

Real Property & Title Insurance Update: Weeks Ending April 29 & May 6, 2016

May 10, 2016

REAL PROPERTY UPDATE

- **Foreclosure/Requests for Admission:** trial court erred by involuntarily dismissing foreclosure action based solely on lender's failure to respond to requests for admission because lender's pleadings, discovery responses, and/or trial evidence contradicted technical admissions and no prejudice was demonstrated – [HSBC Bank USA, etc., v. Parodi](#), No. 3D15-652 (Fla. 3d DCA May 4, 2016) (reversed and remanded)
- **Foreclosure/Conditions Precedent:** trial court applied incorrect strict compliance standard in evaluating whether lender's default notice complied with paragraph 22 of mortgage; default notice is sufficient if it substantially complies with mortgage's default notice provision – [Wells Fargo Bank, N.A., etc. v. Hernandez & Silva Enters., Inc.](#), No. 3D15-702 (Fla. 3d DCA May 4, 2016) (reversing summary judgment)
- **Landlord-Tenant/Impracticability Defense:** condominium association excused from performing under lease agreement by doctrine of impracticability – [Florida Laundry Servs., Inc., etc. v. Sage Condo. Ass'n, Inc., etc.](#), Nos. 3D15-1264 & 3D15-2440 (Fla. 3d DCA May 4, 2016) (affirming final judgment)
- **Foreclosure/Trial Witness:** trial court erred in dismissing lender's foreclosure action based on unavailability at trial of lender's same corporate representative designee who was deposed, even though another corporate representative witness was disclosed; prejudice was neither demonstrated nor properly considered by trial court – [Nationstar Mortg., LLC v. Castro](#), No. 3D15-1855 (Fla. 3d DCA May 4, 2016) (reversing and remanded)

- **Equitable Lien:** imposition of equitable lien was improper because (1) there was no evidence of written document demonstrating any intent to subject real property at issue to security interest, (2) no evidence supported any conduct on plaintiff's part that would justify imposition of lien, (3) borrower's property interest in real property was not enriched by his payment of amounts due under loan documents, and (4) plaintiff was not unjustly enriched by receipt of the payments made by borrower out of portion of funds obtained from purported lienor – [Wichi Mgmt. LLC v. Masters](#), No. 3D15-1873 (Fla. 3d DCA May 4, 2016) (reversed, finding no legal or equitable basis for lien)
- **Foreclosure/Enforcement of Settlement Agreement:** lower court should have enforced settlement agreement when both parties mutually assented to the agreement, despite bank's inability thereafter to produce original note when it sought entry of consent judgment and at trial – [U.S. Bank Nat'l Ass'n, as Trustee v. Benoit](#), No. 4D14-4052 (Fla. 4th DCA May 4, 2016) (reversed and remanded for entry of consent final judgment of foreclosure)
- **Foreclosure/Reestablishment of lost note:** plaintiff failed to prove necessary elements to reestablish lost note because it did not prove that it acquired note from a person entitled to enforce note when loss of possession occurred – [Robelto v. U.S. Bank Trust, N.A., as Trustee](#), No. 4D14-4721 (Fla. 4th DCA May 4, 2016) (reversed for entry of judgment for homeowners)
- **Foreclosure/Attorneys' Fees:** stay of second foreclosure action should have been entered until plaintiff paid attorney's fees award in defendant's favor from plaintiff's predecessor's previously dismissed foreclosure action against same property – [Villalona v. 21st Mortg. Corp.](#), No. 4D15-4151 (Fla. 4th DCA May 4, 2016) (granting defendant's petition for writ of certiorari, and quashing order denying defendant's motion to stay)
- **Foreclosure/Separate Deficiency Action:** post-foreclosure deficiency action was proper notwithstanding foreclosure judgment's reservation of jurisdiction to consider entry of deficiency in foreclosure action – [Cheng v. Dyck-O'Neal, Inc.](#), No. 4D16-57 (Fla. 4th DCA May 4, 2016) (affirming order denying Rule 1.540 motion)
- **Foreclosure/Standing:** trial court erred in finding (1) that bank did not have standing to foreclose because evidence showed that loan was never transferred and bank, as a result of merger, had standing, and (2) that note and mortgage were void because original lender was not incorporated when the loan was made, was not a licensed mortgage lender in Florida, and did not have authority to do business in Florida – [Bank of Am., N.A., etc. v. Nash](#), No. 5D14-4511 (Fla. 5th DCA May 6, 2016) (reversing judgment and remanding for entry of judgment in favor of bank)
- **Homestead:** Florida's homestead exemption (protection from creditors) applies to that portion of funds derived from sale of homestead property that (i) seller intends to reinvest in a new homestead within reasonable time, (ii) has not commingled with other funds, and (iii) have been held separate and apart and solely for purpose of acquiring new homestead - [JBK Associates, Inc. etc. v. Sill Bros., Inc., et al.](#), No. SC15-977 (Fla. April 28, 2016).

