

Real Property & Title Insurance Update: Week Ending April 28 & May 5, 2017

May 09, 2017

REAL PROPERTY UPDATE

- **Foreclosure:** final summary judgment in borrower's favor inappropriate where borrower merely asserted that lender mistakenly filed copy of original note with court, instead of original, and where borrower failed to establish that plaintiff could not prevail at trial - [ALS Maxim I LLC v. Katsenko](#), Case No. 2D15-5153 (Fla. 2d DCA May 3, 2017) (reversed and remanded)
- **Foreclosure:** where foreclosing bank's witness unable to testify as to procedures used to "board" payment histories onto successor bank's computers, proper remedy was to remand for further proceedings, rather than dismiss action - [Evans v. HSBC Bank, USA, N.A.](#), Case No. 2D15-433 (Fla. 2d DCA May 5, 2017) (reversed in part, affirmed in part, and remanded)
- **Property Taxes:** long-term lease that is not perpetually renewable does not result in taxable fee simple ownership interest for lessee of real estate pursuant to *Accardo v. Brown*, 139 So. 3d 848 (Fla. 2014) - [Garcia v. Dadeland Station Associates, Ltd.](#), Case No. 3D16-1698 (Fla. 3d DCA May 3, 2017) (affirmed).
- **Foreclosure:** where improperly served defendant files motion for protective order and subsequent motion for sanctions related thereto, that defendant has not sought the "type of affirmative relief that would amount to a submission to the trial court's jurisdiction" - [Bornstein v. The Bank of New York Mellon](#), Case No. 4D16-2908 (Fla. 4th DCA May 3, 2017) (reversed and remanded)
- **Restrictive Covenants:** short-term vacation rentals did not violate restrictive covenants restricting use of property to residential purposes where renters used the property for residential living; owner's income from rental did not convert use to business. [Santa Monica Beach Property Owners Assoc., Inc. v Acord](#), et al., Case No. 1D16-4782 (Fla. 1st DCA April 28, 2017)

- **Foreclosure/Standing:** lender established standing where original note and blank-endorsed allonge was properly authenticated, was introduced into evidence at trial, and was identical to the copy of the note and blank-endorsed allonge attached to the complaint. [Bank of New York Mellon v Heath](#), Case No. 4D16-1988 (Fla. 4th DCA April 26, 2017)
- **Deficiency/Jurisdiction:** holding that a party cannot pursue a separate action for deficiency judgment where the foreclosure court reserved jurisdiction to enter a deficiency; certifying conflict with 2nd DCA, 3rd DCA, 4th DCA and 5th DCA. [Dyck-O'Neal, Inc. v Lanham](#), Case No. 1D16-1624 (Fla. 1st DCA April 24, 2017)
- **Foreclosure/Standing:** assignment of mortgage signed while lawsuit was pending did not negate the possibility that lender had standing at the inception of the case. [HSBC Bank USA, Trustee v Alejandro](#), Case No. 4D15-2750 (Fla. 4th DCA April 26, 2017)
- **Foreclosure/Due Process:** trial court violated borrower's due process rights by refusing borrower's request to present evidence following close of lender's prima facie case. [Dobson v U.S. Bank National Assoc., Trustee, et al.](#), Case No. 5D16-200 (Fla. 5th DCA April 28, 2017)

TITLE INSURANCE UPDATE

- **Duty to Defend:** it is "nonsense" that insurer may claim it was unaware that there might be coverage under a policy where insured title agency did not challenge denial of coverage under errors and omissions policy, and insureds are not required to lodge an exception or request reconsideration to a denial – [Title Indus. Assurance Co., R.R.G. v. First American Title Ins. Co.](#), Case No. 15-3310 (7th Cir. Dec. 10, 2017) (affirming summary judgment against liability insurer)
- **Duty to Defend/Estoppel:** under Illinois law, an insurer uncertain of its obligations may defend under a reservation of rights or seek declaratory relief, but if it abandons its insured at the onset where it should have defended its insured, the insurer has breached its duty, is estopped from invoking policy defenses to indemnify, and may be liable for judgments or settlements that claimants obtain against the insured – [Title Indus. Assurance Co., R.R.G. v. First American Title Ins. Co.](#), Case No. 15-3310 (7th Cir. Dec. 10, 2017) (affirming summary judgment against liability insurer)
- **Duty to Defend/Exclusions:** exclusion withholding coverage for "dishonest, fraudulent, criminal, malicious or intentional wrongful acts" of insured title agency is not triggered when title insurance company alleges agency committed errors and omissions that could arise from mere negligence, which allegations were legal conclusions that did not permit insurer to avoid a duty to defend – [Title Indus. Assurance Co., R.R.G. v. First American Title Ins. Co.](#), Case No. 15-3310 (7th Cir. Dec. 10, 2017) (affirming summary judgment against liability insurer)

- **Duty to Defend/Exclusions:** fraud count against third party with unexplained relationship to insured title agency, without more, does not permit liability insurer to invoke exclusion for “dishonest, fraudulent, criminal, malicious or intentional wrongful acts” under errors and omissions policy – [Title Indus. Assurance Co., R.R.G. v. First American Title Ins. Co.](#), Case No. 15-3310 (7th Cir. Dec. 10, 2017) (affirming summary judgment against liability insurer)
- **Duty to Defend/Exclusions:** liability insurer not permitted to preemptively decline coverage at outset of litigation based on facts it did not and could not know, where underlying complaints alleged several theories of recovery and any theory was within potential coverage of an errors and omissions policy – [Title Indus. Assurance Co., R.R.G. v. First American Title Ins. Co.](#), Case No. 15-3310 (7th Cir. Dec. 10, 2017) (affirming summary judgment against liability insurer)
- **Duty to Defend/Prior Knowledge Provision:** liability insurer’s failure to assert prior knowledge provision of title agency’s errors and omissions policy until summary judgment stage required insurer to provide justification for delay in asserting exclusion, in an action brought by insurer seeking declaratory relief where title insurance company appeared as a defendant seeking recovery for insured title agency’s wrongdoing – [Title Indus. Assurance Co., R.R.G. v. First American Title Ins. Co.](#), Case No. 15-3310 (7th Cir. Dec. 10, 2017) (affirming summary judgment against liability insurer)
- **Duty to Defend/Waiver:** both a long delay in asserting a policy defense and the “mend-the-hold” doctrine in which an insurer changes the basis for denial of a claim may constitute a waiver of the defense upon a showing by a claimant that it has been prejudiced by the delay – [Title Indus. Assurance Co., R.R.G. v. First American Title Ins. Co.](#), Case No. 15-3310 (7th Cir. Dec. 10, 2017) (affirming summary judgment against liability insurer)

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