

Real Property & Title Insurance Update: Weeks Ending September 2 & 9, 2016

September 14, 2016

REAL PROPERTY UPDATE

- Foreclosure/Standing: where copy of note attached to foreclosure complaint contained no endorsement and original note presented at trial had endorsement in favor of plaintiff, plaintiff required to prove endorsement occurred prior to filing suit to prove standing - [Dhank v. HSBC Bank USA, NA, Trustee](#), Case No. 2D13-5292 (Fla. 2d DCA Sept. 9, 2016) (judgment reversed)
- Sanctions/Dismissal With Prejudice: trial court erred by dismissing foreclosure action with prejudice as sanction for plaintiff's failure to timely file certification of authority prior to mediation, as required by Fla. R. Civ. P. 1.720, where rule provides less severe and more appropriate sanctions - [HR Block Bank v. Perry](#), Case No. 2D15-1351, 1624 (Fla. 2d DCA Sept. 9, 2016).
- Ejectment: plaintiff proved prima facie case to eject defendant from real property because plaintiff had possession of original deed from grantor, and trial court erred by dismissing claim for plaintiff's failure to present evidence that grantor was competent at time she signed deed because burden to prove defense fell on defendant - [Marcinkewicz v. Quattrocchi](#), Case No. 3D15-1068 (Fla. 3d DCA Sept. 7, 2016) (affirmed in part, reversed in part and remanded).
- Foreclosure/Standing: plaintiff failed to prove standing to foreclose mortgage where it did not put in evidence that it had possession of note at time suit filed, and proof that note was part of asset purchase agreement was insufficient to support standing - [Diroberto v. Bayview Loan Services, LLC, et al.](#), Case No. 4D15-749 (Fla. 4th DCA Sept. 7, 2016) (judgment reversed)

TITLE INSURANCE UPDATE

- Limitation on Liability: section 9 of the policy applies to declarant rights covered by an endorsement just as it applies to title covered under the policy, and, where the insurer defends title, it has no further obligation under the policy and insured is not entitled to damages incurred during the litigation to defend and establish title – [RA Southeast Land Co., LLC v. First American Title Ins. Co.](#), Case No. 2:14-cv-01621 (D. Nev. Sept. 1, 2016)(order granting summary judgment)
- Attorney’s Fees: insured is not entitled to recover fees paid to retain its own private counsel in connection with its claim on the policy – [CH Properties, Inc. v. First American Title Ins. Co.](#), Case No. 13-1354 (D. P.R. Sept. 2, 2016)(memorandum and order on attorney’s fees)
- Negligence: logic, common sense, justice, policy, and precedent, dictate that a title insurance company does not owe a duty of care to third parties in the recording of legal instruments – [Centurion Properties III, LLC v. Chicago Title Ins. Co.](#), Case No. 13-35692 (9th Cir. Sept. 1, 2016) (affirming summary judgment after certified question to Washington Supreme Court was answered in the negative)
- Exclusion 3(a): Court finds Plaintiff insured sufficiently pled action for breach of contract against title insurer because insured’s consent to modified deed restriction was more akin to mitigation of damages and thus exclusion 3(a) did not apply to bar claim - [Plantation Bay LLC v. Stewart Title Guar. Co.](#), Case No. 15-2042 (D.N.J. Aug. 29, 2016) (memorandum opinion)
- Unjust Enrichment: Title insurer entitled to judgment on unjust enrichment claim when it was forced to pay off borrower’s prior mortgage to protect insured lender due to borrower’s failure to remit loan proceeds for release of prior mortgage, but damages would be reduced based upon borrower’s reasonable reliance on advice of counsel - [Fidelity Nat’l Title Ins. Co. v. Harlow, Adams & Friedman, P.C.](#), Case No. CV1160218695 (Conn. Sup. Ct. Jul. 25, 2016) (memorandum decision)

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