CARLTON FIELDS

Real Property, Financial Services, & Title Insurance Update: Week Ending February 9, 2018

February 14, 2018

REAL PROPERTY UPDATE

- **Misrepresentation/Concealment:** genuine issues of material fact remained in dispute regarding whether board-certified real estate attorney committed fraudulent or negligent misrepresentation or concealment by falsely assuring purchaser that no buyer's-side real estate broker commission would be payable in transaction – Grimes v. Lottes, No. 2D16-5557 (Fla. 2d DCA Feb. 9, 2018) (reversing summary judgment)

- **Proceedings Supplementary/Homestead:** because property was owned by corporation, and individual residing there did not possess ownership interest, property was not entitled to homestead protection against forced sale – DeJesus v. A.M.J.R.K. Corp., No. 2D17-2374 (Fla. 2d DCA Feb. 9, 2018) (reversed and remanded)

- **Foreclosure/Negotiability and Standing:** reversing judgment for borrower, and concluding that (1) trial court erred by admitting expert testimony on legal issues, (2) negotiability of note was not destroyed by its reference to mortgage, nor by its definition of "note holder," (3) bank had standing to foreclose, and alleged violations of pooling and servicing agreement did not destroy standing, nor did assignment of mortgage, (4) servicer's business records were admissible, and (5) bank did not have unclean hands – HSBC Bank USA, Nat'l Ass'n, etc. v. Buset, No. 3D16-1383 (Fla. 3d DCA Feb. 7, 2018) (reversed with directions to enter judgment for bank)

- **Foreclosure/Attorneys' Fees:** borrowers' motion for attorneys' fees denied because bank was not party to note and mortgage, and because borrowers successfully argued that bank was not entitled to enforce instrument containing attorneys' fee provision – Sabido v. The Bank of New York Mellon f/k/a The Bank of New York, Successor to JP Morgan Chase Bank, Nat'l Ass'n, as Trustee, No. 4D16-2944 (Fla. 4th DCA Feb. 7, 2018) (granting motion for clarification and denying motion for reconsideration)

- **Guaranty/Condition Precedent:** trial court erred in entering partial summary judgment in landlord's favor because demand for payment was condition precedent to guarantor's performance – Nabbie v. Orlando Outlet Owner, LLC, No. 5D16-1146 (Fla. 5th DCA Feb. 9, 2018) (reversed and remanded)

- **Best Evidence Rule:** trial court erred by admitting a copy of promissory note into evidence at trial; best evidence rule required original note (negotiable instrument) be submitted into evidence to support judgment - Heller v Bank of America, No. 2D14-3530 (Fla. 2d DCA January 27, 2018) (reversed and remanded); see also, Morales v Fifth Third Mortgage Co., Case No. 4D17-1260 (Fla. 4th DCA Jan. 31, 2018) (reversed and remanded).

- **Hearsay:** testimony by lender's representative based upon bank records not entered into evidence is inadmissible hearsay - Heller v Bank of America, No. 2D14-3530 (Fla. 2d DCA Jan. 27, 2018) (reversed and remanded).

- **Deficiency:** a deficiency action is not an action to collect a consumer debt and, therefore, section 559.715, Florida Statutes, requiring 30 days' notice before any action to collect the debt, is inapplicable - O'Neal, Inc. v Ward, No. 2D15-2989 (Fla. 2d DCA Jan. 27, 2018) (reversed and remanded).

- **Standing:** a foreclosure plaintiff must have standing at both the time when the foreclosure complaint is filed and when the final judgment is entered - Fielding v PNC Bank NA, No. 5D16-440 (Fla. 5th DCA Feb. 2, 2018) (reversed and remanded).

- **Attorneys' Fees:** purchaser of real property in foreclosure was not a party to the mortgage and, therefore, was not entitled to recover attorneys' fees following lender's dismissal of foreclosure action - PNC Bank, NA v MDTR LLC, as Trustee, No. 5D16-2887 (Fla. 5th DCA Feb. 2, 2018) (reversed and remanded).

