

Real Property & Title Insurance Update: Week Ending April 14 & 21, 2017

April 24, 2017

REAL PROPERTY UPDATE

- **Foreclosure/Attorneys' Fees:** mortgage foreclosure plaintiffs seeking attorney's fees must support their claim with competent, substantial evidence of the number of hours worked and evidence that those hours and hourly rate are reasonable - [Henderson v. Onewest Bank FSB](#), No. 1D16-2670 (Fla. 1st DCA April 18, 2017) (reversed and remanded in part).
- **Foreclosure/Standing:** plaintiff failed to provide evidence that indorsee had intent to transfer any interest to plaintiff when note was transferred into trust - [Shaffer v. Deutsche Bank National Trust](#), as Indenture Trustee for American Home Mortgage Investment Trust 2006-1, Mortgage Backed Notes, Series 2006-1, No. 2D14-4205 (Fla. 2d DCA April 19, 2017) (reversed and remanded).
- **HOA/Summary Judgment:** trial court erred in entering final summary judgment in favor of homeowners' association, where conflicting affidavits evinced disputed issues regarding owner's property and her compliance with recorded restrictions - [Sexton v. Southfield Subdivision Maintenance and Property Owners' Association, Inc.](#), No. 2D16-3567 (Fla. 2d DCA April 19, 2017) (reversed and remanded).
- **Foreclosure/Lack of Prosecution:** "close enough" is not "good enough" where plaintiff's good cause showing was filed 4 days before hearing, as opposed to minimum 5 day requirement under rule 1.420(e) - [Held v. U.S. Bank National Association](#), as Trustee for C-BASS 2007-CB7 Trust, Mortgage Loan Asset-Backed Certificates, Series 2006-CB7, et al., No. 4D15-499 (Fla. 4th DCA April 19, 2017) (reversed and remanded).

- **Foreclosure/Standing:** plaintiff, as nonholder in possession, failed to prove series of transactions through which it acquired note starting with first holder of note - [Powell v. Wells Fargo Bank, N.A.](#) as Trustee for Structured Asset Mortgage Investments II, Inc., GreenPoint Mortgage Funding Trust 2006-AR2, Mortgage Pass-Through Certificates, Series 2006-AR2, No. 4D15-3013 (Fla. 4th DCA April 19, 2017) (reversed and remanded).
- **Foreclosure/Appeal:** order granting summary judgment for borrowers and dismissing case without prejudice to lender's filing a new foreclosure action was final appealable order - [Bank of New York Mellon v. Swain](#), No. 5D16-139 (Fla. 5th DCA April 21, 2017) (dismissed).
- **Foreclosure/Conditions Precedent:** plaintiff's notice of default substantially complied with notice provision contained in paragraph 22 of mortgage - [U.S. Bank Trust, N.A., etc. v. Wellman](#), No. 3D15-1368 (Fla. 3d DCA Apr. 12, 2017) (reversed and remanded)
- **Dismissal with Prejudice:** trial court improperly dismissed with prejudice *pro se* plaintiff's complaint against lender for, among other things, unauthorized entry and conversion of personal property, and plaintiff should have been permitted to amend - [Hanna-Mack v. Bank of Am., N.A.](#), No. 3D16-1897 (Fla. 3d DCA Apr. 12, 2017) (reversed and remanded to permit amendment of complaint)
- **Foreclosure/Assignment of Rents:** where there was no agreement between the parties to assign rents or other basis for sequestering rents, and the rents were not the subject of the litigation, trial court lacked authority to order that rents be deposited into court registry - [UV Cite III, LLC v. Deutsche Bank Nat'l Trust Co., as Trustee](#), No. 3D16-2341 (Fla. 3d DCA Apr. 12, 2017) (reversed and remanded)
- **Foreclosure/Attorneys' Fees:** party that successfully prevailed in obtaining dismissal with prejudice of foreclosure action based on lack of standing pursuant to contract sued upon not entitled to an attorneys' fees award pursuant to contract's attorneys' fee provision - [Nationstar Mortg. LLC v. Glass](#), No. 4D15-4561 (Fla. 4th DCA Apr. 12, 2017) (denying motion for fees, and denying without prejudice request for costs)
- **Foreclosure/Reverse Mortgage:** language in reverse mortgage was patently ambiguous regarding whether spouse of decedent was a "borrower" under its terms, and extrinsic evidence was necessary to resolve this factual question - [Nationstar Mortg. Co. v. Levine](#), No. 4D16-615 (Fla. 4th DCA Apr. 12, 2017) (reversing entry of summary judgment)
- **Foreclosure/Business Records Hearsay Exception:** bank satisfied predicate necessary for admission of prior servicers' loan payment histories, having presented detailed testimony regarding the "on-boarding" process utilized by current servicer to verify information received from prior servicers - [Bank of New York Mellon f/k/a Bank of New York Successor Trustee v. Vessels](#), No. 5D15-4248 (Fla. 5th DCA Apr. 13, 2017) (reversed and remanded for new trial on issue of damages)