- **Property Insurance:** after jury finds insured suffered a covered loss, court is required to enforce the insurance policy contract, as written, and cannot order repair of portions not covered by the policy - [Citizens Property Ins. Corp. v. Cabrera, et al.](#), No. 2D14-4337 (Fla. 2d DCA April 29, 2016) (affirmed in part, reversed in part and remanded).
- **Foreclosure:** lender not precluded from collecting on defaulted note because prior foreclosure action accelerating payment on default has been dismissed; also, pursuant to 95.281(1)(a), Fla. Stat. (2013), mortgage lien terminates 5 years after date of maturity shown on face of mortgage - [Balaguer v. Chase Home Financial, LLC](#), No. 3D14-2801 (Fla. 3d DCA April 27, 2016) (dismissal affirmed).
- **Dismissal:** trial court has neither authority under rule 1.540 nor inherent authority to grant relief from a voluntary dismissal where fraud on the court is alleged but no affirmative relief has been granted to dismissing party - [U.S. Bank National Association, etc. v. Gladys Rivera, et al.](#), No. 3D15-1415 (Fla. 3d DCA April 27, 2016) (quashing orders).
- **Ad Valorem Taxes:** city owned and operated marinas serve a “municipal or public purpose” under article VII, section 3(a) of the Florida Constitution and therefore are exempt from ad valorem taxation - [City of Ft. Pierce v. Treasure Coast Marina, LLC](#), et al., No. 4D14-3064 (Fla. 4th DCA April 27, 2016) (judgment reversed).
- **Foreclosure:** final judgment reversed and remanded for further proceedings because included interest, attorneys’ fees and other expenses unsupported by competent substantial evidence - [Hovannesian v. Pennymac Corp., et al.](#), No. 4D14-3088 (Fla. 4th DCA April 27, 2016).
- **Abandonment of Relief:** trial court had inherent authority to declare post-judgment motion for fees and costs abandoned when motion not set for hearing for 18 months and trial court did not err in denying motion for rehearing - [Grosso v. HSBC Bank USA, NA](#), No. 4D14-3971; [Ramos v. Deutsche Bank National Trust Co., Trustee](#), No. 4D14-3981; [Berenson v. Deutsche Bank National Trust Co.](#), Case No. 4D14-3985 (Fla. 4th DCA April 27, 2016).
- **Standing:** trial court could not take judicial notice of common known fact of affiliation between servicer and lender where no timely and sufficient request for judicial notice under section 90.203, Fla. Stat. - [Reynolds v. Nationstar Loan Services, LLC](#), No. 4D14-4045 (Fla. 4th DCA April 27, 2016).
- **Foreclosure:** trial court erred in entering judgment in favor of lender for past due amounts and foreclosure where lender failed to comply with notice requirements in mortgage; instead, case should have been dismissed - [Miller v. The Bank of NY Mellon, et al.](#), No. 4D15-36 (Fla. 4th DCA April 27, 2016).

- **Default/Amended Pleading:** lender that added lost note count after it obtained a default against homeowners, but did not serve homeowners with amended complaint, not entitled to judgment on lost note and required reversal of foreclosure judgment - [Kitchens v. Nationstar Mortgage, LLC](#), No. 4D15-617 (Fla. 4th DCA April 27, 2016).

TITLE INSURANCE UPDATE

- **Title Agent:** attorney who hires title company on behalf of a party to a transaction does not have standing in his individual capacity to sue the title company – [Estate of Gaspar](#), No. A142068 (Cal. App. April 28, 2016) (affirming judgment of dismissal)
- **Policy Reformation:** when the nature of the ownership of the property to be insured is mistakenly described as a cooperative instead of a leasehold, the policy may be reformed – [Yano v. Old Republic National Title Ins. Co.](#), No. 652180/12 (N.Y. Supr. Ct. April 25, 2016)(trial order granting summary judgment of dismissal)

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