

Real Property, Financial Services & Title Insurance Update: Weeks Ending February 12 & 19, 2016

February 23, 2016

REAL PROPERTY UPDATE

- **Foreclosure/Discovery:** trial court erred by declining to rule prior to trial on borrowers' motion *in limine* seeking to exclude evidence contrary to bank's "technical admissions" established by prior order - [Chelminsky v. Branch Banking & Trust Company](#), No. 4D14-1680 (Fla. 4th DCA February 17, 2016) (reversed and remanded).
- **Foreclosure/Attorney's Fees:** error to award attorney's fees without evidentiary hearing where affidavits of attorney's fees were not introduced into evidence at trial and no indication that right to evidentiary hearing was waived - [Petrovsky v. HSBC Bank, USA](#), No. 4D14-1485 (Fla. 4th DCA February 17, 2016) (affirmed in part, reversed in part and remanded).
- **Foreclosure/Notice of Default:** bank's default letter substantially complied with notice obligation prescribed by mortgage and, thus, was sufficient - [IndyMac Fed. Savings Bank, FSB v. Nabozny](#), No. 2D14-1010 (Fla. 2d DCA Feb. 10, 2016) (reversing summary judgment in borrower's favor and remanding for further proceedings).
- **Foreclosure/Rule 1.540:** bank's challenge to order dismissing case without prejudice not properly brought under Rule 1.540(b)(4), which applies only to judgments and decrees, not to orders; thus, bank's challenge needed to be brought pursuant to subsections (b)(1)–(3) of Rule 1.540 and within one year of entry of dismissal order - [De La Osa v. Wells Fargo, N.A.](#), No. 3D14-1455 (Fla. 3d DCA Feb. 10, 2016) (reversed because Rule 1.540(b)(4) did not provide trial court with jurisdiction to revisit dismissal order and all proceedings thereafter were void).
- **Foreclosure/Notice of Default:** Lender's notice of default provided to borrower substantially complied with paragraph 22 of mortgage - [SunTrust Mortg., Inc. v. Garcia](#), No. 3D15-1372 (Fla. 3d DCA Feb. 10, 2016) (reversing summary judgment in borrower's favor on confession of error).

- **Foreclosure/Standing:** bank attempting to proceed as holder of note rather than non-holder in possession was required to, but did not, introduce evidence that it held note at time complaint was filed – [Angelini v. HSBC Bank USA, N.A.](#), as Trustee, No. 4D14-216 (Fla. 4th DCA Feb. 10, 2016) (reversing and remanding for entry of involuntary dismissal)
- **Foreclosure/Service of Process:** trial court erred in determining defendants waived insufficiency of service of process by failing to assert it in initial motion to dismiss because they amended to assert it prior to court ruling on motion – [Cepero v. The Bank of New York Mellon Trust Co., N.A.](#), as Trustee, No. 4D15-1162 (Fla. 4th DCA Feb. 10, 2016) (affirming in part, reversing in part, and remanding for further proceedings)
- **Submerged Lands:** city's denial of permit to build dock and wedding platform on submerged lands was proper because plaintiffs, who owned property abutting a public street that ran along navigable waterway, did not own any submerged lands or riparian rights associated with their property – [Whetstone v. City of St. Augustine, Florida](#), No. 5D14-3628 (Fla. 4th DCA Feb. 12, 2016) (affirmed)

TITLE INSURANCE UPDATE

- **Title Agent:** agent has no duty to borrowers to disclose double escrow where her responsibilities were to follow the instructions of the parties and the borrowers had already signed documents disclosing the double escrow – [Resh v. Realty Concepts, Ltd.](#), No. 3:12-cv-00668 (S.D. W.V. Feb. 12, 2016) (memorandum opinion and order granting motions for summary judgment)
- **Title Agent:** title agent and insurer not required to give notice of availability of title insurance to refinancing owner – [Scott v. BAC Home Loan Servicing, L.P.](#), No. 13-5540 (E.D. Pa. Jan. 26, 2016) (memorandum granting summary judgment)
- **Bad Faith:** whether title insurer acted in bad faith in defending and appealing quiet title action presented issues of material fact precluding summary judgment under Hawai'i's enhanced standard of good faith for insurers acting under a reservation of rights – [Anastasi v. Fidelity National Title Ins. Co.](#), No. SCWC-30557 (Hi. Feb. 4, 2016) (affirming in part and vacating in part judgment of intermediate appellate court and remanding)
- **Bad Faith:** whether title insurer induced retained counsel to breach her ethical duties to insured in defending and appealing quiet title action raised issues of material fact precluding summary judgment under Hawai'i's enhanced standard of good faith for insurers acting under a reservation of rights – [Anastasi v. Fidelity National Title Ins. Co.](#), No. SCWC-30557 (Hi. Feb. 4, 2016) (affirming in part and vacating in part judgment of intermediate appellate court and remanding)

- **Bad Faith:** whether work product doctrine protects communications by an in-house attorney who performed duties both as an attorney and a claims adjuster depends on whether the document was produced “because of” anticipated litigation rights – [Anastasi v. Fidelity National Title Ins. Co.](#), No. SCWC-30557 (Hi. Feb. 4, 2016) (affirming in part and vacating in part judgment of intermediate appellate court and remanding)

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