

Real Property & Title Insurance Update: Week Ending May 19 & 26, 2017

June 02, 2017

Real Property Update

- **Foreclosure/Standing/Lost Note:** if plaintiff did not have right to enforce note when lost, plaintiff should present evidence of assignment from payee to plaintiff or affidavit of ownership - [Peters v. The Bank of New York Mellon](#), Case No. 2D15-2222 (Fla. 2d DCA May 26, 2017) (Reversed and remanded with directions.)
- **Foreclosure/Standing/Assignment:** assignment of mortgage, but not note, insufficient to prove standing - [Peters v. The Bank of New York Mellon](#), Case No. 2D15-2222 (Fla. 2d DCA May 26, 2017) (Reversed and remanded with directions.)
- **Foreclosure/Standing:** lender failed to prove standing because original allonge to note not filed before or at trial - [Mathis v Nationstar Mortgage, LLC](#), Case No. 2D15-2782 (Fla. 2d DCA May 26, 2017) (Reversed and remanded with directions.)
- **Condition Precedent/Foreclosure:** notice to borrower of terms of default and action required to cure constitutes substantial compliance with paragraph 22 default notice in mortgage - [U.S. Bank National Assoc., Trustee v Doepker](#), Case No. 2D15-5307 (Fla. 2d DCA May 24, 2017) (Reversed and remanded.)
- **Due Process:** violation of procedural due process occurred when trial court considered and adjudicated matters beyond those noticed for hearing - [Nationstar Mortgage, LLC v Weiler](#), Case No. 2D16-1607 (Fla. 2d DCA May 26, 2017) (Reversed and remanded.)
- **Claim to Deposit:** broker had “ownership interest” in forfeited deposits because listing agreement provided broker would be paid commission from any retained deposits - [Plaza Tower Realty Group, LLC v 300 S. Duval Assoc., LLC, et al.](#), Case No. 3D16-1491 (Fla. 3d DCA May 24, 2017)

- **Standing/Foreclosure:** lender not entitled to evidentiary inference that it possessed original note at time of filing foreclosure action because copy attached to complaint did not have loan numbers and, therefore, was not “identical” to original note, with loan numbers - [Friedle v The Bank of NY Mellon, et al.](#), Case No. 4D15-1750 (Fla. 4th DCA May 24, 2017)
- **Exemption to Homestead Protection:** trial court could force sale of ex-spouse’s homestead property to pay former spouse when property owner acts egregiously, reprehensibly, or fraudulently - [Spector v Spector, et al.](#), Case No. 4D16-0922 (Fla. 4th DCA May 24, 2017) (*Reversed and remanded with instructions.*)
- **Homeowners Association Powers/Restrictions:** HOA required to strictly comply with 14 day notice required under section 720.305(2)(b), Florida Statutes, before imposing fines - [Dwork v Executive Estates of Boynton Beach Homeowners Ass., Inc.](#), Case No. 4D16-1698 (Fla. 4th DCA May 24, 2017) (*Reversed and Remanded.*)
- **Vacating Dismissal:** voluntary dismissal filed by clerical error should have been vacated pursuant to 1.540(b) where evidence showed inadvertence of filing - [Wells Fargo Bank, N.A. v Rojas](#), Case No. 4D16-4301 (Fla. 4th DCA May 24, 2017) (*Reversed and remanded.*)
- **Lis Pendens:** possible financial harm, by way of loss of potential sale of property, not enough to show requisite irreparable harm imposed by trial court’s denial of motion to dissolve lis pendens - [Landmark at Crescent Ridge, L.P. v Everest Financial, Inc.](#), No. 1D16-4532 (Fla. 1st DCA May 16, 2017) (petition for writ of certiorari dismissed)
- **Proposal for Settlement:** proposal for settlement complied with rule 1.442 in inverse condemnation case where plaintiff did not raise any equitable claims for relief in its complaint - [Polk County v. Highlands-in-the-Woods, L.L.C.](#), No. 2D15-5642 (Fla. 2d DCA May 19, 2017) (reversed and remanded)
- **Foreclosure/Attorneys’ Fees:** plaintiff not entitled to attorneys’ fees where failed to present expert testimony as to reasonableness of attorney’s hourly rate and hours expended - [Sciandra v. Pennymac Corp.](#), No. 2D15-5189 (Fla. 2d DCA May 19, 2017) (affirmed in part; reversed in part; remanded with instructions)
- **Foreclosure/Statute of Limitations:** accrual of cause of action for each missed monthly installment payment accrues the day after each is due to be paid, not on the date of acceleration of entire balance - [Ventures Trust 2013-I-NH v. Johnson](#), No. 5D16-1020 (Fla. 5th DCA May 19, 2017) (affirmed)
- **Short Sale/Statute of Limitations:** one-year statute of limitations to bring deficiency action, contained in Florida Statute 95.11(5)(h), is not applicable to an action after a short sale - [Bush v. Whitney Bank et al.](#), No. 5D16-2344 (Fla. 5th DCA May 19, 2017) (affirmed)

