

Real Property, Financial Services, & Title Insurance Update: Weeks Ending October 20 & 27, 2017

October 30, 2017

REAL PROPERTY UPDATE

- **Foreclosure:** witness may testify as to business records of another company so long as that witness can lay proper foundation of personal knowledge necessary to establish business records exception - [Bayview Loan Servicing, LLC v. Kay](#), Case No. 1D16-4043 (Fla. 1st DCA October 18, 2017) (reversed and remanded)
- **Condominium/Appurtenances:** beach club memberships of beach club located a mile away from condominium units in which condominium owners had no ownership interest were not appurtenances to the condominium units, despite declaration of condominium stating that such club memberships were appurtenances to the condominium units - [Silver Beach Towers Property Owners Association, Inc. v. Silver Beach Investments of Destin, L.C.](#), Case No. 1D16-4555 (Fla. 1st DCA October 18, 2017) (reversed and remanded).
- **Foreclosure:** subsequent purchaser who takes title to property subject to mortgage may not join foreclosure action to challenge note and mortgage's validity - [Wells Fargo Bank, NA v. Rutledge](#), Case No. 2D16-244 (Fla. 2d DCA October 20, 2017) (reversed and remanded)
- **Tax Liens:** tax liens are superior to mortgage liens and are given priority in foreclosure actions pursuant to Florida Statutes section 197.122(1), and priority of tax liens imposed due to improper grant of homestead tax exemptions governed by section 197.122(1) - [Miami-Dade County v. Lansdowne Mortgage, LLC](#), Case No. 3D16-1046 (Fla. 3d DCA October 18, 2017) (reversed and remanded)

- **Foreclosure:** where landlord/tenant relationship exists independent of any rental agreement and where tenant claims equitable interest in property, ejectment, and not eviction, is proper remedy for landlord - [Borjas v. Vergara](#), Case No. 3D16-1788 (Fla. 3d DCA October 18, 2017) (reversed and remanded).
- **Foreclosure:** “[a] lost [mortgage note] can be enforced if the person seeking to enforce the instrument was entitled to enforce it when the loss occurred or acquired ownership of it from someone entitled to enforce it when the loss occurred, the loss was not the result of a transfer or seizure, and the instrument cannot reasonably be obtained” - [Wisman v. Nationstar Mortgage, LLC](#), Case No. 5D16-3236 (Fla. 5th DCA October 20, 2017) (reversed and remanded)
- **Littoral Rights:** “owners of real property abutting a lake have [certain] common law littoral rights, including the right to an unobstructed view of the lake” - [HagertySmith, LLC v. Gerlander](#), Case No. 5D16-3655 (Fla. 5th DCA October 20, 2017) (reversed and remanded).
- **Reformation/Statute of Limitations:** action seeking reformation of deeds not barred by section 95.231(2), Florida Statutes’ 20-year statute of limitations because that statute only bars claims against the claimants under the deed or their successors in title, as opposed to individuals seeking relief in conformance with the interests of claimants under deed – [Pettis v. Chrisentery](#), No. 1D17-506 (Fla. 1st DCA Oct. 24, 2017) (reversing and remanding for further proceedings on reformation claim and reevaluation of other claims and impact of the Marketable Record Title Act)
- **Foreclosure / Standing:** promissory note did not contain endorsement in bank’s favor, nor was evidence admitted that established merger of bank with predecessor bank, and, in addition, bank did not establish that sub-servicer was properly acting as bank’s agent with power to file suit – [Buckingham v. Bank of Am., N.A.](#), No. 2D15-5424 (Fla. 2d DCA Oct. 25, 2017) (reversing and remanding for entry of order of involuntary dismissal)
- **Landlord-Tenant/Rent in Court Registry:** in suit between tenant and subtenant, trial court incorrectly found that funds in court registry represented rent owed to landlord, an intervenor in the lawsuit; rather, landlord is entitled to claim against any remaining funds in the registry to which tenant is entitled, after disbursement is made to subtenant for the value of subtenant’s successful claim in lawsuit – [Tribeca Aesthetic Med. Solutions, LLC. V. Edge Pilates Corp.](#), No. 4D16-648 (Fla. 4th DCA Oct. 25, 2017) (reversing and remanding)
- **Liability for Assessments:** although current parcel owner did not directly qualify for safe harbor provision under section 720.3085(2)(c), it indirectly benefited from said provision because it was jointly and severally liable with prior parcel owner for all unpaid assessments due up to time of transfer of title – [Villas of Windmill Point II Prop. Owners’ Ass’n, Inc. v. Nationstar Mortg., LLC](#), No. 4D16-2128 (Fla. 4th DCA Oct. 25, 2017) (affirming and remanding for trial court to correct final judgment)

- **Contract for Sale/Election of Remedies:** trial court erred in finding that judgment on buyer's damages claim estopped it from later electing to pursue its specific performance claim because remedies were factually consistent and only full satisfaction of the damages claim would estop buyer from pursuing specific performance – [The Allegro at Boynton Beach, L.L.C. v. Pearson](#), No. 4D16-4299 (Fla. 4th DCA Oct. 25, 2017) (reversing and remanding)
- **Foreclosure/Standing:** trial court erred in concluding that standing could not be transferred by selling the note – [US Bank, NA, as Legal Title Trustee for Truman 2012 SC2 Title Trust v. Glicker](#), No. 5D15-4059 (Fla. 5th DCA Oct. 27, 2017) (reversing and remanding for final judgment in plaintiff's favor)