- **Easement:** unit owners not entitled to access a dock through neighboring lands by way of an easement by necessity because unit owners could not show "absolute necessity" given that unit owners lived on waterfront property and could build their own access to the dock - Goldman v. Lustig, No. 4D16-1933 (Fla. 4th DCA Jan. 24, 2018) (reversed and remanded).

- **Attorney's Fees:** Once sellers chose affirmation of contract, rather than rescission, sellers could not be awarded attorney's fees as damages - DFG Group, LLC et. al., v. Heritage Manor of Memorial Park, Inc., No. 4D16-2972 (Fla. 4th DCA Jan. 24, 2018) (affirmed in part, reversed in part, and remanded).

- **Leasing/Doctrine of Avoidable Consequences:** summary judgment reversed where plaintiff did not conclusively refute affirmative defense that plaintiff failed to exercise ordinary and reasonable care in disconnecting fire sprinkler system and if it had done so, water damage could have been avoided - Penton Business Media Holdings, LLC v. Orange County, Florida, No. 5D16-3935 (Fla. 5th DCA Jan. 26, 2018) (affirmed in part, reversed in part, and remanded).

FINANCIAL SERVICES UPDATE

- **FDCPA/FCCPA/TCPA:** Defendant mortgage servicers were not liable for violations of FDCPA or FCCPA based upon claim that they attempted to collect illegitimate debt where court in foreclosure action found that debt was legitimate and claims were thus barred by collateral estoppel; Defendants were not liable for TCPA violations where no auto-dialed calls were placed to a cellular phone number owned by plaintiff - *Ferrer v. Bayview Loan Servicing, LLC* (S.D. Fla. Jan. 26, 2018) (granting summary judgment for defendants).

- **RESPA/FCCPA:** Borrower sued for violations of RESPA and FCCPA claiming servicer improperly rejected her loan modification without notice and an opportunity to correct the error, which was that she failed to return the original signed documents. District court found servicer complied with RESPA by providing an explanation as to the denial, and that unreasonable conduct by a servicer does not necessarily amount to a violation of RESPA. Servicer also did not violate FCCPA by proceeding with foreclosure after modification was denied - *Finster v. U.S. Bank, N.A.*, No. 17-11662 (11th Cir. Jan. 31, 2018) (affirming summary judgment for defendant).

- **TCPA:** Defendants entitled to summary judgment in class action brought by consumer who received auto-dialed text messages on his cell phone from payday lender without consent because entity that sent actual text messages was not a party to the suit and defendants had not ratified the conduct and were not aware of the TCPA violations - *Kristensen v. Credit Payment Services Inc.*, 879 F.3d 1010 (9th Cir. Jan. 10, 2018) (affirming summary judgment for defendants).

- **FCCPA/FDCPA:** concluding that allegations that loan servicer and law firm violated the FCCPA and FDCPA by filing a verified amended foreclosure complaint seeking, according to the borrower, collection of mortgage loan debt that was partially barred by the applicable 5-year statute of limitations, was legally insufficient to support borrower's FCCPA and FDCPA claims and, rather, were affirmative defenses that could possibly be raised in a foreclosure or other action to collect the indebtedness owed; and concluding that merely alleging a conflict between the loan due date listed on a mortgage statement and that alleged in the verified amended foreclosure complaint was, by itself, insufficient to state a claim for violation of the FCCPA - Blake v. Select Portfolio Servicing, Inc., No. 6:17-cv-01523 (M.D. Fla. Jan. 18, 2018).

