

# Real Property & Title Insurance Update: Weeks Ending May 13 & May 20, 2016

May 26, 2016

## REAL PROPERTY UPDATE

- **Contracts/Personal Liability:** official title of “President” underneath signor’s signature on contract did not shield individual from personal liability because contract language reflected individual assumed personal obligations - [Frieri v Capital Investment Services, Inc.](#), etc., Case Nos. 3D14-293 & 3D14-1442 (Fla. 3d DCA May 18, 2016) (affirmed)
- **Constructive Trust:** a constructive trust may be imposed only where property of trust is specific and identifiable or when assets can be specifically traced - [Frieri v Capital Investment Services, Inc.](#), etc., Case Nos. 3D14-293 & 3D14-1442 (Fla. 3d DCA May 18, 2016) (affirmed)
- **Summary Judgment:** borrower movant for summary judgment could not shift burden of proof to lender before proving case by competent evidence in form of timely served affidavit (at least 5 days prior to hearing) - [Wells Fargo Bank, N.A. v Bilecki](#), Case Nos. 4D14-1015 & 15-67 (Fla. 4th DCA May 18, 2016) (reversed and remanded)
- **Foreclosure/Hearsay/Business Records:** it was not necessary for witness to have personal knowledge of prior servicer’s business practices or to participate in boarding process to lay foundation for business records exception to hearsay - [Michel v. The Bank of New York Mellon f/k/a The Bank of New York as trustee for holder of Structured Asset Mortgage Investments II Trust 2006-ARS](#), Mortgage Pass-Through Certificates Series 2006-ARS et al. No. 2D14-3022 (Fla. 2d DCA May 13, 2016) (affirmed in part, reversed in part, and remanded)
- **Foreclosure/Standing:** plaintiff failed to prove that it had standing to foreclose where plaintiff failed to provide evidence that it was in possession of original note at time lawsuit was filed - [Rosa v. Deutsche Bank National Trust Co., as Trustee for Fremont Home Loan Trust 2006-1](#), No. 2D14-5710 (Fla. 2d DCA May 13, 2016) (reversed and remanded)

- **Foreclosure/Discovery:** trial court abused its discretion in denying plaintiff relief from technical admissions where record evidence was contrary to technical admissions and defendant failed to show prejudice - [Wells Fargo Bank, National Association, as Trustee for the Certificateholders of SARM 2005-15 v. Voorhees et al.](#) No. 2D15-2055 (Fla. 2d DCA May 13, 2016) (reversed and remanded)
- **Foreclosure/Statute of Limitations:** applying Beauvais, court held five-year statute of limitations in foreclosure action does not bar a second foreclosure lawsuit filed on a subsequent payment default if that subsequent default occurred within the five-year period preceding commencement of second foreclosure lawsuit - [Arnoux v. Bank of New York, etc., et al.](#) No. 3D14-1407 (Fla. 3rd DCA May 11, 2016) (affirmed).
- **Foreclosure/Notice of Default:** undisputed evidence established default notice substantially complied with requirements of paragraph 22 of mortgage - [Nationstar Mortgage, LLC v. Craig et al.](#) No. 3D15-568 (Fla. 3d DCA May 11, 2016) (reversed and remanded)
- **Foreclosure/Default:** court's judgment not supported by competent, substantial evidence, where bank did not actually accelerate note before borrower tendered past due payment - [Reano v. US Bank, National Association, as Trustee for Credit Suisse First Boston CSFB2005-3 et al.](#), No. 4D14-886 and 4D15-0212 (Fla. 4th DCA May 11, 2016) (reversed)
- **Foreclosure/Bankruptcy:** borrower's actions and orders of bankruptcy court fully resolved foreclosure matter where borrower admitted in bankruptcy proceeding he owed a non-contingent, undisputed mortgage debt to bank and he surrendered property to bank - [Rivera v. Bank of America, N.A., successor by merger to BAC Home Loans Servicing, L.P., f/k/a Countrywide Home Loans Servicing, L.P.](#), No. 5D13-1618 (Fla. 5th DCA May 13, 2016) (dismissed)

