CARLTON FIELDS

Real Property, Financial Services, & Title Insurance Update: Weeks Ending June 15 & 22, 2018

June 23, 2018

Real Property Update

- Equitable Lien/Foreclosure: lender entitled to an equitable lien, but not entitled to foreclose on that lien where was no showing of default on mortgage from which the lien arose - Rozanski v. Wells Fargo et al., Case No. 2D16-3800 (Fla. 2d DCA June 22, 2018) (affirmed in part, reversed in part and remanded).
- Quiet Title/Submerged Land: a 1934 deed conveying "all lands…to the Channel of Clearwater Harbor" unambiguously conveyed all lands, including the submerged lands within the boundaries described in the deed and extrinsic evidence is not admissible to vary the terms of said deed - City of Clearwater v. Bayesplanade.com, LLC, Case No. 2D17-2006 (Fla. 2d DCA June 22, 2018) (reversed and remanded).
- Foreclosure/Motion to Vacate Final Judgement: it was error to grant motion to vacate final judgment *sua sponte* without affording opposing party an opportunity to be heard and without holding evidentiary hearing - Bayview Loan Servicing, LLC v. Dzidzovic, Case No. 2D17-3608 (Fla. 2d DCA June 22, 2018) (reversed and remanded).
- Restrictive Covenant: where a restrictive covenant is involved, the party seeking to enforce the covenant need not establish irreparable injury - ASA College, Inc. v. Dezer Intracoastal Mall, LLC, Case No. 3D16-1381 (Fla. 3d DCA June 20, 2018) (affirmed in part, reversed in part and remanded).
- Condominium Association: section 718.113(2)(a), which provides a procedure for approval of material alterations, not applicable where condominium declaration provided a manner for approval by board vote of alterations to common property - Lenzi v. The Regency Tower Association, Inc., No. 4D17-2507 (Fla. 4th DCA June 20, 2018) (affirmed).

- Domestication of Foreign Judgment: trial court erred by denying domestication of sister-state judgment based upon substantive review of underlying cause of action, and judgment was valid on its face under laws of the foreign state - New v Bennett, Case No. 1D17-3196 (Fla. 1st DCA June 4, 2018) (reversed).

- Foreclosure/Notice/Condition Precedent: trial court improperly dismissed foreclosure action for lender's failure to send default notice to proper address where lender's mailed notice to borrower's prior address and borrower admitted receiving same - Deutsche Bank National Trust Co., Trustee v Sheard, et al. Case No. 2D17-1911 (Fla. 2d DCA June 8, 2018) (reversed).

- Salvin Doctrine: contractors not liable for injuries to third parties where owner accepted contractor's work as complete and where alleged defect was patent and would have been discovered by owner based upon reasonably careful inspection - Valiente v R.J. Behar & Co., Inc.et al., Case No. 3D15-1049, 3D14-2635, 3D14-3058 (Fla. 3d DCA June 6, 2018) (affirmed).

- Foreclosure: trial court erred by dismissing foreclosure action because initial default fell outside statute of limitations period, where lender also alleged borrower failed to make subsequent payments within limitations period -U.S. Bank National Assoc., Trustee v Morelli, et al., Case No. 3D17-286 (Fla. 3d DCA June 6, 2018) (dismissal reversed)

Consumer Finance Update

- FCRA: recommending consumer's second amended complaint for violation of FCRA be dismissed where consumer's pleading alleged defendants, which included credit reporting agencies and furnisher's of credit information, failed to provide consumer with "original documentation with an original wet signature"; magistrate concluded there is no such requirement pursuant to FCRA which would provide a foundation for complaint - *Butler v. Midland Funding*, No. 3:17cv422-MCR-CJK (N.D. Fla. May 17, 2018).

- FCRA: denying motion to dismiss complaint against debt collector for violation of FCRA where plaintiff alleged debt collector accessed consumer credit information without consent and without permissible purpose because it was unclear from the record whether the debt collector reasonably believed it was authorized to obtain plaintiff's credit report for debt collection purposes - *Foote v. Continental Serv. Group*, 6:18-cv-00073-PGB-TBS (M.D. Fla. June 16, 2018).

- TCPA: declining to exercise supplemental jurisdiction where counterclaim sought enforcement of the very debt that was subject of alleged unlawful calls - Haire v. Tampa Truck Driving School, Inc., No. 8:18-cv-711-T-26MAP (M.D. Fla. June 8, 2018).

- FCRA: affirming dismissal of corporation's FCRA claim because corporation did not qualify as a "consumer," even though credit history of corporation's owner was accessed during credit request - Boydstun v. US Bank, No. 16-35523 (9th Cir. June 7, 2018).

Title Insurance Update

- Insurance Codes: The Texas Insurance Code, Chapter 542, does not apply to title insurance policies, and a bad faith claim based on an underwriter's duty to defend cannot be brought under Chapter 542 – Hall CA-NV, LLC v. Old Republic Nat'l Title Ins. Co., Civil Action No. 3:18-CV-0380-B (N. D. Tex., June 14, 2018) (affirming trial court judgment)

- Personal and Specific Jurisdiction: Louisiana resident defendant's contacts with the state of Texas were insufficient to confer specific or general jurisdiction over defendant in alleged fraudulent-transfer scheme, where defendant received telephone calls from Texas, deposited money into Texas bank account, received proceeds from the sale of real property in Texas, and recorded liens against vehicles in Texas. The test for establishing purposeful availment has three factors: (1) only the defendant's contacts with the forum; (2) those contacts must be purposeful rather than random, fortuitous, or attenuated; and (3) the defendant must seek some benefit, advantage, or profit by availing itself of the jurisdiction – Old Republic Nat'l Title Ins. Co., etc. v. Bell, Case No. NO. 17–0245 (Tex., June 1, 2018) (affirming trial court judgment)

Related Practices

Real Property Litigation
Title Insurance
Consumer Finance