- **FDCPA/FCRA/RESPA/TILA:** affirming dismissal of complaint on collateral estoppel grounds where claims were based on borrower's purported 2008 rescission of the loan and where the rescission issue was decided in an earlier action between the parties; concluding that borrower was also barred by res judicata from asserting claims under the various consumer protection statutes that were or could have been raised by him in the earlier action; and concluding that borrower's TILA claim failed because there were no allegations that a TILA violation existed at the time the loan was assigned to the defendant/assignee which is a requisite for stating a claim of assignee liability under TILA and noting that "an assignee of a loan is not subject to liability under the Truth in Lending Act for violations that occur after the loan has been made" - Kareem v. Ocwen Loan Services, LLC, No. 16-15589 (11th Cir. Jan. 22, 2018).

- **TILA:** rejecting claim that TILA violation occurred by virtue of mere existence of a provision in motor vehicle sales contract granting seller the unilateral right to cancel the contract, and stating that a "seller's unilateral right to cancel a sales contract or a contract conditioned upon seller-located financing, does not, by itself, violate TILA" because it does not relieve the seller of the seller's disclosure obligations under TILA - Clarke v. West Palm Nissan, LLC, No. 9:17-cv-81032 (S.D. Fla. Jan. 23, 2018).

- **FDCPA:** concluding that Federal Rule of Civil Procedure 23's class certification requirements were met and certifying class in action alleging that bank violated FDCPA by mailing debt collection letters to borrowers which contained language requiring that borrowers dispute the validity of the debt in writing, and noting that the Court had previously joined those courts who have analyzed the issue of whether § 1692g(a)(3) contains a writing requirement and who have determined that the statute "does not require a consumer to dispute the validity of the debt in writing before the debt collector may assume the debt is valid" - Alderman v. GC Services Limited Partnership, No. 2:16-cv-14508 (S.D. Fla. Jan. 19, 2018).

- **Rosenthal Act:** denying summary judgment and determining that plaintiffs had Article III standing to pursue claims against automobile finance loan servicer under California's Rosenthal Act for the servicer's collection and retention of alleged unauthorized processing fees charged to plaintiffs by Western Union for making their loan payments online or by phone through Western Union, concluding that a concrete harm was suffered by virtue of plaintiffs' payment of the fee and that "[i]t is immaterial that the fee was optional [']and at times convenient' if the collection of the fee is impermissible altogether" under the Rosenthal Act; and concluding that a fact issue existed as to whether the fee was permitted by the Act - Lindblom v. Santander Consumer USA Inc., No. 1:15-cv-0990 (E.D. Cal. Jan. 22, 2018).

- **FCRA:** concluding that plaintiff had Article III standing to pursue FCRA claims against company which performed an employment-related background check on plaintiff and furnished a report to plaintiff's prospective employer inaccurately reporting that plaintiff had a criminal history, and stating that plaintiff's alleged emotional distress suffered due to the uncertainty of his prospects in obtaining the job in light of the inaccurate report as well as the cost and time he spent pursuing court proceedings to establish a case of mistaken identity constituted concrete, actual harm sufficient for demonstrating Article III standing; but finding that fact issues remained as to whether the defendant willfully/recklessly or negligently violated the FCRA by failing to use reasonable procedures to ensure the accuracy of the information it reported, by failing to use strict procedures to ensure that the "reported public records information for employment purposes was complete and up to date," and by failing to timely provide plaintiff written notice of the defendant's reinvestigation of the dispute concerning the inaccurate report - Adan v. Insight Investigation, Inc., No. 16-cv-2807 (S.D. Cal. Jan. 18, 2018).

- **FCRA:** denying creditor's motion to dismiss and concluding that plaintiff sufficiently pled an FCRA claim by alleging that creditor reported inaccurate or misleading information by inaccurately reporting her account as "charged off" when the creditor knew that the debt had instead been discharged in bankruptcy; and concluding that plaintiff's allegation that creditor failed to comply with the applicable Metro 2 reporting guidelines, standing alone, would support plaintiff's FCRA claim - Nissou-Rabban v. Capital One Bank (USA), N.A., No. 15-cv-01673 (S.D. Cal. Jan. 23, 2018).

