Real Property, Financial Services, & Title Insurance Update: Week Ending January 12, 2018

January 24, 2018

REAL PROPERTY UPDATE

- **Standing/Foreclosure:** pursuant to Florida Rule of Procedure 1.260, the assignee of a note during pendency of a foreclosure acquires standing of original plaintiff lender - Spicer v Ocwen Loan Servicing, LLC, et al., Case No. 4D16-2335 (Fla. 4th DCA Jan. 10, 2018) (affirmed).

- **Substitute Service:** service on Secretary of State, pursuant to section 48.181, Fla. Stat., was insufficient to support default judgment, where defendant provided sworn unrefuted testimony he was not conducting business in the State of Florida, and was not avoiding service - Cozzetto v Banyan Finance, LLC, Case No. 4D17-1255 (Fla. 4th DCA Jan. 10, 2018)(reversed and remanded).

- **Statute of Limitations/Foreclosure:** lawsuit filed more than 5 years after borrower's first default under note/mortgage was timely for payments due within limitations period, and required judgment exclude those payment defaults outside of limitations period - Velden v Nationstar Mortgage, LLC, Case No. 5D16-3628 (Fla. 5th DCA Jan. 12, 2018) (affirmed, in part, reversed in part, remanded).

- **Tax Deed/Redemption:** trial court's finding that owner ready, willing, and able to redeem property on day of tax deed auction—i.e., prior to execution and recording of tax deed of owner's property to successful bidder the following day—was supported by competent substantial evidence – Ashear v. Sklarey, No. 3D16-888 (Fla. 3d DCA Jan. 17, 2018) (affirmed in part, reversed in part, and remanded with instructions)

- **Code Enforcement:** some improvements to horse farm, including two barns, storage building, and bin, were exempt from village's building permit requirements and zoning regulations pursuant to section 604.50(1), Florida Statutes – 14269 BT LLC v. Village of Wellington, Florida, No. 4D17-2376 (Fla. 4th DCA Jan. 17, 2018) (granting petition in part)

- **Sinkhole/CRNs:** pursuant to section 624.155(1)(d), Florida Statutes, filing of CRN before appraisal process was complete and damages were determined did not render CRN a legal nullity, nor did it preclude insured's bad faith claim against insurer in connection with sinkhole claim – Landers v. State Farm Florida Ins. Co., No. 5D15-4032 (Fla. 5th DCA Jan. 19, 2018) (reversed and remanded)

FINANCIAL SERVICES UPDATE

- **TCPA:** denying motion to stay TCPA proceeding pending the D.C. Circuit's decision in a case challenging the FCC's July 10, 2015 Order as, issuing stay "would amount to a constructive refusal to enforce the FCC's interpretation [of the statute], which th[e] court is prohibited from doing []" - Williams v. Bluestem Brands, Inc., 2017 WL 6507226 (M.D. Fla. Dec 15, 2017)

- **TCPA:** denying summary judgment motion on TCPA claim where plaintiff's sworn statement that she orally revoked consent conflicted with defendant's records which contained no such notation - Miller v. Ginny's Inc., 2017 WL 6398302 (M.D. Fla. Dec 13, 2017)

- **FCCPA:** denying summary judgment motion on FCCPA claims for harassing calls and asserting a legal right that does not exist where predicated on calls that continued after the oral revocation of consent but conflicting record evidence demonstrated fact issues remained on whether plaintiff orally revoked - Miller v. Ginny's Inc., 2017 WL 6398302 (M.D. Fla. Dec 13, 2017)

- **TILA:** rescission claim properly dismissed where plaintiff failed to allege facts sufficient to show that she exercised the right to rescind within three years of the consummation of her loan, and claim was time-barred with no allegations supporting equitable tolling - Agraz v. Golden Empire Mortgage, Inc., 2017 WL 6525234 (9th Cir. 2017)

- **RESPA:** claim predicated on itemized and verified payoff statement properly dismissed where plaintiff did not allege servicer failed to provide specific information requested, that he suffered actual damages from a potential non-response; noting one potential instance of non-responsiveness cannot constitute a "pattern and practice of noncompliance" warranting statutory damages - Petrovich v. Ocwen Loan Servicing, LLC, 2017 WL 6330877 (9th Cir. 2017)

- **RESPA:** dismissing RESPA claim under 12 C.F.R. section 1024.41 due to borrowers' failure to allege a "colorable relationship" between the lender's conduct and their alleged actual damages consisting of active foreclosure of their property, attorney's fees and various manifestations of distress - Judan v. Wells Fargo Bank, N.A., 2017 WL 6405615 (N.D. Cal. Dec. 15, 2017)

- **FDCPA:** dismissing FDCPA claim predicated on defendant's attempts to foreclosure on real property because "[t]he filing a foreclosure complaint does not constitute a prohibited communication under the FDCPA" and plaintiffs did not allege defendant was attempting to collect a debt from them as they were not obligated on the subject promissory note - Bruce v. U.S. Bank, N.A., 2017 WL 6406904 (M.D. Fla. Dec. 15, 2017)

- **FDCPA:** dismissing FDCPA claim where plaintiffs failed to provide pre-suit notice in accordance with deed of trust, holding the notice provision does not impermissibly abrogate the FDCPA - Giotta v. Ocwen Loan Servicing, LLC, 2017 WL 6397179 (9th Cir. 2017)

- **FDCPA:** while the FDCPA section 1692f(6) claim includes nonjudicial foreclosure in its scope, dismissing claim due to wholly conclusory allegations - Arias v. Select Portfolio Servicing, Inc., 2017 WL 6447890 (E.D. Cal. Dec. 18, 2017)

- **FCRA:** finding reported information (that loan was 120 days or more delinquent) was not inaccurate or incomplete and dismissing with prejudice borrower's complaint alleging violation of the FCRA based on borrower's position that because the state court mortgage foreclosure action accelerated the mortgage, borrower no longer had the ability and/or obligation to make monthly payments on her mortgage – Leones v. Rushmore Loan Management Services, LLC, No. 0:17-CV-61266-WPD (S.D. Fla. Dec. 11, 2017)

TITLE INSURANCE UPDATE

- **Experts:** Late-disclosed "rebuttal" expert report excluded because opinions related to issues on which offering party bore the burden of proof. First American Title Ins. Co. v. Bowles Rice, LLP, Case No. 1:16cv219 (N.D. W. Va. Jan. 5, 2018).

- **Survey Exception:** Affirming summary judgment to title insurer on survey exception where survey would have shown that separate garage parcel was not included in conveyed land. Kreider v. Correa, Case No. 2111 MDA 2106 (Pa. Sup. Jan. 11, 2018).

- **Mortgage Fraud:** unlike fraud and bankruptcy dischargeability, where material issues of fact as to intention remain, summary judgment may be granted on conversion as to the principal of a mortgage lender who loaned himself money but failed to record the mortgage – First American Title Ins. Co. v. Sadek, Case No. 11-1302 (D.N.J. Dec. 29, 2017) (order granting in part and denying in part summary judgment)

Related Practices

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