

Real Property & Title Insurance Update: Weeks Ending September 23 & 30, 2016

October 03, 2016

REAL PROPERTY UPDATE

- **Foreclosure/Hearsay/Business Records:** trial court abused its discretion by excluding the mortgage records, which included records from a prior servicer, where plaintiff's witness demonstrated sufficient familiarity with the boarding process to testify about it - [Ocwen Loan Servicing, LLC, v. Gundersen](#), No. 4D15-2809 (Fla. 4th DCA September 28, 2016) (reversed and remanded).
- **Foreclosure/Default Notice:** final summary judgment of foreclosure reversed where plaintiff failed to address, in its motion for summary judgment or at the hearing on the motion, defendants' affirmative defense that default notice did not comply with paragraph 22 - [Young v. Nationstar Mortgage LLC](#), No. 2D15-1023 (Fla. 2d DCA September 28, 2016) (reversed and remanded).
- **Statute of Limitations:** trial court erred in dismissing amended complaint as barred by statute of limitations, where claims asserted in amended complaint arose from same "conduct, transaction, or occurrence" as initial timely complaint - [Anderson v. Epstein et al.](#), No. 3D15-1050 (Fla. 3d DCA September 28, 2016) (dismissed in part, reversed in part and remanded).
- **Foreclosure/Amendment of Pleadings:** trial court abused discretion in denying motion to amend answer filed by borrower's counsel shortly before trial and alleging failure to comply with conditions precedent and standing as defenses where borrower's first attorney never filed an answer on her behalf and borrower's pro se answers did not raise any affirmative defenses - [Morgan v. The Bank of New York Mellon, f/k/a The Bank of New York, as Trustee](#), No. 1D15-2401 (Fla. 1st DCA Sept. 19, 2016) (reversing and denying motion for rehearing en banc).

- **Duty to Disclose/Sale of Residential Property:** trial court erred in granting summary judgment on buyers' Johnson v. Davis claim because buyers should have been allowed a continuance to provide time to depose agents; court also erred in dismissing buyers' claims against agents for fraudulent misrepresentation, fraudulent concealment, and breach of duties of honesty, candor, and fair dealing because language in residential sale and purchase contract did not extinguish buyers' causes of action premised on alleged violations of statutory obligations – [Kjellander v. Abbott](#), No. 1D15-5475 (Fla. 1st DCA Sept. 19, 2016) (reversed and remanded)
- **Foreclosure/Conditions Precedent:** lender's default letter substantially complied with requirements of paragraph 22 of mortgage, making trial court's order of summary judgment in borrowers' favor improper – [Deutsche Bank Nat'l Trust Co., as Trustee v. Pappa](#), No. 2D14-6029 (Fla. 2d DCA Sept. 23, 2016) (reversed and remanded)
- **Reverse Mortgage/Conditions Precedent:** appellant was a co-borrower as that term was contemplated under a reverse mortgage, and therefore, a condition precedent to appellee's right to foreclose (appellant's death) had not occurred – [Smith v. Reverse Mortg. Solutions, Inc., etc.](#), No. 3D13-2261 (Fla. 3d DCA Sept. 21, 2016) (reversed and remanded)
- **Foreclosure/Conditions Precedent:** trial court erred in granting involuntary dismissal on grounds of failure to comply with conditions precedent because default notice substantially complied with language required by mortgage – [Fed. Nat'l Mortg. Ass'n v. Linares](#), No. 3D14-2815 (Fla. 3d DCA Sept. 21, 2016) (reversed and remanded)
- **Foreclosure/Due Process:** trial court erred in involuntarily dismissing plaintiff's foreclosure action for lack of standing because trial court had previously struck the defense upon which dismissal was premised, and plaintiff proceeded at trial as if defendants had been defaulted and its standing to enforce note had been established – [LNV Corp. v. Gonzalez](#), No. 3D15-1813 (Fla. 3d DCA Sept. 21, 2016) (reversed and remanded for new trial at which issue of standing, as well as any other issues properly framed by parties' pleadings, can be litigated)
- **Real Estate Development:** dismissal of appellant's challenge to development order, which alleged that development order was inconsistent with town's comprehensive growth management plan, was improper because the comprehensive plan required that the project include residential uses, the project did not contain any residential uses, and thus, the development order was inconsistent with the comprehensive plan – [The Realty Associates Fund IX, L.P. v. Town of Cutler Bay, etc.](#), No. 3D15-2407 (Fla. 3d DCA Sept. 21, 2016) (reversed and remanded)
- **Foreclosure/Damages:** because evidence of total indebtedness amount was insufficient, judgment reversed on damages issue and matter remanded for further proceedings – [Ottawa Properties 2 LLC v. Central Mortg. Co.](#), No. 4D15-406 (Fla. 4th DCA Sept. 21, 2016) (reversed and remanded)

