

Real Property & Title Insurance Update: Weeks Ending June 24 & July 1, 2016

July 08, 2016

REAL PROPERTY UPDATE

- **Foreclosure/Leave to Amend:** borrower should have been granted leave to amend to assert affirmative defenses pursuant to motion filed 13 days before trial because there was no prejudice, the privilege had not been abused, and the proposed defenses were not futile – [Morgan v. The Bank of New York Mellon, as Trustee](#), No. 1D15-2401 (Fla. 1st DCA June 28, 2016) (reversed and remanded)
- **Foreclosure/Deficiency Judgment:** trial court erred in entering amended deficiency judgment following trial, which concluded that guarantees necessary to establish liability were not offered into evidence and, thus, guarantors could not be liable for debt, because appellant was not given opportunity to move for rehearing to reopen the case to present additional evidence and because judgment was entered without procedural due process – [Gulf Eagle, LLC v. Park East Dev., Ltd.](#), No. 2D14-5571 (Fla. 2d DCA June 29, 2016) (reversed and remanded)
- **HOA/Action for Unpaid Assessments:** filing of notice of lis pendens by first mortgagee did not bar foreclosure of association's subsequent lien for unpaid assessments where subsequent lien was imposed under association's declaration of covenants recorded prior to first mortgagee's recording of notice of lis pendens – [Jallali v. Knightsbridge Village Homeowners Ass'n, Inc.](#), No. 4D15-2036 (Fla. 4th DCA June 29, 2016) (affirming order denying appellant's motion to vacate judgment)
- **Foreclosure/Return of Service:** returns of service were regular on their face, as they contained the four facts required by section 48.21, Florida Statutes, and defendants thereafter failed to satisfy their burden by presenting clear and convincing evidence that service was invalid – [Matthews v. U.S. Bank, Nat'l Ass'n, Successor Trustee](#), No. 4D15-3942 (Fla. 4th DCA June 29, 2016) (affirmed)

- **Foreclosure/Standing:** appellant established it had actual possession of note at time complaint was filed notwithstanding trial witness' inability to testify regarding date specific endorsement placed on allonge, because complaint attached copies of note and allonge containing specific endorsement and appellant later filed original note and allonge in same conditions as copies attached to complaint – [US Bank Nat'l Ass'n, as Trustee, etc. v. Laird](#), No. 5D14-4033 (Fla. 5th DCA July 1, 2016) (reversed and remanded)
- **Deficiency Action:** trial court's reservation of jurisdiction in final judgment of foreclosure to enter deficiency judgment did not preclude party from filing separate action at law to recover deficiency when foreclosure court had neither granted nor denied deficiency judgment – [Dyck-O'Neal, Inc. v. Beckett](#), No. 5D15-3005 (Fla. 5th DCA July 1, 2016) (reversing final order of dismissal, and certifying conflict)
- **Deficiency Action:** trial court's reservation of jurisdiction in final judgment of foreclosure to enter deficiency judgment did not preclude party from filing separate action at law to recover deficiency when foreclosure court had neither granted nor denied deficiency judgment – [Dyck-O'Neal, Inc. v. Hendrick](#), No. 5D15-3790 (Fla. 5th DCA July 1, 2016) (reversing final order of dismissal, and certifying conflict)
- **Foreclosure:** where an individual was neither a party in the underlying foreclosure action nor a bidder in the foreclosure sale, that individual lacks standing to file a post-sale objection to the foreclosure sale - [Whitburn, LLC v. Wells Fargo Bank, N.A.](#), Case No. 2D15-1056 (Fla. 2d DCA June 24, 2016) (Affirmed)
- **Foreclosure/Conditions Precedent:** providing the notice described in Florida Statutes Section 559.715 is not a condition precedent to foreclosure - [Bank of N.Y. Mellon v. Welker](#), Case No. 2D14-5613 (Fla. 2d DCA June 24, 2016) (reversed and remanded)
- **Foreclosure/Standing:** where a copy of the note attached to the complaint bears no indorsement and plaintiff later files a copy of the note bearing an indorsement in blank to establish standing, summary judgment in the plaintiff's favor is improper where no explanation for the inconsistency is given - [Floyd v. Bank of Am., N.A.](#), Case No. 5D13-4416 (Fla. 5th DCA June 24, 2016) (reversed and remanded)
- **Foreclosure/Lost Note Affidavit:** a lost-note affidavit must establish that: (1) whoever lost the note was entitled to enforce it when the loss of possession occurred; (2) the loss of the note was not the result of a transfer or lawful seizure; and (3) the bank cannot reasonably obtain possession of the note because of the loss - [Home Outlet, LLC v. U.S. Bank, N.A.](#), Case No. 5D15-2643 (Fla. 5th DCA June 24, 2016) (reversed).

