



Real Property & Title Insurance Case Law Update

Recent Opinions of Interest to
Real Property Litigators and Practitioners

Week Ending January 18, 2013

By the Carlton Fields Real Property Litigation Practice Group

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I. FLORIDA STATE CASES – SARA WITMEYER

- **Commercial Lease:** trial court erred in granting summary judgment for lessor where factual disputes remained whether lessor's actions surrounding obligation to install air conditioner constituted anticipatory repudiation of the lease – [TDM of Cent. Fla., LLC v. Saul Holdings Ltd. P'ship](#), No. 5D11-1106 (Fla. 5th DCA Jan. 18, 2013) (reversing order granting summary judgment)
- **Arbitration:** to extent homeowners association, who was suing builder for construction defects, was acting as representative of homeowners who had agreed to arbitrate claims, court should not have denied builder's motion to compel arbitration – [Pulte Home Corp. v. Vermillion Homeowners Ass'n](#), No. 2D12-1532 (Fla. 2d DCA Jan. 16, 2013) (reversing order denying motion to compel arbitration)
- **Affirmative Defenses:** borrowers' failure to properly plead lack of standing and fraud as affirmative defenses resulted in defenses not being properly before trial court at time it granted bank's motion for summary judgment in foreclosure action and actions on notes, security agreement, and guarantees – [Cong. Park Office Condos II, LLC v. First-Citizens Bank & Trust Co.](#), No. 4D11-4479 (Fla. 4th DCA Jan. 16, 2013) (affirming final judgment of foreclosure)
- **Discovery:** trial court did not err in granting summary judgment pending discovery because borrowers failed to act diligently in seeking discovery from foreclosing bank – [Cong. Park Office Condos II, LLC v. First-Citizens Bank & Trust Co.](#), No. 4D11-4479 (Fla. 4th DCA Jan. 16, 2013) (affirming final judgment of foreclosure)
- **Unclean Hands:** borrowers' allegations that bank failed to comply with material terms of loan documents did not amount to unclean hands and thus was insufficient to withstand bank's motion for summary judgment – [Cong. Park Office Condos II, LLC v. First-Citizens Bank & Trust Co.](#), No. 4D11-4479 (Fla. 4th DCA Jan. 16, 2013) (affirming final judgment of foreclosure)

- **Condominium Termination:** 2007 amendment to F.S. § 718.117, requiring 80% owner-approval to terminate a condominium, was unconstitutional as applied retroactively to pre-existing condominium whose declaration required 100% owner-approval and did not specify its creation pursuant to the Florida Condominium Act “as amended from time to time” – [Philips-Zagor v. Versailles Hotel Condo. Assocs., Inc.](#), Case Nos. 12-06636-CA 10, 12-02809-CA 10, 12-05380-CA 10 (Fla. 11th Cir. Ct. Sept. 19, 2012) (order granting partial final summary judgment), appeal filed, Case No. 3D12-2767 (Fla. 3d DCA. Oct. 23, 2012)

II. 11TH CIRCUIT CASES - LAUREN SEMBLER

- **Third Party Beneficiary:** plaintiff-lessor was not an intended third party beneficiary of purchase and assumption agreement between FDIC and purchaser of failed bank and, thus, could not enforce lease against purchaser, where agreement expressly disclaimed any intent to create third party beneficiaries and plaintiff failed to present evidence to overcome presumption that third parties to government contracts are assumed to be incidental beneficiaries – [Interface Kanner, LLC v. JPMorgan Chase Bank, N.A.](#), No. 11-13579 (11th Cir. Jan. 10, 2013) (vacating district court decision and remanding with instructions to dismiss for lack of subject matter jurisdiction)
- **FCCPA:** Florida Consumer Collection Practices Act (FCCPA) claim barred by voluntary payment doctrine where, although plaintiff wrote “under protest” on her checks and defendant had threatened to place a lien on plaintiff’s property, plaintiff did not show “such a degree of mental manipulation” to overcome general rule that payment be deemed voluntary - [Abby v. Paige](#), No. 10-23589-CIV (S.D. Fla. Jan. 11, 2013) (granting summary judgment on FCCPA claim)

III. TITLE INSURANCE CASES - CHRIS SMART

- **Title Agent:** plaintiff failed to state a cause of action against insurer where it failed alleged insurer was aware of agent’s issuance of fraudulent commitments or that agent had apparent authority based on the misleading conduct of the insurer – [DLJ Mortgage Capital, Inc. v. Kontogiannis](#), Case No. 104675/10 (N.Y. App. Jan. 15, 2013) (reversing denial of motion to dismiss)
- **Duty to Defend:** where policy is ambiguous as to whether easement is excluded or excepted from coverage, insurer has a duty to defend – [Cox v. Commonwealth Land Title Ins. Co.](#), Case No. Yor-12-3 (Me. Jan. 15, 2013) (vacating summary judgment)
- **Tripartite Relationship:** where law firm is retained by insurer to prosecute action on behalf of insured, attorney client privilege applies to law firm’s communications with insurer and its work product is protected even though such communications and work product are shared with insurer – [Bank of America v. Superior Court of Orange County](#), Case No. G046829 (Cal. App. Ct. Jan. 15, 2013) (granting petition for writ of mandate and vacating order denying motion to quash subpoenas duces tecum)
- **Agency Agreement:** where title agent closed transaction, failed to apply proper discounted rate, and collected premium for insurer and insurer was sued in class action, agent was obligated to indemnify insurer under agency agreement – [Hancock v. Chicago Title Ins. Co.](#), Case No.3:07-CV-1441 (N.D. Tex. Jan. 11, 2013) (memorandum order granting summary judgment)

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