- **Foreclosure/Mortgaged Property:** newly formed land adjacent to original parcel was part of original property from moment of its creation and, thus, was subject to mortgage in bank's favor encumbering original property, as adjacent land was not carved out – [Accardi v. Regions Bank](#), No. 4D15-3213 (Fla. 4th DCA Sept. 21, 2016) (affirmed)
- **Foreclosure/Lack of Jurisdiction:** trial court lacked jurisdiction to enter final judgment after notice of removal to federal court filed and before case was remanded back to trial court – [Cole v. Wells Fargo Bank Nat'l Ass'n](#), etc., No. 5D15-2118 (Fla. 5th DCA Sept. 23, 2016) (reversed)

TITLE INSURANCE UPDATE

- **Termination of liability:** lender's settlement agreement satisfying the debt obligation imposed by the mortgage notes terminated liability pursuant to Section 9(c) of the Conditions and Stipulations of the lender's title insurance policies – [Joglor, LLC v. First Am. Title Ins. Co.](#), Case No. 15-1088 (D. Puerto Rico Sept. 27, 2016) (opinion and order granting summary judgment)
- **Bad Faith:** disputed question of fact about whether a particular risk was covered or not provided insurer "reasonable grounds" to contest liability, even though court ultimately found liability, and thus precluded bad faith claim and entitled insurer to summary judgment – [First Am. Title Ins. Co. v. Silbiger](#), Case No. 1:15-cv-546 (N.D. Ga. Sept. 27, 2016) (opinion and order granting in part and denying in part summary judgment)
- **Enforcement of subdivision regulations:** Insured not entitled to loss caused by municipality's foreclosure based upon unpaid assessment because insured failed to allege facts showing a recording of notice of an intention to enforce subdivision regulations. [BV Jordanelle, LLC v. Old Republic Nat'l Title Ins. Co.](#), Case No. 15-4127 (10th Cir. July 26, 2016).
- **Governmental Taking:** Because municipal lien occurred after issuance of policy, and even assuming municipal assessment was a governmental taking, there was no covered loss. [BV Jordanelle, LLC v. Old Republic Nat'l Title Ins. Co.](#), Case No. 15-4127 (10th Cir. July 26, 2016).
- **Right of Access:** 30 year revocable right of way purchased by title insurer for insured property constitutes "right of access" as phrase is used in title insurance policy and insured failed to show that policy required insurer to provide permanent irrevocable access to remote parcel. [Fidelity Nat'l Title Ins. Co. v. Woody Creek Ventures, LLC](#), Case No. 14-1274 (10th Cir. July 26, 2016).
- **Statutory liens:** Even if municipal assessment arguably would benefit insured property, the resulting lien secured payment of assessment, not services, labor, or material used in construction and thus, municipal lien was not covered risk under policy. [BV Jordanelle, LLC v. Old Republic Nat'l Title Ins. Co.](#), Case No. 15-4127 (10th Cir. July 26, 2016).

- **Title Defect:** Municipal assessment made after title policy was issued and after lender acquired title to property after foreclosure did not constitute covered risk under policy and thus municipality's foreclosure of insured's interest was not a covered loss. [BV Jordanelle, LLC v. Old Republic Nat'l Title Ins. Co.](#), Case No. 15-4127 (10th Cir. July 26, 2016).
- **Unmarketability of Title:** Unmarketability of title in policy relates to defects affecting rights of ownership rather than defects affecting physical condition or use of covered property. Thus, insurer's failure to obtain permanent irrevocable right of way for insured did not render property unmarketable under the terms of policy. [Fidelity Nat'l Title Ins. Co. v. Woody Creek Ventures, LLC](#), Case No. 14-1274 (10th Cir. July 26, 2016).

Authored By



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