TITLE INSURANCE UPDATE

- **Bad Faith:** Summary Judgment against lender on its bad faith claim against insurer is affirmed because insurer had reasonable basis to refuse demand for payment - [Old Republic Nat'l Title Ins. Co. v. RM Kids LLC](#), Case Nos. A16A0257 & A16A0258 (Ga. Ct. App. June 29, 2016)
- **Class Action:** Plaintiff's class action suit against six major title insurers in Georgia dismissed based upon Plaintiff's lack of standing because he failed to allege insurers actually fixed prices or created market of inflated prices - [Downing v. Fidelity Nat'l Title Ins. Co.](#), Case No. 15-cv-154-TCB (N.D. Ga. June 9, 2016) (Memorandum Order)
- **Date of Loss:** Jury verdict against title insurer reversed and remanded for new trial because trial court erred in ruling that date of loss was date loan was closed instead of date of foreclosure by lender - [Old Republic Nat'l Title Ins. Co. v. RM Kids LLC](#), Case Nos. A16A0257 & A16A0258 (Ga. Ct. App. June 29, 2016).
- **Prejudgment Interest:** On appeal, directed verdict in favor of title insurer on issue of prejudgment interest affirmed because lender's damages were not liquidated until entry of judgment - [Old Republic Nat'l Title Ins. Co. v. RM Kids LLC](#), Case Nos. A16A0257 & A16A0258 (Ga. Ct. App. June 29, 2016).
- **CPL:** in order to recover for a closing agent's fraud or dishonesty, a lender is not required to present evidence of concealed disbursements, shortages, or unpaid prior lien holders if those restrictions are not contained in the CPL where there is evidence that agent was aware of details and participated in sham transaction – [Bank of America v. Fidelity Nat'l Title Ins. Co.](#), Case Nos. 311798, 312426, 313797, 316538 (Mich. Jun. 21, 2016) (unpublished order reversing, remanding, and vacating numerous lower court orders on summary disposition)
- **CPL:** where there is evidence that a transaction was a sham from the outset and the title agent participated in the scheme, a trier of fact may reasonably conclude that the agent dishonestly or fraudulently handled the lender's funds and documents, thereby triggering coverage under a CPL – [Bank of America v. Fidelity Nat'l Title Ins. Co.](#), Case Nos. 311798, 312426, 313797, 316538 (Mich. Jun. 21, 2016) (unpublished order reversing, remanding, and vacating numerous lower court orders on summary disposition)
- **CPL:** a trier of fact may find a causal connection between an agent's fraud or dishonesty and the lender's losses so as to trigger CPL coverage because generally the phrase "arises out of" does not mean proximate cause in the strict legal sense; almost any causal connection will suffice if it is more than merely incidental or fortuitous; a causal connection is not negated by underwriting deficiencies – [Bank of America v. Fidelity Nat'l Title Ins. Co.](#), Case Nos. 311798, 312426, 313797, 316538 (Mich. Jun. 21, 2016) (unpublished order reversing, remanding, and vacating numerous lower court orders on summary disposition)

