

Real Property & Title Insurance Update: Weeks Ending May 29 & June 3, 2016

June 07, 2016

REAL PROPERTY UPDATE

- Foreclosure/Bankruptcy Stay: because borrower's notice of appeal was filed during pendency of bankruptcy stay it was a nullity, and appellate court lacked jurisdiction to consider appeal – [Hewett v. Wells Fargo Bank, N.A., as Trustee](#), No. 2D15-1074 (Fla. 2d DCA June 1, 2016) (dismissing appeal)
- Foreclosure/Dismissal as Sanction: trial court did not err in failing to apply Kozel factors before dismissing mortgagee's claim without prejudice because those factors need only be considered when dismissal is with prejudice or the functional equivalent – [Fed. Nat'l Mortg. Ass'n v. Linner, as Trustee](#), No. 2D15-1631 (Fla. 2d DCA June 3, 2016) (affirming, and certifying conflict)
- Foreclosure/Redemption: reversing order dismissing foreclosure action based on redemption of subject mortgage because amount required to redeem was unliquidated and required evidentiary support – [Wells Fargo Bank, Nat'l Ass'n, as Trustee v. Sawh](#), No. 3D14-2707 (Fla. 3d DCA June 1, 2016) (reversing and remanding for evidentiary hearing)
- Foreclosure/Standing: bank failed to prove standing to foreclose because it did not provide sufficient evidence establishing merger of predecessors; thus, there was no evidence that bank's predecessor had authority to transfer note to bank – [Segall v. Wachovia Bank, N.A., as Trustee](#), No. 4D14-4424 (Fla. 4th DCA June 1, 2016) (reversing and remanding for entry of involuntary dismissal)
- Foreclosure/Modification of Note: bank violated best evidence rule by failing to introduce written modification to promissory note as evidence at trial; without its introduction, error to admit testimony regarding modification – [Rattigan v. Central Mortg. Co.](#), No. 4D15-1087 (Fla. 4th DCA June 1, 2016) (reversing and remanding for entry of involuntary dismissal)

- Foreclosure/Substantial Compliance: trial court improperly applied strict compliance standard in finding plaintiff's notice of default deficient; notices of default need only substantially comply – [Green Tree Servicing, LLC v. Goins](#), No. 4D14-4722 (Fla. 4th DCA June 1, 2016) (reversing and remanding for further proceedings)
- Foreclosure/Evidence of Damages: trial court erred in finding bank failed to submitted reliable evidence of damages because current servicer's loan history reflecting starting principal balance, along with testimony regarding current unpaid principal balance, were admitted as evidence at trial, albeit erroneously – [Deutsche Bank Nat'l Trust Co., as Trustee v. Baker](#), No. 4D15-1293 (Fla. 4th DCA June 1, 2016) (reversing and remanding for new trial on damages)
- Foreclosure/International Service: where process is served and return of process is completed by an official of a country that is a signatory to the Hague Service Convention, any additional requirement which may be imposed by either Florida law or international law is pre-empted - [Bevilacqua v. U.S. Bank, N.A.](#), Case No. 3D15-1684 (Fla. 3d DCA May 25, 2016) (Affirmed)
- Foreclosure: a foreclosure sale cannot be held while a timely motion for rehearing is pending because enforcement of a final judgment is suspended by the filing of a rehearing motion - [944 CWELT-2007 LLC v. Bank of Am., N.A.](#), Case No. 3D15-2091 (Fla. 3d DCA May 25, 2016) (granting petition for certiorari)
- Foreclosure/Summary Judgment Evidence: summary judgment improper where lender's affidavit in support of summary judgment neither stated that a notice of acceleration was sent nor attached acceleration correspondence allegedly sent to borrower - [Brooks v. Bank of Am., N.A.](#), Case No. 4D14-3337 (Fla. 4th DCA May 25, 2016) (reversed and remanded)
- Foreclosure/Standing: where a copy of a note is attached to the complaint and the plaintiff later files the original note in the same condition as the copy attached to the complaint, the combination is sufficient to establish standing to bring the foreclosure action, absent any testimony or evidence to the contrary - [U.S. Bank Nat. Ass'n. v Clarke](#), Case No. 4D14-3398 (Fla. 4th DCA May 25, 2016) (reversed and remanded)
- Foreclosure: lender's default letter need only substantially comply with its notice obligations under the mortgage - [Bank of N.Y. Mellon v. Baloun](#), Case No. 5D14-4470 (Fla. 5th DCA May 27, 2016) (reversed and remanded)
- Business Records: a party who fails to object to a certificate of authenticity of business records prior to trial waives any objection to the admissibility of the certificate - [Wilmington Savings Fund Society, FSB v. Aldape](#), Case No. 5D15-369 (Fla. 5th DCA May 27, 2016) (reversed and remanded)

- Final Judgments: a trial court is without jurisdiction to award relief that was not requested in the pleadings or tried by consent and a court may relieve a party from a final judgment or decree that is void - [Deutsche Bank Nat. Trust Co. v. Patino](#), Case No. 5D15-474 (Fla. 5th DCA May 27, 2016) (reversed and remanded)

TITLE INSURANCE UPDATE

- Equitable Subrogation: equity and good conscience prevent HELOC lender from obtaining relief under the doctrine of equitable subrogation where the lender squandered the opportunity to avoid subsequent drawdowns by ignoring a so-called incorrect account number and the borrowers' directions to terminate the HELOC after payoff by a subsequent lender - [Eastern Savings Bank. V. Chiavarini](#), Case No. CV156009439 (Conn. Sup. Ct. May 9, 2016) (unpublished memorandum on motion to determine priorities)
- Class Action: Maryland statute prohibiting paying or receiving anything in exchange for settlement business does not provide an express or implied private right of action - [Fangman v. Genuine Title, LLC](#), Case No. 14-0081 (Md. App. March 31, 2016) (answering certified question)
- Discovery: title insurer seeking equitable reinstatement of loan paid off in error entitled to deposition of corporate representative of lender whose loan was inadvertently paid off on why the loan had not been reinstated - [Blizzaro v. First American Title Ins. Co.](#), Case No. 2:15-cv-00320 (D. Utah May 19, 2016) (memorandum decision granting in part, denying in part motion for protective order)
- Vicarious Liability: under Florida law, unless a title insurer is alleged to have acted as the closing agent, the title insurer is not liable for defects in the closing that are unrelated to defects in title - [Bank of America, N.A. v. Zaskey](#), Case No. 9:15-cv-81325 (S.D. Fla. May 18, 2016) (order granting in part, denying in part motion to dismiss)
- Negligence: title insurer who accepts short sale proceeds intended for bank may thereby assume certain duties to short sale sellers - [Bank of America, N.A. v. Zaskey](#), Case No. 9:15-cv-81325 (S.D. Fla. May 18, 2016) (order granting in part, denying in part motion to dismiss)

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