TITLE INSURANCE UPDATE

- **Duty to Defend:** duty to indemnify is a contractual one dictated by title policy provisions, and insurer is required to indemnify insured under Section 9(b) of an ALTA 2006 Extended Lender's policy where deed was invalid and unenforceable as an unauthorized conveyance in a Ponzi scheme – [Banner Bank v. First American Title Ins. Co.](#), Case No. 2:16-CV-00200-BSJ (D. Utah. Apr. 12, 2017)(granting summary judgment in favor of insured)
- **Duty to Defend:** title defect not exempt from coverage under Exclusion 6 of an ALTA 2006 Extended Lender's policy for unauthorized conveyances that violate the Securities Act of 1933 and Exchange Act of 1934, and Rules 10(b) and 10b-5 because the Exclusion only applies to fraudulent conveyances or transfers pursuant to federal bankruptcy, state insolvency or similar creditors' rights laws – [Banner Bank v. First American Title Ins. Co.](#), Case No. 2:16-CV-00200-BSJ (D. Utah. Apr. 12, 2017)(granting summary judgment in favor of insured)
- **Implied Covenant of Good Faith and Fair Dealing:** insurer breached implied covenant of good faith and fair dealing when it failed to diligently investigate, fairly evaluate, and promptly and reasonably act in rejecting or settling claim for indemnity as a result of unauthorized conveyances, where insurer took four months to respond and had not investigated or evaluated the insured's reading of claim documents – [Banner Bank v. First American Title Ins. Co.](#), Case No. 2:16-CV-00200-BSJ (D. Utah. Apr. 12, 2017)(granting summary judgment in favor of insured)
- **Paragraph 15(b) – Applicability:** summary judgment should not have been entered in favor of insurer based upon paragraph 15(b) of policy when insured also sued for negligent provision of real estate transaction services and policy did not include property at issue. [Michael v. Stock](#), Case No. 1229 EDA 2016 (Pa. Sup. Ct. Apr. 11, 2017) (vacating award of summary judgment in favor of title insurer).
- **Estoppel:** insured's argument that insurer's failure to properly search title records and properly issue policy insuring entirety of property purchased by insured precluded summary judgment on coverage issue in favor of insurer. [Michael v. Stock](#), Case No. 1229 EDA 2016 (Pa. Sup. Ct. Apr. 11, 2017) (vacating award of summary judgment in favor of title insurer).
- **Bad faith:** Pennsylvania's bad faith statute creates independent cause of action to insured which is not dependent on success of coverage dispute and thus trial court's reasoning regarding existence of coverage was not determinative of insured's bad faith claims. [Michael v. Stock](#), Case No. 1229 EDA 2016 (Pa. Sup. Ct. Apr. 11, 2017) (vacating award of summary judgment in favor of title insurer).
- **Defective Description Exception:** insurer had no duty to defend because defective description exception – that expressly stated insurer could not insure a description based on acreage – excludes coverage for any claims related to legal description. [Fischer Sand & Aggregate, LLP v. Old Republic National Title Ins. Co.](#), Case No. A16-0988 (Minn. Ct. App. Apr. 10, 2017).

- **Survey Exception:** insurer was entitled to summary judgment when an accurate survey would have disclosed boundary and insured failed to provide survey to clear exception. [Fischer Sand & Aggregate, LLP v. Old Republic National Title Ins. Co.](#), Case No. A16-0988 (Minn. Ct. App. Apr. 10, 2017).

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