- **CPL:** a lender may sustain actual losses under a CPL where the lender sold loans to third party investors and repurchased the loans after discovering the loans were fraudulent, even if there is no document explicitly stating that the interest in the CPL transferred back to the lender on repurchase; moreover, the agent's fraud and a lender's losses are not negated or rendered incidental or fortuitous by such repurchase –[Bank of America v. Fidelity Nat'l Title Ins. Co.](#), Case Nos. 311798, 312426, 313797, 316538 (Mich. Jun. 21, 2016) (unpublished order reversing, remanding, and vacating numerous lower court orders on summary disposition)
- **CPL:** a lender's notice of a potential claim under a CPL may be sufficient notice of a claim if the notice identifies the property and borrower and alleges a failure of the title agent to comply with closing instructions and that the title insurer committed fraud or dishonesty handling lender's funds, even if the lender fails to provide additional details of the potential claim –[Bank of America v. Fidelity Nat'l Title Ins. Co.](#), Case Nos. 311798, 312426, 313797, 316538 (Mich. Jun. 21, 2016) (unpublished order reversing, remanding, and vacating numerous lower court orders on summary disposition)
- **CPL - Adverse Inference:** a title agent's invocation of the Fifth Amendment gives rise to a legitimate inference that the agent was engaged in criminal activity and, when combined with other evidence of a fraudulent transaction, a trier of fact may reasonably conclude that the agent dishonestly or fraudulently handled the lender's funds and documents so as to trigger CPL coverage – [Bank of America v. Fidelity Nat'l Title Ins. Co.](#), Case Nos. 311798, 312426, 313797, 316538 (Mich. Jun. 21, 2016) (unpublished order reversing, remanding, and vacating numerous lower court orders on summary disposition)
- **CPL - Full Credit Bid Rule:** in Michigan, the full credit bid rule is inapplicable to a mortgagee's claims against non-borrower third parties, and therefore the rule is inapplicable for breach of CPL claims against a title insurer related to a closing agent's fraud or dishonesty –[Bank of America v. Fidelity Nat'l Title Ins. Co.](#), Case Nos. 311798, 312426, 313797, 316538 (Mich. Jun. 21, 2016) (unpublished order reversing, remanding, and vacating numerous lower court orders on summary disposition)
- **CPL - Prejudice:** an insurer must demonstrate with a sufficient level of specificity how missing evidence prejudices its ability to investigate liability and damages or why information from secondary sources is inadequate, rather than simply claiming that it is prejudiced because evidence was lost, physically altered, or has otherwise become unavailable and that witnesses have died, disappeared, or their memories have faded – [Bank of America v. Fidelity Nat'l Title Ins. Co.](#), Case Nos. 311798, 312426, 313797, 316538 (Mich. Jun. 21, 2016) (unpublished order reversing, remanding, and vacating numerous lower court orders on summary disposition)

- **CPL - Rescission:** a title insurer may not rescind a CPL due to a lender's deficient underwriting because underwriting practices are irrelevant and not material to the terms of a CPL – [Bank of America v. Bailey](#), Case No. 2:14-CV-885 JCM (D. Nev. Jun. 15, 2016) (order denying motion to dismiss)
- **Economic Loss Doctrine:** in Nevada, the economic loss doctrine does not bar claims for tortious breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, or interference with contractual relations against title insurer and agent where insurer and agent substituted a policy with lesser coverage rather than assigning an existing policy in connection with the assignment of a deed of trust – [Bank of America v. Bailey](#), Case No. 2:14-CV-885 JCM (D. Nev. Jun. 15, 2016) (order denying motion to dismiss)
- **Economic Loss Doctrine:** a title insurer is not an excepted professional under the economic loss doctrine and claims of negligence against the insurer are therefore barred, however, the economic loss doctrine does not bar claims for negligence of an insurance broker because under Nevada law the broker is an excepted professional not subject to the doctrine – [Bank of America v. Bailey](#), Case No. 2:14-CV-885 JCM (D. Nev. Jun. 15, 2016) (order denying motion to dismiss)
- **Intentional Interference With Contractual Relations:** an insured may bring a claim for intentional interference with a contractual relationship against title company and agent, where insurer and agent substituted a policy with lesser coverage rather than assigning an existing policy in connection with the assignment of a deed of trust – [Bank of America v. Bailey](#), Case No. 2:14-CV-885 JCM (D. Nev. Jun. 15, 2016) (order denying motion to dismiss)

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