

Real Property & Title Insurance Update: Weeks Ending November 4 & 11, 2016

November 17, 2016

REAL PROPERTY UPDATE

- **Foreclosure/Constitutional Challenge:** record title owner's argument that Florida Statutes section 702.035, governing "Legal notice concerning foreclosure proceedings," is an unconstitutional special law was improper where record title owner failed to comply with Florida Rule of Civil Procedure 1.071, governing constitutional challenges to state statutes - [Shelton v. The Bank of NY Mellon](#), Case No. 2D16-952 (Fla. 2d DCA November 9, 2016) (Affirmed).
- **Foreclosure/Voluntary Dismissal:** where foreclosing bank filed a notice of voluntary dismissal, the trial court was instantaneously divested of jurisdiction and trial court was in error for subsequently entering amended final judgment and order denying defendant's motion for attorneys' fees and costs - [The Bank of NY Mellon v. Poker Run Acquisitions, Inc.](#), Case Nos. 3D13-2607, 3D13-2379 (Fla. 3d DCA November 9, 2016) (Reversed and remanded).
- **Foreclosure/Rule 1.540(b)(4) Motion:** borrower's verified motion to vacate final judgment of foreclosure under Rule 1.540(b)(4) was improper where it raised for the first time that foreclosing bank lacked standing - [Rincon v. Bank of Am., N.A.](#), Case No. 3D16-76 (Fla. 3d DCA November 9, 2016) (affirmed).
- **Foreclosure:** final judgment of foreclosure in favor of lender was proper where at the time it acquired its mortgage interest, lender lacked constructive or actual notice of the existence of an unrecorded agreement allegedly bestowing a previously-acquired interest in the property - [White v. Greymar Associates, LLC](#), Case No. 3D16-617 (Fla. 3d DCA November 9, 2016) (Affirmed).

- **Foreclosure/Statute of Limitations:** bank's prior acceleration in foreclosure action that was involuntarily dismissed did not trigger statute of limitations to bar future foreclosure based on a separate default and filed within 5 years thereof - [Bartram v. U.S. Bank National Assoc., etc., et al.](#), Case No. SC14-1265 (Fla. Nov. 3, 2016) (affirmed)
- **Foreclosure/Standing:** bank proved standing by presenting evidence of pooling and servicing agreement and corresponding mortgage loan schedule that expressly reflected borrower's loan - [Bolous v U.S. Bank National Assoc., etc., et al.](#), Case No. 4D15-2608 (Fla. Nov. 2, 2016) (affirmed; distinguishing *Lewis v U.S. Bank Nat's Ass'n*, 188 So. 3d 46 (Fla. 4th DCA 2016))

TITLE INSURANCE UPDATE

- **Class Action/Bipolar Arbitration:** district court did not err in compelling bipolar arbitration of class claims for overcharges of recording fees because title insurers did not waive right to arbitration despite not seeking to enforce arbitration provision until two years after litigation was initiated - [Chassen v. Fidelity National Financial, Inc.](#), 836 F.3d 291 (3rd Cir. Sept. 8, 2016)
- **Diversity Jurisdiction/Removal:** title insurer, with burden to show grounds for diversity jurisdiction in federal court, could not simply rely upon purchase price of property or policy limits to counter insured's claim that losses fell below policy limits and jurisdictional amount - [David & Sheri Elter, LLC v. Stewart Title Guarantee Co.](#), Case No. 16-CV-1036 (W.D. La. Sept. 20, 2016) (Report and Recommendations)
- **Economic Loss Rule:** plaintiff's breach of fiduciary duty claim should be dismissed because title insurer only owes fiduciary duty when it undertakes duty to defend insured and absent trigger of duty to defend, relationship between plaintiff and insurer was purely contractual - [Johnsen and Allphin Props., LLC v. First American Title Ins. Co.](#), Case No. 12-CV-740-DN-PMW (D.Utah Oct. 31, 2016) (memorandum decision)
- **Punitive Damages:** plaintiff could not seek punitive damages against title insurer when it had no viable tort claims against title insurer and could only proceed on claims for breach of contract and breach of implied covenant of good faith and fair dealing - [Johnsen and Allphin Props., LLC v. First American Title Ins. Co.](#), Case No. 12-CV-740-DN-PMW (D.Utah Oct. 31, 2016)(memorandum decision)
- **Statute of Limitations:** to avoid being time barred under New Jersey's statute of limitations, plaintiff had to bring claim within six years of knowledge of injury, rather than knowledge of identity of title insurer as potential defendant in claim arising from alleged mortgage foreclosure rescue scam - [Kretz v. Hernandez](#), Case No. 12-3152 (D.N.J. Oct. 31, 2016) (Memorandum Opinion)

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