [Wells Fargo Bank, N.A. v. MLD Mortgage, Inc.](#), Case No. 12-227 (D. Minn. Dec. 11, 2012) (order granting motion to dismiss)
- **Class Action:** borrower's claims she was overcharged for closing fees and her lender's title insurance was based on statute and not contract and did not fall within title insurance policy's arbitration provision – [Hamilton v. Mortgage Information Services, Inc.](#), Case No. COA12-584 (N.C. App. Dec. 18, 2012) (affirming order denying motion to stay and compel arbitration)
- **Rates:** insurer's independent agents had actual and apparent authority to act on insurer's behalf for purposes of determining that insurer allowed its agents to charge excessive and discriminatory rates – [Robertson v. Tigor Title Ins. Co. of Florida](#), Case No. 49A02-1110-PL-971 (Ind. App. Dec. 19, 2012) (reversing trial court's reversal of administrative order)
- **Agents:** independent agent's title issuing agreement is limited to issuing title insurance products and agent acts outside of the scope of its agency agreement by withholding mortgages from public record in furtherance of a fraud and victim of fraud fails to state a

cause of action against insurer based on its title agent's fraudulent acts – [One West Bank, FSB v. Islam](#), Case No. 29577 (N.Y. Sup. Nov. 26, 2012) (granting motion to dismiss)

- **Third Party Beneficiary: condominium purchasers are not third party beneficiaries of developer's title insurance policy and lacked standing to bring claims against insurer** – [Hobaica v. Seypet Resorts, LLC](#), Case No. 11-702 (C.D. Cal. Dec. 17, 2012) (granting motion to dismiss)
- **Applicable Law: Mexican law does not apply to the interpretation of a policy issued in the U.S. to a U.S. corporation, even though the insured property is in Mexico** – [Hobaica v. Seypet Resorts, LLC](#), Case No. 11-702 (C.D. Cal. Dec. 17, 2012) (granting motion to dismiss)

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