

Real Property & Title Insurance Update: Week Ending January 6, 2017

January 11, 2017

REAL PROPERTY UPDATE

- **Foreclosure – Involuntary Dismissal:** although lender's witnesses failed to explain lender's loan payment history statement, the statement reflected the principal amount due and had been admitted into evidence, which was sufficient to establish a *prima facie* case on damages and avoid involuntary dismissal. [Bayview Loan Servicing, LLC v Luciano del Lupo](#), Case No. 4D15-1088 (Fla. 4th DCA Jan. 4, 2017)(dismissal reversed and remanded).
- **Lis Pendens:** section 48.23, Florida Statutes, does not bar an Association from filing separate action to foreclose claim of lien for unpaid assessments even though mortgage lender had already filed suit and recorded lis pendens because the Declaration of Covenants, which included provisions with respect to the Association's right to lien and foreclose on the property, was a recorded "interest" at the time of the filing of lis pendens. [Jallali v Knightsbridge Village Homeowners Association, Inc.](#), Case No. 4D15-2036 (Fla. 4th DCA Jan. 4, 2017)(affirmed).
- **Note Indorsement - Standing:** lender is not required to prove the validity of the indorsement on the note through a chain of transfers because indorsement was presumed to be both authentic and made by an authorized party, and the borrower failed to make any showing to the contrary. Mere possession of the note indorsed in blank was sufficient for standing. [Pennymac Corp. v Frost](#), Case No. 4D16-262 (Fla. 4th DCA Jan. 4, 2017) (reversed and remanded).
- **Rule 1.540(b):** Rule 1.540(b)(4) authorizes a court to relieve a party from a void final "order" in addition to a void final "judgment or decree." [De La Osa v. Wells Fargo Bank, N.A.](#), Case No. 3D14-1455 (Fla. 3d DCA December 14, 2016) (Vacating panel opinion and affirming trial court's order).

- **Rule 1.540(b):** The trial court was within its discretionary right to relieve foreclosing bank from involuntary dismissal pursuant to Rule 1.540(b)(1) where the foreclosing bank filed its motion for relief within a reasonable time, not exceeding one year. [Fields v. Beneficial Florida, Inc.](#), Case Nos. 5D15-4091 (Fla. 5th DCA December 16, 2016) (Affirmed).

TITLE INSURANCE UPDATE

- **Closing Protection Letter (CPL) -- Causation:** Issue of fact as to causation of lender's losses precluded entry of summary judgment in favor of FDIC despite fact that FDIC may be entitled to adverse inference from closing agent's assertion of Fifth Amendment privilege against self-incrimination. [FDIC v. Fidelity National Title Insurance Group](#), Case No. 14-13706 (E.D.Mich. Jan. 3, 2017)
- **Closing Protection Letter (CPL)—Prompt Notice:** Title insurer's inability to explain how missing evidence, caused by long passage of time prior to receiving CPL claim, prejudiced its ability to defend claim, and thus precluded entry of summary judgment in favor of title insurer on issue of timely notice. [FDIC v. Fidelity National Title Insurance Group](#), Case No. 14-13706 (E.D.Mich. Jan. 3, 2017)
- **Closing Protection Letter (CPL) – Impairment of Subrogation Rights:** When FDIC could not discover that closing agent may have been aware of fraud until deposition occurring shortly before claim was submitted, [FDIC v. Fidelity National Title Insurance Group](#), Case No. 14-13706 (E.D.Mich. Jan. 3, 2017)
- **Closing Protection Letter (CPL) – Limit of Liability:** Lender need not retain interest in mortgage to recover under CPL. Terms of CPL more reasonably interpreted to limit amount of liability to loan amount under title policy to avoid double recover under CPL and title policy. [FDIC v. Fidelity National Title Insurance Group](#), Case No. 14-13706 (E.D.Mich. Jan. 3, 2017).
- **Closing Protection Letter (CPL)--Damages:** FDIC failed to sustain burden on summary judgment when it failed to explain why proceeds from insurance claims or foreclosure sales were not included in calculation of damages. [FDIC v. Fidelity National Title Insurance Group](#), Case No. 14-13706 (E.D.Mich. Jan. 3, 2017)
- **Title Insurer's Duty:** Ambiguous deed description, prepared by escrow agent, precluded summary judgment on issue of whether insurer breached duty as an escrow agent, when insurer allegedly failed to discover and disclose to insured that City had right to maintain a waterline across insured's property. [Evans v. City of Warrenton](#), 283 Or. App. 256 (Or. Ct. App. Dec. 29, 2016).

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