- **RESPA/FCCPA:** mortgage servicer did not violate its responsibilities to respond to borrower's notice of error under RESPA where servicer explained its reasons for denying borrower's loan modification, even though borrower was unsatisfied with responses and found servicer's actions to be unreasonable. Servicer also did not violate FCCPA where it had no actual knowledge that it lacked the authority to deny the loan modification and proceed with foreclosure - Finster v. U.S. Bank National Association, No. 17-11662 (11th Cir. Jan. 31, 2018) (affirming granting of summary judgment to mortgage servicer).

- **TILA:** residential mortgage transactions (i.e., first mortgages and construction mortgages) are expressly excluded from the right of rescission under TILA. Under TILA, if a creditor fails to make a required disclosure, borrower only has one year from violation to sue for statutory and actual damages - Cooper v. Countrywide Home Loans, No. 16-16173, (11th Cir. Feb. 6, 2018) (affirming dismissal of borrower's complaint brought under TILA).

TITLE INSURANCE UPDATE

- **Breach of Contract:** title insurer, as subrogee, not entitled to expand rights under a sales contract to bring a breach of contract claim pursuant to a special warranty deed, where insurer alleged seller breached covenant of seisin but special warranty deed delineated the parties' rights and sales contract merged with the special warranty deed – Cochran Investments, Inc. v. Chicago Title Ins. Co., No. 14-16-00119-CV (Tex. Ct. App. Feb. 6, 2018) (reversing final judgment)

- **Consequential Damages:** under Nebraska law, if the terms of a title policy are clear they are accorded their plain and ordinary meaning and the plain language of the policy does not provide for consequential damages – Helms v. Old Republic Nat'l Title Ins. Co., No. 4:16-cv-2010 (D. Neb. Jan. 11, 2018) (order granting in part and denying in part summary judgment)
- **Defect in Title:** inability to develop property as intended, based solely on a defect in title, is precisely the kind of reliance title insurance seeks to protect against – Helms v. Old Republic Nat'l Title Ins. Co., No. 4:16-cv-02010 (D. Neb. Jan. 11, 2018) (order granting in part and denying in part summary judgment)
- **Diminution in Value:** in Nebraska, the proper method for valuing an insured's loss is the highest and best use of the property, where policy issued in 2012 insured fee simple title but did not reflect a portion of land subject to 1940 government condemnation proceeding and insured was required to undo irrigation improvements to the property to restore land to original 1940 status – Helms v. Old Republic Nat'l Title Ins. Co., No. 4:16-cv-02010 (D. Neb. Jan. 11, 2018) (order granting in part and denying in part summary judgment)
- **Expert Valuation of Property:** factual basis of an expert opinion in valuing property in Nebraska goes to the credibility of testimony, rather than the admissibility of purportedly inaccurate facts – Helms v. Old Republic Nat'l Title Ins. Co., No. 4:16-cv-02010 (D. Neb. Feb. 5, 2018) (denying motion to exclude expert testimony)
- **Indemnification Under Agent's D&O Policy:** E&O liability insurance carrier not required to indemnify title agent where agent knew of an incident or circumstance which may result in a claim prior to filing application for and receiving coverage under D&O Policy – Aztec Abstract & Title Ins. Inc. v. Maxum Specialty Group & Maxum Indemnity Co., No. 16-103 KG/KBM (D.N.Mex. Feb. 6, 2018) (order granting summary judgment)
- **Indemnification Under Agent's D&O Policy:** in New Mexico, E&O liability insurance carrier not required to indemnify title agent unless a lawsuit is filed and a duty to defend arises – Aztec Abstract & Title Ins. Inc. v. Maxum Specialty Group & Maxum Indemnity Co., No. 16-103 KG/KBM (D.N.Mex. Feb. 6, 2018) (order granting summary judgment)

Related Practices

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