



Real Property Case Law Update

Recent Opinions of Interest to
Real Property Litigators and Practitioners

Week Ending December 7, 2012

By the Carlton Fields Real Property Litigation Practice Group

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I. FLORIDA STATE CASES – SARA WITMEYER

- **Preservation of Error:** trial court did not err in vacating final judgment based on unsworn representation of counsel that he had not received notice of the hearing where no contemporaneous objection made to court's failure to place counsel under oath – [Cemex Constr. Materials v. Ross](#), No. 5D12-2449 (Fla. 5th DCA Dec. 7, 2012) (affirming vacatur of final judgment)
- **Foreclosure:** summary foreclosure judgment reversed where defendant did not answer but had not been defaulted and plaintiff failed to establish that no answer which defendant might file could present genuine issue of material fact regarding whether plaintiff complied with condition precedent of providing pre-suit notice of default – [Dominko v. Wells Fargo Bank, N.A.](#), No. 4D11-1854 (Fla. 4th DCA Dec. 5, 2012) (reversing final judgment) (*Editor's note: Carlton Fields shareholder Michael Winston represented Wells Fargo in this appeal and argued for affirmance because defendant did not preserve this issue for appeal; the court did not address this argument in its opinion*)
- **Due Process:** landowners denied due process where court affirmed code violation without ruling on landowners' motion to supplement appendix with transcript of proceedings below – [Kirrie v. Indian River County Code Enforcement Bd.](#), No. 4D12-2328 (Fla. 4th DCA Dec. 5, 2012) (granting petition for writ of certiorari)
- **Takings:** where landowners deprived of all or substantially all economically viable use of property, trial court erred in ruling against landowners' inverse condemnation claim – [Galleon Bay Corp. v. Bd. of County Comm'rs of Monroe County, Florida](#), No. 3D11-1296 (Fla. 3d DCA Dec. 5, 2012) (reversing final judgment)

II. 11TH CIRCUIT & OTHER FEDERAL CIRCUIT CASES - LAUREN SEMBLER & DANA BLUNT

- **FDCPA:** plaintiff could not sustain claim under Fair Debt Collection Practices Act

("FDCPA") because defendant was engaged in the collection of its own debts, not the debts of another and, thus, did not qualify as a "debt collector" under the FDCPA – [Goia v. CitiFinancial Auto Corp.](#), No. 12-12639 (11th Cir. Dec. 3, 2012) (affirming district court's judgment in favor of defendant)

- **HAMP:** borrowers failed to state claims for breach of contract to provide permanent modifications based upon lender's alleged breaches of Trial Period Plans ("TPPs") under federal Home Affordable Modification Program ("HAMP") where pleadings demonstrated borrowers did not meet conditions of TPPs requiring (i) that lender sign the TPP to be effective or (ii) that borrowers meet HAMP's financial-hardship requirement; lender's acceptance of TPP payments did not prove intent to be bound because borrowers already owed regular payments and borrowers' claims they never would have fallen behind absent HAMP only proved ineligibility for loan modification – [Pennington v. HSBC Bank USA, N.A.](#), No. 12-50064 (5th Cir. Oct. 3, 2012) (affirming dismissals).

III. TITLE INSURANCE CASES - CHRIS SMART

- **Attorney's Fees:** under New York common law, an insured may not recover the expenses of bringing action against its insurer absent a contractual or policy provision permitting recovery of attorney's fee – [Stein, LLC v. Lawyers Title Ins. Corp.](#), Case No. 2011-02264 (N.Y. App. Nov. 7, 2012) (affirming dismissal of complaint as to attorney's fees)

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