



# Real Property Case Law Update

Recent Opinions of Interest to  
Real Property Litigators and Practitioners

**Week Ending May 25, 2012**

*By the Carlton Fields Real Property Litigation Practice Group*

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## I. FLORIDA STATE CASES – SARA WITMEYER

- **Pre-Suit Notice:** lender entitled to summary judgment where borrower failed to comply with express terms of mortgage requiring borrower to provide written notice and afford lender reasonable time to take corrective action before commencing judicial proceeding – [Winterberg v. Wells Fargo Bank, N.A.](#), No. 312010CA1040 (Fla. 19th Jud. Cir. Ct. Jan. 11, 2012) (granting final summary judgment) **[Congratulations to our own Michael Winston, who represented Wells Fargo Bank in this action!]**
- **Rescission:** buyer was not entitled to rescind commercial purchase and sale agreement in the absence of seller's fraud or actionable failure to disclose a material fact, and where "as is" provision placed risk of mutual mistake on buyer – [Thomas J. Duggan, LLC v. Peacock Point, LLC](#), No. 1D11-3352 (Fla. 1st DCA May 23, 2012) (affirming order denying rescission)
- **Foreclosure:** borrower was not judicially estopped from arguing that release in mortgage extension agreement did not bar its counterclaims and affirmative defenses where borrower did not assert inconsistent position in separate proceeding and lender was not misled and did not change its position – [Crawford Residences, LLC v. Banco Popular N. Am.](#), No. 2D11-3720 (Fla. 2d DCA May 25, 2012) (reversing final judgment of foreclosure)
- **Foreclosure:** lender was not entitled to summary judgment where it could not provide copy of notice of default required by mortgage and could not establish that the notice was mailed to the proper address – [Boye v. Citimortgage, Inc.](#), No. 2D11-2604 (Fla. 2d DCA May 23, 2012) (reversing final judgment of foreclosure)
- **Ejectment:** claim for ejectment was barred by laches defense where defendant established that she had no notice that plaintiffs claimed any rights in disputed strip of land, plaintiffs had long failed to assert their rights in same, and defendant would be prejudiced or injured if plaintiffs prevailed – [Trevett v. Walker](#), No. 3D10-1953 (Fla. 3d DCA May 23, 2012) (affirming final judgment denying ejectment claim)
- **Fraudulent Transfers:** judgment creditor was not entitled to summary judgment order setting aside debtor's property conveyances to his wife as fraudulent transfers where (i) one of the properties had been owned by them as tenants by the entireties, (ii) the other

property was entitled to constitutional homestead protection, and (iii) creditor's claims were barred by the applicable statute of limitations – [Calarese v. Weissfisch](#), No. 3D11-985 (Fla. 3d DCA May 23, 2012) (reversing final summary judgment)

- **Foreclosure:** defense that bank violated anti-discrimination provisions of Equal Credit Opportunity Act by having wife sign note and mortgage was legally insufficient to bar entry of judgment against wife on mortgage foreclosure count where property offered as security to satisfy debt was jointly owned by husband and wife – [Gonzalez v. NAFH Nat'l Bank](#), No. 3D11-1800 (Fla. 3d DCA May 23, 2012) (affirming final summary judgment on foreclosure count but reversing as to promissory note claim)
- **Homeowners Associations:** seller's failure to provide buyers of a home subject to homeowners association with statutorily required disclosure summary that included current amount of assessments and time period covered by assessments rendered agreement voidable by buyers – [Tempel v. S. Homes of Palm Beach, L.L.C.](#), No. 3D11-2521 (Fla. 3d DCA May 23, 2012) (reversing order determining seller substantially complied with statutory requirements)
- **Construction Lien:** circuit court erred in granting owner and surety's motion for reduction in transfer bond without allowing construction lienor opportunity to present evidence regarding appropriate amount of bond – [Bayview Constr. Corp. v. Jomar Props.](#), No. 4D11-4426 (Fla. 4th DCA May 23, 2012) (granting petition for writ of certiorari)

## II. 11<sup>TH</sup> CIRCUIT CASES – LAUREN SEMBLER

- **RESPA:** a violation of Section 2607(b) occurs only when a charge for real estate settlement services has actually been split between two or more persons; no violation occurs when an unearned fee has been retained solely by the settlement service provider charging the fee – [Freeman v. Quicken Loans, Inc.](#), No. 10–1042 (May 24, 2012) (affirming 5th Circuit)

## III. TITLE INSURANCE CASES – CHRIS SMART

- **Tender of Payment:** insurer's payment of difference in value in property with and without easement satisfies its obligations under policy and is complete defense to insured's breach of contract action – [Toste v. First American Title Ins. Co.](#), Case No.C067520 (Cal. App. March 28, 2012) (affirming summary judgment)
- **Termination of Coverage:** where insured leaseholder conveys leasehold to third party without any guaranty or covenant of warranty, 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.A.D. May 22, 2012) (declaratory judgment)
- **Bankruptcy:** insured lender's third party claim of breach of contract and bad faith against insurer is not a core proceeding or related to the bankruptcy and must be dismissed from debtor's adversary proceeding without prejudice – [Ricchi v. American Home Mortgage Servicing, Inc.](#), Case No. 11-1144 (Bkrtcy. D.N.J. May 17, 2012) (dismissing third party complaint)

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