TITLE INSURANCE UPDATE

- **Adverse Possession:** under Delaware law, the state is exempt from loss of title by adverse possession absent consent by statute – [Delaware v. Sweetwater Point, LLC](#), C.A. No. 5009-VCG (N.D. Ala. May 23, 2017) (unpublished memorandum opinion) (congratulating the parties on their diligence in tracing title back to colonial times and their exemplary civility and courtesy in pursuit of zealous advocacy)
- **Bad Faith:** title insurers are exempt from bad faith denial of coverage claims by Illinois Title Insurance Act, and claims for common law bad faith or breach of covenant of good faith and fair dealing are barred by Illinois law – [Bank of America v. Chicago Title Ins. Co.](#), Case No. 17 C 0407 (N.D. Ill. May 18, 2017) (granting motion to dismiss)
- **Breach of Agency Agreement:** inappropriate to enter summary judgment where agency agreement is ambiguous and the court must consider parole evidence to determine meaning of agreement – [First American Title Ins. Co. v. Nat'l Title Agency, LLC](#), Case No. 2:13CV1055DAK (D. Utah, May 19, 2017) (denying summary judgment)
- **Breach of Agency Agreement:** title agent breached agency agreement with insurer by failing to pay for shortfalls in trust account and insurer was required to pay for shortfalls, even though shortfalls may have been caused by financial institution which permitted garnishment of trust account – [First American Title Ins. Co. v. Nat'l Title Agency, LLC](#), Case No. 2:13CV1055DAK (D. Utah, May 19, 2017) (granting summary judgment)
- **Breach of Contract:** title company permitted to bring breach of contract action against lender that conveyed property purchased at foreclosure sale to insured and inadvertently conveyed additional lot not owned by lender, where property description was not included in the contract, parties executed contract prior to drafting property description, and insured purchaser was in possession of the land – [Fidelity Nat'l Title Ins. Co. v. Wooden](#), Case No. 5:16-cv-00844-AKK (N.D. Ala. May 23, 2017) (denying motion to dismiss)
- **Breach of Warranty:** title company permitted to bring breach of warranty action against lender where lender purported to convey good and marketable title to property purchased at foreclosure sale via special warranty deed to insured, and inadvertently conveyed additional property not owned by lender – [Fidelity Nat'l Title Ins. Co. v. Wooden](#), Case No. 5:16-cv-00844-AKK (N.D. Ala. May 23, 2017) (denying motion to dismiss)
- **Closing instructions:** issue of whether purchaser provided closing instructions and whether instructions were required by law, policy, custom or practice to be in writing is a genuine issue of material fact underlying breach of contract action, where closing agent who was provided with borrower's verbal closing instructions was title insurer's escrow, title and closing agent – [Johnson v. U.S. Title Agency, Inc.](#), Case No. 103665 (Ohio Dist. Ct. App. May 18, 2017) (reversing and remanding summary judgment)
- **Closing instructions:** borrower has standing to bring action against closing, title and escrow agent for agent's failure to comply with lender's closing instructions where instructions contained a provision that agent will be liable for bank's losses – [Johnson v. U.S. Title Agency, Inc.](#), Case No. 103665 (Ohio Dist. Ct. App. May 18, 2017) (reversing and remanding summary judgment)
- **Created, Suffered or Assumed:** insured not required to act intentionally or wrongfully under Exclusion 3(a); rather, the Exclusion applies if the insured either expressly or impliedly assumed or agreed to the defects or encumbrances in the course of purchasing the property involved – [Bank of America v. Chicago Title Ins. Co.](#), Case No. 17 C 0407 (N.D. Ill. May 18, 2017) (denying motion to dismiss counterclaim)
- **Fraudulent Transfers:** Utah's Fraudulent Transfer Act does not provide a cause of action against individual directors of a corporate entity, and unless insurer brings a claim to pierce the corporate veil against the corporate entity causing the transfer it cannot prevail against the principals of the corporation – [First American Title Ins. Co. v. Nat'l Title Agency, LLC](#), Case No. 2:13CV1055DAK (D. Utah, May 19, 2017) (granting summary judgment)

- **Indemnification:** title company's claim for indemnity against lender that sold property purchased at foreclosure sale to insured and inadvertently conveyed additional lot not owned by lender not ripe because no payment for loss had been made – [Fidelity Nat'l Title Ins. Co. v. Wooden](#), Case No. 5:16-cv-00844-AKK (N.D. Ala. May 23, 2017) (granting motion to dismiss without prejudice)
- **Personal Guaranty:** insurer can bring suit against guarantor for unpaid premiums, where guarantor obligated to remit policy premiums under personal guaranty – [First American Title Ins. Co. v. Nat'l Title Agency, LLC](#), Case No. 2:13CV1055DAK (D. Utah, May 19, 2017) (granting summary judgment)
- **Record Title:** under Delaware law, evidentiary standard is preponderance of the evidence in an *in personam* action to determine competing claims to property – [Delaware v. Sweetwater Point, LLC](#), C.A. No. 5009-VCG (N.D. Ala. May 23, 2017) (unpublished memorandum opinion) (congratulating the parties on their diligence in tracing title back to colonial times and their exemplary civility and courtesy in pursuit of zealous advocacy)
- **Indemnity from title agent:** Title underwriter awarded summary judgment on fraud claims against former title agent, which were deemed excepted from discharge in former agent's bankruptcy proceedings, based upon former agent's intentional failure to except pre-existing liens from coverage prior to issuing policies. [IN RE: Syed Rizwan Mohiuddin, Southern Title Ins. Corp. v. Mohiuddin](#), Adversary No. 16-3151 (Bankr. S.D. Tex May 12, 2017)

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