

Real Property & Title Insurance Update: Week Ending January 27, 2017

February 03, 2017

REAL PROPERTY UPDATE

- **Foreclosure/Lis Pendens:** a proper reading of Florida Statute section 48.23(1)(d) is that “when a foreclosure action is prosecuted to a judicial sale, that sale discharges all liens, whether recorded before the final judgment or after, if the lienor does not intervene in the action within 30 days” after the recording of the notice of lis pendens - [Ober v. Town of Lauderdale-by-the-Sea](#), No. 4D14-4597 (Fla. 4th DCA January 25, 2017) (reversed and remanded).
- **Foreclosure/Deficiency:** Florida Statute section 559.715 of the Florida Consumer Collection Practices Act’s requirement that notice must be given “at least 30 days before any action to collect the debt” does not apply in deficiency actions because it is not an action to collect consumer debt - [Dyck O’Neal, Inc., v. Ward](#), No. 2D15-2989 (Fla. 2d DCA January 27, 2017) (reversed and remanded).
- **Foreclosure:** it is necessary to surrender the original note into evidence to remove it from the stream of commerce and prevent the negotiation of the note to another person as the promissory note is a negotiable instrument - [Heller v. Bank of America, NA](#), No. 2D14-3530 (Fla. 2d DCA January 27, 2017) (reversed and remanded).
- **Foreclosure/Deficiency:** guarantors are not collaterally estopped from challenging the amount of deficiency in subsequent deficiency actions, where guarantors were not named in the underlying foreclosure action - [Romagnoli v. SR Acquisitions – Homestead, LLC, etc., et al.](#), No. 3D16-386 (Fla. 3d DCA January 25, 2017) (reversed).

- **Eminent Domain:** expert appraisal testimony offered by owner under “development approach” method for determination of fair and just value was appropriate as it was based on the actual value of the property at the time of the taking if sold for its highest and best use - [City of Sunny Isles Beach, etc. v. Cavalry Corp., etc., et al.](#), No. 3D15-1420 (Fla. 3rd DCA January 25, 2017) (affirmed).

TITLE INSURANCE UPDATE

- **Collateral Estoppel:** where issue of validity of plaintiff’s title to property was decided in her favor as a result of previous construction defect litigation, plaintiff is collaterally estopped from arguing validity of title in a breach of contract and bad faith action against title insurer in a new action, where title insurer was not a party to previous litigation and plaintiff is attempting a second bite at the apple by re-litigating the same issue – [Gillard v. Fidelity Nat’l Title Ins. Co.](#), Case No. D067604, (Cal Ct. App., Jan. 24, 2017) (unpublished opinion) (reversing trial court opinion)
- **Statute of Limitations:** claims against title insurer barred by the statute of limitations because insurer addressed insured’s claim eight years earlier and thus plaintiff had discovered the loss or damage suffered – [Grill v. Tigor Title Ins. Co.](#), Case No. C070730, (Cal Ct. App., Jan. 24, 2017) (unpublished opinion) (affirming dismissal)
- **Collateral Estoppel:** where trial court took judicial notice of claims in current litigation that were adjudicated adversely to plaintiff in prior litigation, issues decided in prior litigation bar subsequent action against title insurer – [Edwards v. First American Title Ins. Co.](#), Case No. B264490 (Cal Ct. App. Jan. 19, 2017) (unpublished opinion) (affirming judgment and awarding fees)
- **Administrative Review:** title insurer must exhaust administrative remedies concerning Insurance Commissioner’s investigatory hearing before seeking relief in Indiana’s courts – [First American Title Ins. Co. v. Robertson](#), 65 N.E. 3d 1045 (In. Ct. App. 2016) (affirming dismissal)
- **Claim Preclusion:** title insurer not permitted to pursue an action for declaratory relief and for prohibition and mandate after receiving an unfavorable result in a prior appeal of a proceeding pertaining to an administrative order and procedures act – [First American Title Ins. Co. v. Robertson](#), 65 N.E. 3d 1045 (In. Ct. App. 2016) (affirming dismissal)
- **Created, Suffered or Assumed:** title insurer is not liable to insured where insured entrusted insurer’s policy issuing agent for disbursement of loan funds and the agent misappropriated funds and failed to satisfy prior mortgages, because the insured assumed or agreed to the prior mortgages and also failed to make a claim for vicarious liability – [Northwest Savings Bank v. Fidelity Nat’l Title Ins. Co.](#), Case No. 451 WDA 2016 (Pa. Ct. App., Jan. 20, 2017) (non-precedential, unreported opinion) (affirming dismissal)

- **MRTA:** Ohio's Marketable Title Act operates to extinguish interests and claims in existence prior to effective date of root of title unless properly noted subsequent to root of title, where the root of title is the most recent conveyance to be recorded as of a date forty years prior to the time when marketability is being determined – [Spellman Outdoor Advertising Serv., LLC v. Ohio Turnpike and Infrastructure Comm.](#), Case No. 2015-P-0081, --- N.E.3d ---- (Oh. Ct. App. Sep. 30, 2016) (affirming summary judgment)

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