

Real Property, Financial Services, & Title Insurance Update: Week Ending June 5, 2020

CONSUMER FINANCE | REAL PROPERTY LITIGATION | TITLE INSURANCE | JUNE 25, 2020

Real Property Update

- **Covenant Running With Land:** Rejecting association's argument on appeal that trial court erred in finding that recorded agreement was not a restrictive covenant running with the land but a personal contract between the former developer and association where association had previously taken the same position in the litigation that it later argued was erroneous – *Jockey Club III Ass'n, Inc. v. Jockey Club Maint. Ass'n, Inc.*, Nos. 3D17-1393 & 3D17-1494 (Fla. 3d DCA June 3, 2020) (affirming entry of partial summary judgment in developer's favor)
- **Successor-in-Title vs. Corporate Successor or Assignee:** "Successors and assigns" clause in recorded agreement, to which association and former developer were parties, did not bind current property owner to that agreement where association failed to explain why the current owner, a mere successor-in-title to property, was a corporate successor or assignee of the former developer – *Jockey Club III Ass'n, Inc. v. Jockey Club Maint. Ass'n, Inc.*, Nos. 3D17-1393 & 3D17-1494 (Fla. 3d DCA June 3, 2020) (affirming entry of partial summary judgment in developer's favor)
- **Non-Exclusive Easement / Owner's Right to Develop & Maintain Property:** Trial court did not abuse discretion in amending final order to clarify, consistent with its original findings following trial, that: (1) non-exclusive maintenance easement granted to associations is limited solely for the periods of time when, and if, the owner ceases site maintenance; (2) current owner has the right to not only develop but also recommence its site maintenance of its property and is not prohibited from developing the common areas encumbered by non-exclusive maintenance easement; and (3) certain portions of the property were removed from the non-exclusive maintenance easement pursuant to written notice and, in turn, those portions of owner's property are no longer subject to the non-exclusive easement – *Jockey Club III Ass'n Inc. v. Jockey Club Maint. Ass'n, Inc.*, Nos. 3D17-1393 & 3D17-1494 (Fla. 3d DCA June 3, 2020) (affirming trial court's granting of developer's rehearing motion and subsequent amended final order)

Financial Services Update

- **FDCPA / Failure to State a Claim:** Plaintiff failed to sufficiently plead that defendant was a "debt collector" under the FDCPA because plaintiff did not allege that defendant obtained the subject debt after it was in default – *Cannioto v. Simon's Agency, Inc.*, No. 6:19-cv-06686 (W.D.N.Y. May 29, 2020) (denying in part plaintiff's motion for leave to amend)

Title Insurance Update

- **Equitable Subrogation:** Bank not entitled to equitable subrogation where mortgage as to which equitable subrogation was sought was not in existence at the time of closing and when the closing funds were used to pay off mortgage and thus was not an "intervening lien" so equitable subrogation was not applicable – *U.S. Bank N.A. v. Juliano*, No. 2017-04752 (N.Y. App. June 3, 2020) (decision and order on summary judgment)
- **Unlicensed Practice of Law / Real Estate Closings:** Non-attorneys do not engage in the unlicensed practice of law when they conduct residential real estate closings, draft residency affidavits, and draft limited durable powers of attorney, so long as those activities are carried out in connection with the issuance of title insurance; conversely, examination of title for marketability must be conducted by an attorney engaged or employed by title insurance company – *In re William E. Paplauskas, Jr.*, No. 2018-161-M.P. (R.I. May 29, 2020)
- **Title Insurance Coverage:** After obtaining summary judgment on plaintiff's claims that title insurer had failed to warn that home that plaintiffs were going to purchase contained lead paint, title insurer sought Rule 11 sanctions and was awarded attorneys' fees and costs against plaintiff and plaintiff's counsel – *Ilkowitz v. Durand*, No. 1:17-cv-00773 (S.D.N.Y. May 31, 2020) (order on motion for sanctions)
- **Title Agent / Criminal Liability:** Order denying defendant attorney and title agency president's motions for bond and to correct restitution after criminal conviction based on his recruiting unqualified straw buyers to purchase high-end residential property using proceeds from multimillion-dollar mortgage loans from Fifth Third Bank and then disbursing loan proceeds to himself – *United States v. Nicoletti*, No. 2:15-cv-20382 (E.D. Mich. June 3, 2020) (order denying motions)
- **Trade Secrets:** Affirming trial court's rejection of Title Source Inc.'s breach of contract and fraud claims, but reversing House Canary's final judgment of \$235,400,000 in compensatory damages, \$470,800,000 in punitive damages, \$28,989,154 in prejudgment interest, and \$4,528,711.79 in attorneys' fees based on alleged misappropriation of trade secrets and fraud – *Title Source, Inc. v. HouseCanary, Inc.*, No. 04-19-00044-CV (Tex. App. June 3, 2020) (opinion affirming in part and reversing in part final judgment)

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