

Real Property & Title Insurance Update: Weeks Ending December 2 & 9, 2016

December 15, 2016

REAL PROPERTY UPDATE

- **Deficiency/Subject Matter Jurisdiction:** approving the 3d DCA's opinion that an assignee of a foreclosure judgment can maintain a separate action for deficiency under Florida Statutes, Section 702.06, even when foreclosure court retains jurisdiction to adjudicate deficiency in foreclosure action - [Dyck-O'Neal, Inc. v Konstantino](#), Case No. 2D15-4064 (Fla. 2d DCA Dec. 9, 2016) (reversed and remanded; certifying conflict with *Higgins v. Dyck-O'Neal, Inc.*, 41 Fla. L. Weekly D1376 (Fla. 1st DCA June 9, 2016), certified)).
- **Default:** Florida Rule of Civil Procedure 1.500 precludes entry of default when defendant has served response to complaint, even if response was not filed within the time granted by the trial court - [Sansbury v Wells Fargo Bank, N.A.](#), Case No. 5D15-1956 (Fla. 5th DCA Dec. 9, 2016) (reversed and remanded).
- **Landlord-Tenant/Self-Help/Wrongful Eviction:** landlord that removed Tenant pursuant to self-help provisions in lease agreement was liable for wrongful eviction for violating Section 83.05(2), Florida Statutes, which provides that Landlord may only recover possession of a rented premises (a) In an action for possession under s. 83.20, or other civil action in which the issue of right of possession is determined; (b) When the tenant has surrendered possession of the rented premises to the landlord; or (c) When the tenant has abandoned the rented premises - [Palm Beach Florida Hotel and Office Building Limited Partnership, et al. v Nantucket Enterprises, Inc.](#), Case No. 4D14-3450 (Fla. 4th DCA Dec. 7, 2016) (affirmed, in part, reverse, in part and remanded).

- **Landlord-Tenant/Conversion:** landlord could not convert Tenant's newly remodeled space because real property cannot be converted - [Palm Beach Florida Hotel and Office Building Limited Partnership, et al. v Nantucket Enterprises, Inc.](#), Case No. 4D14-3450 (Fla. 4th DCA Dec. 7, 2016) (affirmed, in part, reverse, in part and remanded).
- **Foreclosure/Conditions Precedent:** a breach of a condition precedent does not preclude the enforcement of an otherwise valid contract, absent some prejudice - [Liberty Home Equity Solutions, Inc. v Raulston, et al.](#), Case No. 4D15-3652 (Fla. 4th DCA Dec. 7, 2016)
- **Foreclosure/Standing:** attaching a copy of the note to the complaint and presenting the original note in the same condition at trial creates an inference that the plaintiff was in actual possession of the note at the time the complaint was filed, which, absent evidence to the contrary, is sufficient to establish standing - [The Bank of NY Mellon v Milford, et al.](#), Case No. 4D15-4813 (Fla. 4th DCA Dec. 7, 2016).
- **Foreclosure/Lack of Jurisdiction:** trial court lacked jurisdiction to impose sanction against bank for filing allegedly frivolous foreclosure action because bank had voluntarily dismissed the case within the safe harbor period under section 57.105(4), Florida Statutes - [Bank of Am. v. Turkanovic](#), No. 1D16-3416 (Fla. 1st DCA Dec. 1, 2016) (granting bank's petition for writ of prohibition)
- **Foreclosure/Improper Expert Testimony:** trial court, in finding that trust lacked standing, relied solely on improper legal conclusions of borrower's expert that trust documents did not allow for trust to acquire subject note and that trust was not the holder of the note - [Citibank, N.A., etc. v. Olsak](#), No. 3D15-1032 (Fla. 3d DCA Nov. 30, 2016) (reversing involuntary dismissal, and remanding for further proceedings)
- **Commercial Landlord-Tenant/Voluntary Deposit of Rents:** in tenant's lawsuit against landlord based on alleged noise pollution from neighboring tenant, trial court did not abuse its discretion by allowing tenant to voluntarily deposit rent money into court registry pursuant to Rule 1.600 because purpose of tenant's lawsuit was, in part, to determine entitlement to base rent from the date of the alleged construction eviction onward - [Tixe Designs, Inc. v. Green Ice, Inc.](#), No. 3D15-2419 (Fla. 3d DCA Nov. 30, 2016) (affirmed)
- **Foreclosure/Authenticity of Signature:** even though borrower failed to place bank on notice in her pleadings that she was challenging the authenticity or validity of her signature, trial court allowed borrower to present testimony on that issue, and trial court's ultimate determination that borrower signed the loan documents was supported by competent, substantial evidence - [Polonsky v. HSBC Bank USA, N.A., etc.](#), No. 3D16-371 (Fla. 3d DCA Nov. 30, 2016) (affirmed)

- **Foreclosure/Attorneys' Fees:** because defendants ultimately placed plaintiff bank on notice of their unpled claim for attorneys' fees, and bank failed to timely object to defendants' failure to plead entitlement, trial court's judgment awarding attorneys' fees to defendants was proper – [BankUnited, N.A. v. Ajabshir](#), No. 3D16-872 (Fla. 3d DCA Nov. 30, 2016) (affirmed)
- **Foreclosure/Damages:** bank provided competent, substantial evidence of some, but not all, of its damages in foreclosure action – [Tervil v. U.S. Bank, Nat'l Ass'n, as Trustee](#), No. 4D15-2561 (Fla. 4th DCA Nov. 30, 2016) (affirmed in part, reversed in part, and remanded with instructions)
- **Foreclosure/Condition Precedent:** trial court erred by requiring borrower to raise bank's noncompliance with condition precedent, specifically the HUD regulation's requirement under 24 C.F.R. § 203.604 concerning face-to-face counseling, as an affirmative defense where borrower specifically denied the bank's compliance with that HUD regulation in her answer, thereby shifting burden back to bank to prove such compliance at trial – [Palma v. JPMorgan Chase Bank, Nat'l Ass'n, et al.](#), No. 5D15-3358 (Fla. 5th DCA Dec. 2, 2016) (reversed, and remanded with instructions to enter an involuntary dismissal)

TITLE INSURANCE UPDATE

- **Breach of Title Insurance Policy:** Under Florida's Marketable Record Title to Real Property Act, title insurer has no duty to discover a customary right for public beach access which accrued prior to an undisputed date of root title, the date the last transaction purporting to create or transfer the estate being claimed provided the transaction was recorded at least 30 years prior to the date marketability is being determined – [Kahama VI, LLC v. HJH, LLC](#), Case No. 8:11-cv-2029-T-30TBM (M. D. Fla., Dec. 6, 2016) (granting summary judgment)
- **Land Use Regulations:** Unless specifically noted in the policy, title insurance policy does not insure against future changes to land use regulations made after city discovered its interest in the property at issue, which interest was not discovered or disclosed by title insurer in the policy, even if those regulations cause an economic loss – [Kahama VI, LLC v. HJH, LLC](#), Case No. 8:11-cv-2029-T-30TBM (M. D. Fla., Dec. 6, 2016) (granting summary judgment)

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