

Real Property, Financial Services, & Title Insurance Update: Week Ending June 26, 2020

June 26, 2020

Real Property Update

- **Foreclosure / Condition Precedent:** Borrower who raises an affirmative defense, such as failure of conditions precedent, bears the burden of proving that affirmative defense even if lender's complaint alleges satisfaction of conditions precedent - [Russell v. Wells Fargo Bank, N.A.](#), No. 1D18-5128 (Fla. 1st DCA June 22, 2020) (affirmed)
- **Foreclosure / Attorneys' Fees:** Trial court is required to conduct an evidentiary hearing on attorneys' fees absent a waiver by the opposing party - [McCammond v. E. Coast Props., LLC](#), No. 2D19-3027 (Fla. 2d DCA June 26, 2020) (affirmed in part, reversed in part, and remanded)
- **Foreclosure / Fundamental Error:** Trial court's decision to forgo closing arguments was not fundamental error - [Dumerlus v. Wilmington Tr. Nat'l Ass'n](#), No. 3D19-1595 (Fla. 3d DCA June 24, 2020) (affirmed)
- **Class Action / Condominium:** Common interest provision of rule 1.221 permits a condominium association to bring a class action for a construction defect located physically within a unit, rather than in the common elements, if the defect is prevalent throughout the building - [Allied Tube & Conduit Corp. v. Latitude on the River Condo. Ass'n, Inc.](#), Nos. 3D19-2054; 3D19-2053; 3D19-2051; 3D19-2048; 3D19-2046; 3D19-2044 (Fla. 3d DCA June 24, 2020) (affirmed)
- **Foreclosure / Attorney's Fees:** A trial court can amend the final foreclosure judgment to include appellate and post-judgment attorneys' fees and costs *after* the borrower redeemed the property - [Dawson v. Hernandez](#), No. 4D18-1588 (Fla. 4th DCA June 24, 2020) (reversed in part and remanded for proceedings consistent with this opinion)

Financial Services Update

- **FCCPA / Definition of "Debt":** Loan made to an individual for a business venture cannot satisfy the definition of a "debt" under the FCCPA even if the individual actually used the loan funds for personal use and not for her business venture; "the FCCPA applies to an obligation based on what gave rise to the obligation, not what the debtor eventually used the loan for" - [Korkmas v. Onyx Creative Grp.](#), No. 1D18-5328 (Fla. 1st DCA June 22, 2020) (affirmed in part, reversed in part, and remanded)
- **TCPA / "Called Party":** Consistent with other circuits to address the issue, the Ninth Circuit held that a creditor cannot escape liability under the TCPA because the party it intended to call previously gave the creditor consent to be called, even though the party the creditor actually called, as a result of the phone number being reassigned, did not give the creditor consent - [N.L. v. Credit One Bank, N.A.](#), Nos. 19-15399, 19-15938 (9th Cir. June 3, 2020)

Title Insurance Update

- **Title Policy / Torts:** An injured party must rely on its title insurance contract to bring suit against its title insurer or the insurer's agent; there can be no action in tort - [Shower Curtain Sols. Ltd. v. First Am. Title Ins. Co.](#), No. 346549 (Mich. Ct. App. June 18, 2020) (affirming dismissal of negligent misrepresentation claims)
- **Title Policy / Agent Liability:** A title policy issuing agent is not a party to the title insurance policy and therefore is not a proper party for breach of title insurance contract - [Shower Curtain Sols. Ltd. v. First Am. Title Ins. Co.](#), No. 346549 (Mich. Ct. App. June 18, 2020) (affirming dismissal of breach of contract claim against title agent)
- **Title Policy / Insured Land:** Title policy did not insure alley abutting insured property where policy expressly excluded from the definition of insured "land" abutting alleys and metes and bounds legal description of insured land did not otherwise include the alley - [Shower Curtain Sols. Ltd. v. First Am. Title Ins. Co.](#), No. 346549 (Mich. Ct. App. June 18, 2020) (affirming dismissal of breach of contract claim against title insurer)

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