## TITLE INSURANCE UPDATE

- **Arbitration:** an insured is required to arbitrate its claims against title insurers when the claims relate to coverage under the title insurance policy and amount of insurance was under \$2,000,000 as mandated by arbitration provision in policy - [Perdue Properties, LLC v. USA](#), No. 15-CV-47 (DCB) (MTP) (S.D. Miss. May 16, 2016) (Memorandum Opinion compelling arbitration and dismissing third-party claims against title insurers)
- **Coverage:** title insurer did not breach policy when insured sought defense and indemnity based upon quiet title action insured initiated to assert ownership over lot that was not included in description of property insured under policy - [Krajewski v. Fidelity Nat'l Ins. Co.](#), No. 1350 EDA 2015 (Pa. Super. Ct. May 11, 2016) (memorandum opinion affirming summary judgment in favor of title insurer)

- **Coverage:** title insurer entitled to summary judgment on breach of contract claim when insured's claim is based upon sewer easement that was expressly listed as exception on policy even if it may affect marketability of title and even if legal description in deed incorporates map by reference that conflicts with sewer easement - [Cusumano v. Chicago Title Ins. Co.](#), No. 155983-2013, (NY Sup. Ct. May 17, 2016) (memorandum opinion granting summary judgment in favor of title insurer)
- **CPL:** If closing agent's compliance with closing instructions would have caused lender not to make loan then losses would fall within scope of paragraph 1(c) of closing protection letter relating to collection and payment of funds due to lender - [Fifth Third Mortg. Co. v. Kaufman](#), No. 12 C 4693 (N.D. Ill. May 14, 2016) (Memorandum Opinion)
- **CPL:** closing agent's alleged failure to comply with instruction to suspend transaction and notify lender that properties would not be owner-occupied if it had knowledge of facts, could trigger liability under paragraph 1(c) of closing protection letter relating to collection and payment of funds due to lender - [Fifth Third Mortg. Co. v. Kaufman](#), No. 12 C 4693 (N.D. Ill. May 14, 2016) (Memorandum Opinion)
- **CPL:** lender is required to show that claimed losses arose from closing agent's conduct and a reasonable fact finder could find that closing agent's failures resulted in lender making loans to straw buyers who defaulted and that lender would not have made loans because owner-occupancy was condition for subsequent sale of loans to Freddie Mac or Fannie Mae - [Fifth Third Mortg. Co. v. Kaufman](#), No. 12 C 4693 (N.D. Ill. May 14, 2016) (Memorandum Opinion)
- **CPL:** title insurer may contend at trial that market conditions are actual cause of lender's losses on loans but it is insufficient basis for summary judgment when lender presented affidavits setting forth payments made to Freddie Mac in response to repurchase demands made to lender - [Fifth Third Mortg. Co. v. Kaufman](#), No. 12 C 4693 (N.D. Ill. May 14, 2016) (Memorandum Opinion denying summary judgment)
- **Agency Agreement:** An underwriter has no fiduciary duty to an agent and is not prevented from hiring the agent's employees if the agency agreement between the agent and underwriter is mutually non-exclusive - [Stewart Title Guar. Co. v. Kelley](#), 89 Mass. App. Ct. 1121 (2016) (memorandum and order affirming summary judgment, unpublished)
- **Agent/Attorney:** Investigation of a property's records is commonly performed by non-lawyers for real estate attorneys, but in Massachusetts the determination of marketable title is the practice of law and must be performed by an attorney - [Stewart Title Guar. Co. v. Kelley](#), 89 Mass. App. Ct. 1121 (2016) (memorandum and order affirming summary judgment, unpublished)

- **Malpractice/Negligence:** A law firm that conducts real estate closings in its capacity as a limited agent for an underwriter pursuant to an agency agreement is not relieved of its duty to use reasonable and appropriate care during title examination and issuance of a title policy, even if the firm retained a reputable title examiner to conduct the title review – [Stewart Title Guar. Co. v. Kelley](#), 89 Mass. App. Ct. 1121 (2016) (memorandum and order affirming summary judgment, unpublished)
- **Negligence:** An agent who submitted sufficient funds to satisfy an open line of credit was negligent by failing to maintain a copy of a letter directing the lender to close out the line of credit, where the borrower subsequently withdrew additional funds on the line of credit and the underwriter suffered a loss – [Stewart Title Guar. Co. v. Kelley](#), 89 Mass. App. Ct. 1121 (2016) (memorandum and order affirming summary judgment, unpublished)

## Related Practices

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