

Real Property & Title Insurance Update: Week Ending August 18 & 25, 2017

August 31, 2017

REAL PROPERTY UPDATE

- **Foreclosure:** general reservation of jurisdiction in a foreclosure judgment is very limited, and certainly does not give trial court jurisdiction to eliminate a lien more than three years after Final Judgment of Foreclosure becomes final - [Garcia v. Christiana Trust, et al.](#), Case No. 3D16-735 (Fla. 3d DCA August 23, 2017) (vacating trial court order).
- **Foreclosure:** “A party that prevails on its argument that dismissal is required because the plaintiff lacked standing to sue upon the contract cannot recover fees based upon a provision in that same contract” - [Christiana Trust v. Rushlow](#), Case No. 4D16-1898 (Fla. 4th DCA August 23, 2017) (reversed and remanded).
- **Foreclosure/Statute of Limitations:** foreclosure action was not barred by the statute of limitations where it alleged and proved separate and continuing defaults that fell within the five years preceding the filing of the action - [Depicciotto v Nationstar Mortgage LLC, et al.](#), Case No. 4D16-3254 (Fla. 4th DCA Aug.16, 2017).
- **Foreclosure/Collateral Estoppel/Res Judicata:** neither res judicata nor collateral estoppel apply to bar subsequent foreclosure based on separate and continuing mortgage and note defaults - [Depicciotto v Nationstar Mortgage LLC, et al.](#), Case No. 4D16-3254 (Fla. 4th DCA Aug.16, 2017).
- **Foreclosure/Standing:** plaintiff proved standing because the original note, with a blank indorsement, filed in the foreclosure action was in the same condition as the copy attached to the initial complaint - [Nationstar Mortgage, LLC v Chan](#), Case No. 5D16-3492 (Fla. 5th DCA Aug. 18, 2017)

- **Foreclosure/Statute of Limitations:** a subsequent foreclosure action is not barred if brought on a subsequent default within five-year statute of limitations period found in section 95.11(2)(c), Florida Statutes - [Wells Fargo Bank, N.A., as Trustee v BH-NV Investments 1, LLC](#), Case No. 3D15-2692 (Fla. 3d DCA Aug.16, 2017)
- **Foreclosure/Servicing:** borrower could not sustain claim against services for failing to respond to qualified written requests where lender had established specific address for receipt and handling requests and borrower mailed letter to the wrong address - [Bivens v Bank of America, N.A. and Select Portfolio Servicing, Inc.](#), Case No. 16-15119 (11th Jud. Ct. Aug.17, 2017)

FINANCIAL SERVICES UPDATE

- **RESPA:** RESPA requires use of designated address when writing to challenge status of purported loan servicer – [Bivens v. Bank of America, N.A.](#), No 16-15119 (11th Cir Aug. 17, 2017) (affirming summary judgment against borrower)
- **FSCPA and FCCPA:** mortgage servicer that acquires mortgage before it goes into default is not a debt collector, and FCCPA claim based only on state court foreclosure action because that it protected by the litigation privilege – [Solis v. Citimortgage, Inc.](#), No. 16-17585 (11th Cir. 17, 2017) (affirming dismissal of FDCPA claim)
- **TILA:** Rooker-Feldman prohibited federal court review of clearly erroneous state court judgment that borrowers had been required to sue their lender for rescission rather than simply send a TILA notice – [Waisome v. JP Morgan Chase Bank, N.A.](#), No. 16-16531 (11th Cir. Aug. 11, 2017) (affirming dismissal of TILA claim)
- **TILA:** record unclear on why borrower's rescission letter was returned undeliverable despite his testimony it was mailed to address he was provided – [Barnes v. Chase Home Finance, LLC, No. 13-35716](#) (9th Cir. Aug. 10, 2017) (reversing lender's summary judgment on TILA claim)

TITLE INSURANCE UPDATE

- **Dischargeability Exception for Fraud:** agent's debt arising from personal real estate transaction not within dischargeability exception for fraud in 11 U.S.C. § 523(a)(2)(A) and (a)(4) adversary proceeding, where there was no demonstration of intentional conduct or gross deviation from appropriate conduct on the basis of debtor's negligent breach of contract, agent relied on representation of lender that it would swap collateral for second mortgage lien, and underwriter's representative conducted closing and disbursed funds even though he was aware that second mortgage lien had not been released – [Conestoga Title Ins. Co. v. Patchell](#) (In re Patchell), Adv. Case No. 15-00243 (Bankr. D. Md. June 23, 2017) (dismissing case)

- **Economic Loss Doctrine:** underwriter's cause of action against title agent for indemnification barred by the economic loss doctrine because the claim depended on the same facts as a breach of contract claim and alleged negligent conduct resulted in only economic loss – [Stewart Title Guar. Co. v. ISGN Fulfillment Servs., Inc.](#), Case No. 3:16-cv-01687 (D. Conn. August 18, 2017) (dismissal with prejudice)
- **Indemnification:** no indemnification for agent performing title exam, settlement and closing services where agent successfully defended claims for breach of contract and negligence in closing but escrow conditions did not include language including claims for title – [B&H Resources, L.L.C. v. 28925 Lorain Inc.](#), Case No. 105323 (Ohio Dist. Ct. App. August 17, 2017) (affirming judgment)
- **Statute of Limitations:** underwriter's causes of action against title agent for indemnification and breach of agency agreement barred by statute of limitations under court's rationale that even if a party has suffered no demonstrable harm and has no cause of action it may be entitled to nominal damages, could have sued for specific performance, and creation of a risk of loss had occurred, even though underwriter did not receive a claim until after cause of action accrued (but within statute of limitations period) – [Stewart Title Guar. Co. v. ISGN Fulfillment Servs., Inc.](#), Case No. 3:16-cv-01687 (D. Conn. August 18, 2017) (dismissal with prejudice)
- **Statutory Bad Faith:** claim for bad faith pursuant to § 624.155(1)(b)(1), Florida Statutes, was premature and abated where action for benefits to assignee of lender's title policy had not yet been resolved in insured's favor – [Stewart Title Guar. Co. v. The Machado Family Ltd. P'Ship. No. 1](#), Case No. 6:17-cv-562-ORL (M.D. Fla. August 23, 2017) (abating, rather than dismissing, bad faith claim in light of Florida Supreme Court's holding in *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289 (Fla. 1991)) (congratulations to Carlton Fields' shareholder Marty Solomon and associate Scott Feather, who represented Stewart Title Guar. Co. in this action)
- **Title Agent Liability:** title agent was liable neither in contract nor tort for failure to uncover tax dispute where escrow agreement limited its responsibility to pro-rating taxes based on latest available valuation – [B&H Resources, LLC v. 28925 Lorain, Inc.](#), No. 105323 (Oh. App. Aug. 17, 2017) (summary judgment affirmed)

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