FINANCIAL SERVICES UPDATE

- **FDCPA:** judgment debtor's misrepresentation and over-collection claim under FDCPA barred by Rooker-Feldman doctrine and FDCPA's venue provision does not apply to postjudgment garnishment proceedings under California law – [Muhammad v. Reese Law Group](#), Case No. 16cv2513-MMA (S.D. Cal. Oct. 12, 2017) (granting defendant's motion for summary judgment and dismissing FDCPA claims)
- **FDCPA:** affirming dismissal of FDCPA claim where default letter substantially complied with statute and defendant's acquisition of debt after default insufficient allegation to make it a "debt collector" within meaning of statute – [Kurtzman v. Nationstar Mortgage, LLC](#), No. 16-17236 (11th Cir. Oct. 10, 2017)
- **FDCPA:** reversing in part dismissal of FDCPA claim because voicemail was "initial communication" requiring statutory disclosures – [Hart v. Credit Control, LLC](#), No. 16-17126 (11th Cir. Sept. 22, 2017)
- **FCCPA/FDCPA:** upon entry of default judgment against non-appearing defendants, maximum statutory damages of \$1,000 per defendant under FCCPA and FDCPA awarded; however, an additional \$5,000 for "stress, anxiety, loss of sleep, and deterioration of relationships" deemed "too tenuous to warrant an award of actual damages at this stage of the pleadings" -- [Castro v. Capital One Services, LLC](#), Case No. 8:16-CV-889- T-17TGW (M.D. Fla., Aug. 3. 2017).
- **FDCPA:** allegations that mortgage balance statement was "inflated" and amounted to an "improper demand" with regard to the amount owed on the loan were insufficient to allege a violation of Section 1692e(2)(A) absent allegations showing the stated balance did not accurately reflect was owed on the loan at that particular point in time, noting "[t]he fact that the balance exceeds the value of the Property does not, in and of itself, establish the loan balance is overinflated." -- [Kemp v. Wells Fargo Bank, N.A.](#), Case No. 17-cv-01259-MEJ, (N.D. Cal. Oct. 25, 2017).

- **FDCPA/RESPA:** summary judgment for Fannie Mae and loan servicer affirmed on debtors' FDCPA and RESPA claims predicated on chapter 13 bankruptcy payments where the record demonstrated the payments were applied to the loan and fees remained due and owing thereafter such that the total demand in the servicer's default letter was not false, deceptive or misleading -- [Moore v. Seterus, Inc.](#), No. 16-17571 (11th Cir. Oct. 19, 2017).
- **TCPA:** upon entry of default judgment against non-appearing defendants, statutory damages of \$500 per alleged call awarded; however, sparse record did not support a finding that the defendants acted willfully or knowingly to award treble damages -- [Castro v. Capital One Services, LLC](#), Case No. 8:16-CV-889-T-17TGW (M.D. Fla., Aug. 3, 2017).
- **TCPA:** motion to certify TCPA class denied where issues of consent, including whether consent was obtained through and conveyed by intermediaries, the purpose of the challenged calls, and "called party" determinations required examination into individual calls and could not be determined based on classwide evidence -- [Jacobs v. Quicken Loans, Inc.](#), 15-81386-CIV-MARRA (S.D. Fla. Oct. 19, 2017).
- **Arbitration:** waiting one year from the filing of an action to move to compel arbitration, participating in a case management conference where the prospect of arbitration was never raised, responding to discovery and propounding its own waived the right to arbitrate TCPA and FCCPA claims under arbitration provision in credit card agreement -- [Nelson v. Synchrony Bank](#), Case No: 2:16-cv-703-FtM-99MRM (M.D. Fla. Oct. 20, 2017).

TITLE INSURANCE UPDATE

- **Title Agency Agreement Salvage:** reversing summary judgment because title underwriter that did not have "unconditional right to settle" in indemnity provision of its agency agreement was required to prove settlement with insured lender was in good faith and reasonable in salvage action against title agent whose mistake caused the claim – [Colonial Title Co., LLC v. Commonwealth Land Title Ins. Co.](#), No. 12-16-00328-CV (Tex. App. Oct. 18, 2017)
- **Claim Preclusion/Privity:** insurer who provided appointed counsel to insured in state court action concerning lien priority was not in privity with insured in trial court, therefore judgment against insured in trial court does not prevent insurer's claim in subsequent bankruptcy action to recover for fraud and misrepresentation by borrower in obtaining title insurance – [Commonwealth Land Title Ins. Co. v. Creditor Group.](#), Case No. 2:14-cv-01394-JAD (D. Nev. Oct. 17, 2017) (reversing bankruptcy court's order sustaining creditors' objection to insurer's claim)
- **Litigation Privilege:** no litigation privilege for actions of executor of estate who claimed his work for the estate was privileged and that he had no liability to title insurer who sought to recover the amount of a lien on real property sold without satisfying a lien on the property – [Stewart Title Guaranty Co. v. Borkowski](#), Case Nos. C075264 and C076709 (Cal. Ct. App. Oct. 23, 2017) (unpublished opinion affirming summary judgment for unjust enrichment and breach of contract)

- **Res Judicata/Class Action:** class plaintiffs' appeal of motion to enforce a consent decree and for contempt barred by res judicata where trial court in first action ruled that contempt motion was barred by statute of limitations and the new action was based on the same factual occurrence as the first action, even though plaintiffs sought a new remedy, argued a new theory, and asserted new evidence – [Terry v. Chicago Title Ins. Co.](#), Case No. 2017-0102 (N.H. Sep. 29, 2017) (affirming trial court)
- **Unmerchantable Title:** property purchased by two parties with undivided interests has unmerchantable title when judgments and liens against one party encumbered property prior to date of title policy, party donated his undivided interest to the second party and second party was unaware of liens and did not agree to attachments of the liens to property – [Degueyter v. First American Title Co.](#), Case No. 17-78 (La. Ct. App. Oct. 25, 2017) (reversing summary judgment denying coverage under title policy)

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