

Real Property & Financial Services Update: Weeks Ending February 16 & 23, 2018

March 01, 2018

REAL PROPERTY UPDATE

- **Breach of Contract/Damages:** court erred by precluding setoff when calculating damages because purpose of award is to restore the injured party to the position it would have realized no for the other party's breach. [Asset Management Holdings, LLC, et al v Assets Recovery Center Investments, LLC, et al](#), Case Nos. 2D16-341 and 3599 (Fla. 2d DCA Feb. 23, 2018).
- **Foreclosure/Standing:** ownership of lost note and standing to foreclose mortgage securing same can be proven by unbroken chain of assignments from originating lender to present lender. [Hines and Long v New Urban Pine Road LLC](#), Case No. 3D16-1168 (Fla. 3d DCA Feb. 21, 2018).
- **Subscription Agreements:** a subscription agreement is an agreement to invest on specific terms and is enforceable against subscriber without mutuality of agreement necessary to sustain a bilateral contract. [Liork, LLC, et al v BH 150 Second Avenue, LLC](#), Case No. 3D16-1881 (Fla. 3d DCA Feb. 21, 2018).
- **Foreclosure/Default:** borrower that continued making payments into account, in accordance with terms of note, following receipt of "goodbye letter" from original lender notifying borrower note had been sold and payment should be made to new lender, did not default on note for failing to pay to new lender because original lender was not the holder of the Note at time of notice and, therefore, had no authority to change payment terms of note. [Coconut Grove Acquisition, LLC v. S&C Venture](#), Case No. 3D17-434 (Fla. 3d DCA Feb. 21, 2018).
- **Time for Appeal:** order enforcing settlement agreement is final and appealable when enforcement is the only thing left for the court to do, and there is no need for a subsequent formal order of dismissal. [Mack v Repole](#), Case No. 4D16-3595 (Fla. 4th DCA Feb. 21, 2018).

- **Failure to Preserve Arguments for Appeal:** dismissal with prejudice resulting from counsel's failure to appear at case management conference affirmed, notwithstanding the lack of necessary findings required to sustain it, where appellant failed to raise deficiencies in order in a motion for rehearing. [Shelswell v Bourdeau](#), Case No. 4D17-174 (Fla. 4th DCA Feb. 21, 2018).
- **Agency:** attorney had apparent authority to receive notice of default on behalf of client where attorney previously received notices on behalf of client, which client upon, and attorney did not advise opposing counsel he no longer represented client and/or could not accept notice for client. [Clayton v Poggendorf, et al.](#), Case No. 4D17-488 (Feb. 21, 2018).
- **Deficiency Judgment/Limitations:** statute of limitations for seeking deficiency judgment begins to run after foreclosure sale pursuant to judgment of foreclosure. [Dyck-O'Neal, Inc. v Germany, et al.](#), Case No. 5D17-1059 (Fla. 5th DCA Feb. 23, 2018)
- **Foreclosure/Best Evidence Rule:** trial court erred in admitting copies of a loan modification where the bank's witness did not provide any explanation regarding why the original loan modification was not available. [McCampbell v. Federal National Mortgage Association](#), No. 2D16-177 (Fla. 2d DCA Feb. 14, 2018) (reversed and remanded).
- **Foreclosure/Hearsay:** plaintiff failed to introduce any admissible evidence that a default letter was actually mailed to the borrowers, where the plaintiff's witness was an employee of the servicer and not an employee of the company that mailed the default letter ("About Mail"), had never visited About Mail's facility, never spoke with an About Mail employee, and did not have documents from About Mail to support his testimony that About Mail mailed the default letter to the borrowers. [Knight et. al., v. GTE Federal Credit Union](#), No. 2D16-3241 (Fla. 2d DCA Feb. 14, 2018) (reversed and remanded).
- **Intervention:** plaintiff in an action to rescind a first deed does not have a direct and immediate interest in a reformation cross-claim to reform a second deed where Plaintiff was not a party to that second deed and would need to first prevail in its action to void or rescind the first deed. [C&J Global Investments, Inc., v. JVS Contracting, Inc.](#), No. 2D16-3241 (Fla. 2d DCA Feb. 14, 2018) (reversed and remanded).

FINANCIAL SERVICES UPDATE

- **Dodd-Frank:** held that "[t]o sue under Dodd-Frank's anti-retaliation provision, a person must first 'provid[e]...information relating to a violation of the securities laws to the [Securities and Exchange] Commission'", reasoning that such an interpretation is consistent with the definition of the term "whistleblower" in the statute, the statute's express mandate that the definition apply throughout § 78u-6 of Dodd-Frank, and the purpose for which the Dodd-Frank was enacted. [Digital Realty Trust, Inc. v. Somers](#), Case No. 16-1276 (U.S. Feb. 21, 2018).

- **FACTA/FCRA:** concluded that plaintiff lacked Article III standing in putative class action arising from the issuance of a parking receipt containing his credit card's full expiration date where he merely alleged the potential for exposure to identity theft and fraud, as opposed to alleging a concrete injury resulting from the purported FCRA violation. [Bassett v. ABM Parking Services, Inc.](#), Case No. 16-35933 (9th Cir. Feb. 21, 2018).
- **TILA:** TILA does not apply to federally-insured student loans. -- [Upshaw v. United States Department of Education](#), 2017 WL 7156267 (C.D. Cal. Nov. 20, 2017).
- **FDCPA/Standing:** borrowers lack standing to challenge foreclosure under the FDCPA based on the allegedly invalid assignments of mortgage. -- [Im v. Bayview Loan Servicing, LLC](#), 2018 WL 840088 (S.D.N.Y. Feb. 12, 2018) (stating, "Although foreclosure is certainly a pecuniary injury, a borrower is injured by the invalidity of a mortgage assignment only if that assignment exposes her to some additional injury—for example, 'imminent danger ... of having to make duplicate loan payments.'")

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