

Real Property & Title Insurance Update: Weeks Ending June 10 & 17, 2016

June 21, 2016

REAL PROPERTY UPDATE

- **Foreclosure/Standing/Hearsay:** copy of a note with undated allonge containing blank endorsement sufficient to establish standing as a matter of law, even though bank did not have formal assignment of mortgage at time of filing complaint; also, certified copy of a publicly recorded document is self-authenticating; thus objection to lack of foundation, as to mortgage, is without merit - [Wells Fargo Bank, N.A. as Trustee, on behalf of the Holders of the Harborview Mortgage Loan Trust Mortgage Loan Pass-Through Certificates, Series 2006-12 v. Ousley et al.](#), No. 1D15-2100 (Fla. 1st DCA June 15, 2016) (reversed and remanded)
- **Foreclosure/Notice of Default:** applying substantial compliance standard held in [Green Tree Servicing, LLC v. Milam](#), 177 So. 3d 7, 13 (Fla 2d DCA 2015), court reasoned that comparison of text of notice letter to requirements of paragraph 22 will often be all that is necessary to enable court to determine whether lender substantially complied with its requirements - [Federal National Mortgage Association v. Morton et al.](#), No. 2D14-5165 (Fla. 2d DCA June 15, 2016) (reversed and remanded)
- **Foreclosure/Standing:** plaintiff failed to establish standing at time foreclosure filed where original note never filed with court and no other evidence of possession presented to court - [Cruz v. JPMorgan Chase Bank, National Association, as Successor in Interest to Washington Mutual Bank](#), formerly known as Washington Mutual Bank, F.A., No. 4D14-3799 (Fla. 4th DCA June 15, 2016) (reversed and remanded)
- **Post-Judgment Interest:** 2011 amendment to section 55.03, Fla. Stat., which changed judgment interest rate from a fixed rate established on date of judgment to a variable rate that adjusts January of each year, does not apply to judgments entered prior to effective date of amendment - [Townsend v. R.J. Reynolds Tobacco Co.](#), Case No. SC15-722 (Fla. June 9, 2016) (reversed and remanded).

- **Deficiency Judgment:** if creditor requests a deficiency judgment in a foreclosure action and court reserves jurisdiction to grant or deny a deficiency, creditor is barred from filing separate action at law to recover on promissory note - [Higgins v. Dyck-O'Neal, Inc.](#), Case No. 1D15-4784 (Fla. 1st DCA June 9, 2016) (reversed).
- **Loan Modification:** borrower that signed and returned loan modification agreement to lender by mail, and made first three payments due thereunder, which were accepted by lender, was sufficient to support finding of an enforceable agreement, despite evidence that lender had no record of having received signed loan modification - [Nowlin v. Nationstar Mortgage LLC](#), Case No. 2D15-331 (2d DCA June 10, 2016) (reversed and remanded).
- **Attorneys' Fees:** defendant that denied signing note and mortgage could not recover attorneys' fees upon dismissal of action by lender because only parties could claim rights under the loan documents - [Florida Community Bank, N.A., etc. v Red Road Residential, LLC, etc.](#), Case No. 3D15-2039 (Fla. 3d DCA June 8, 2016) (reversed).
- **Standing:** substituted plaintiff must prove standing to foreclose by evidence that original plaintiff had standing - [Fallon Rahima Jallali v. Christiana Trust](#), Case No. 4D14-2369 (Fla. 4th DCA June 8, 2016)(reversed and remanded).
- **Standing:** loan servicer did not prove standing to foreclose mortgage due to lack of evidence that note secured by mortgage was an asset of prior entity at time it merged into servicer - [Vogel v. Wells Fargo Bank, N.A.](#), Case No. 4D15-132 (Fla. 4th DCA June 8, 2016).
- **Standing:** if original note presented into evidence is in same condition as copy attached to complaint, court may infer plaintiff had actual possession of original at time of filing and has standing to maintain lawsuit absent evidence to contrary - [Meilleur v. HSBC Bank USA, N.A.](#), Case No. 4D15-117 (June 8, 2016).

TITLE INSURANCE UPDATE

- **Equitable subrogation:** Lender not entitled to priority on HELOC by claiming it relied upon discrepancies in account number used by payor bank, when the lender failed to terminate HELOC after borrowers' instruction and payoff despite fact that borrowers used HELOC eight months after instruction to terminate account - [Eastern Savings Bank v. Chiavarini](#), Case No. CV156009439 (Conn. Super. Ct. May 9, 2016) (Memorandum decision).
- **Subrogation:** Lender not entitled to subrogation for additional loans extended to borrower after having already released first lien and failing to comply with future advances clause to maintain security interest in property - [Trampush v. United FSC \(In re Trampush\)](#), Case No. 15-13725, Adversary No. 15-166 (W.D.Wis. Bankr. May 24, 2016)(Memorandum Order).

- **Subrogation:** Lender only entitled to subrogation for amount used to refinance portion of original loan because it would have been justifiable for lender to think amount refinanced would still have priority - [Trampush v. United FSC](#) (*In re Trampush*), Case No. 15-13725, Adversary No. 15-166 (W.D.Wis. Bankr. May 24, 2016)(Memorandum Order).
- **Date of Loss:** section 7(a)(iii) of the 1992 lender's policy is ambiguous as to the date from which the insured's loss is to be calculated and allows a case by case approach as to the determination of that date - [First American Title Ins. Co. v. Johnson Bank](#), Case No. CV-15-0244 (Az. June 13, 2016) (vacating intermediary appellate court opinion, reversing judgment, and remanding)
- **Date of Loss:** the date of foreclosure may be the date for calculating loss under 1992 lender's policy where the title defect is an unexcepted senior lien because the loss arises from the loss of priority - [First American Title Ins. Co. v. Johnson Bank](#), Case No. CV-15-0244 (Az. June 13, 2016) (vacating intermediary appellate court opinion, reversing judgment, and remanding)
- **Date of Loss:** where a title defect arises from a recorded restriction that frustrates the borrower's intended use of the property and causes the borrower to default, the date of loss under 1992 lender's policy is the date of the policy - [First American Title Ins. Co. v. Johnson Bank](#), Case No. CV-15-0244 (Az. June 13, 2016) (vacating intermediary appellate court opinion, reversing judgment, and remanding)
- **Title Commitment:** a title commitment is not a representation of title and if a party wants such a representation an abstract of title must be obtained - [First American Title Ins. Co. v. Johnson Bank](#), Case No. CV-15-0244 (Az. June 13, 2016) (vacating intermediary appellate court opinion, reversing judgment, and remanding)
- **Nature of Title Insurance:** title insurance is not guarantee of title and, consequently, the mere existence of a defect is not a breach of the policy - [First American Title Ins. Co. v. Johnson Bank](#), Case No. CV-15-0244 (Az. June 13, 2016) (vacating intermediary appellate court opinion, reversing judgment, and remanding)
- **Closing Agent:** there is no liability for failure to record a deed of trust allegedly "following a closing" where the plaintiff fails to respond to a request for admission that the closing never occurred - [Spring Gardens Inc. v. Security Title Ins. Agency of Utah, Inc.](#), Case No. 20140932-CA (Utah App. May 26, 2016) (affirming summary judgment)
- **Closing Agent:** affidavits and submissions create triable issues of material fact as to whether agent breached agency agreement by failing to follow the standard of care for a New York State title insurance agent and therefore preclude summary judgment - [Lakeview Development at Carmel, LLC v. New York City Dept. of Environmental Protection, et al.](#), Case No. 2014-05353 (N.Y. App. April 15, 2016) (affirming denial of summary judgment)

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