

Real Property, Financial Services & Title Insurance Update: Weeks Ending January 1 & 8, 2016

January 14, 2016

REAL PROPERTY UPDATE

- **Statutory Easement/Attorney's Fees:** appellants that were granted a statutory easement by way of necessity were not entitled to attorney's fees pursuant to Florida Statutes, Section 704.04 because trial court determined that they acted unreasonably – [Messer v. Sander](#), No. 1D15-1349 (Fla. 1st DCA Jan. 6, 2016) (affirming denial of trial-level attorney's fees, and reversing grant of appellate-level attorney's fees)
- **Foreclosure/Standing & Affirmative Defenses:** bank proved standing but failed to refute borrowers' affirmative defenses – [Amstone v. The Bank of New York Mellon f/k/a The Bank of New York, as Trustee](#), No. 2D14-5480 (Fla. 2d DCA Jan. 6, 2016) (reversing final summary judgment of foreclosure)
- **Foreclosure/Grounds Under Rule 1.540:** lender's dismissal of foreclosure action on law firm's advice that it may be barred by statute of limitations was not a mistake remediable under Rule 1.540(b)(1), as it was a judgmental or tactical error, and court was without jurisdiction to proceed further – [Cottrell v. Taylor, Bean & Whitaker Mortg. Corp.](#), No. 2D14-5885 (Fla. 2d DCA Jan. 8, 2016) (reversing and remanding with instructions to reinstate voluntary dismissal without prejudice).
- **Foreclosure/Allonge:** plaintiff established that allonge was sufficiently affixed to promissory note so as to become part thereof and to prove plaintiff's status as holder of note with standing – [Purificato v. Nationstar Mortg., LLC](#), No. 4D14-992 (Fla. 4th DCA Jan. 6, 2016) (affirming final judgment of foreclosure).
- **Foreclosure/Notice of Default:** after voluntarily dismissing initial foreclosure action, lender was not required to send second notice of default pursuant to paragraph 22 of mortgage before filing second foreclosure action – [Sill v. JPMorgan Chase Bank, Nat'l Ass'n](#), No. 4D14-1014 (Fla. 4th DCA Jan. 6, 2016) (affirming final judgment of foreclosure).

- **Foreclosure/Involuntary Dismissal:** trial court erred in granting motion in limine, striking all of bank's trial witnesses, and involuntarily dismissing foreclosure action with prejudice for violations of pretrial orders because it failed to consider the Kozel factors when entering such dismissal – [OneWest Bank, FSB v. Alessio](#), No. 4D14-1444 (Fla. 4th DCA Jan. 6, 2016) (reversing and remanding for trial)
- **Foreclosure/Vacating Sale Based on Redemption:** trial court had authority to vacate sale and certificate of title based on timely exercise of right of redemption, which nullified foreclosure sale process as a matter of right – [Popescu v. Laguna Master Ass'n, Inc.](#), No. 4D14-2227 (Fla. 4th DCA Jan. 6, 2016) (affirming order granting motions to vacate sale)
- **Foreclosure/Indispensable Party:** husband that co-owned property with wife as tenants by the entirety was indispensable party to foreclosure action, and because he was not a party, it was error to issue certificate of title – [Miller v. Washington Mut. Bank](#), Nos. 4D14-2290 & 4D14-2654 (Fla. 4th DCA Jan. 6, 2016) (reversing foreclosure judgment, and orders denying objections to sale and issuance of certificate of title)
- **Foreclosure/Standing:** substitute plaintiff failed to prove that predecessor had possession of the blank-endorsed note prior to the inception of the lawsuit – [Jallali v. Christiana Trust, as Trustee](#), No. 4D14-2369 (Fla. 4th DCA Jan. 6, 2016) (reversing foreclosure judgment)
- **Foreclosure/Standing:** plaintiff failed to prove the series of transaction through which it acquired the note from the original lender and, thus, did not establish its standing as nonholder in possession with rights of a holder – [Bank of New York Mellon Trust Co., N.A. v. Conley](#), No. 4D14-2430 (Fla. 4th DCA Jan. 6, 2016) (affirming order granting involuntary dismissal)
- **Foreclosure/Timeliness of Claims to Surplus Proceeds:** subordinate lienholders' claims to surplus proceeds were timely because they were filed within sixty days after the clerk issued and filed the certificate of title – [Straub v. Wells Fargo Bank, N.A.](#), No. 4D14-2604 (Fla. 4th DCA Jan. 6, 2016) (affirmed)
- **Receivership/Action Following Discharge:** lawsuit against individual appointed as receiver during foreclosure proceeding was permitted because the order discharging receiver released him of further liability and responsibilities as receiver but did not release receiver of individual liability for alleged malfeasance while acting as receiver – [One South Ocean Drive 2000, Ltd. v. One Ocean Boca, LLC](#), No. 4D14-2918 (Fla. 4th DCA Jan. 6, 2016) (reversing order denying leave to file suit against receiver and remanding)
- **Foreclosure/Statute of Limitations:** subsequent action filed five years after the date of default alleged in prior foreclosure action that was voluntarily dismissed was not barred by statute of limitations because new action was based on different event of default – [Solonenko v. Georgia Notes 18, LLC](#), No. 4D14-3001 (Fla. 4th DCA Jan. 6, 2016) (affirming foreclosure judgment, and certifying conflict with Beauvais)

- **Foreclosure/Unpaid Assessments:** trial court lacked continuing jurisdiction to rule on condominium assessment issue because it did not expressly reserve jurisdiction to determine the issue, and the foreclosure judgment did not address the past-due assessments – [Meadows on the Green Condo. Ass’n, Inc. v. Nationstar Mortg., LLC](#), No. 4D14-3065 (Fla. 4th DCA Jan. 6, 2016) (reversed)
- **Foreclosure/Standing:** genuine issue of material fact existed regarding whether servicer had standing – [Beacon Place of Coral Springs Condo. Ass’n, Inc. v. Nationstar Mortg., LLC](#), No. 4D14-3655 (Fla. 4th DCA Jan. 6, 2016) (reversing summary final judgment of foreclosure)
- **Quiet Title/Collateral Estoppel:** doctrine of collateral estoppel did not bar quiet title action because appellants were never parties to foreclosure action and the issues were not fully litigated because trial court in foreclosure action lacked jurisdiction to adjudicate appellants’ objection and motion to vacate final judgment – [Lucky Nation, LLC v. Al-Maghazchi](#), No. 4D14-4764 (Fla. 4th DCA Jan. 6, 2016) (reversing grant of summary judgment)
- **Landlord-Tenant/Judgment of Possession:** landlord was entitled to immediate judgment awarding possession without evidentiary hearing where tenant did not pay disputed rent into court registry, nor request hearing to determine amount of rent within five days of service of process of complaint – [Stephens-Williams v. Johnson](#), Nos. 4D15-587 & 4D15-1005 (Fla. 4th DCA Jan. 6, 2016) (affirming final judgment)
- **Eminent Domain/Severance Damages:** trial court properly ordered an additur regarding post-taking valuation of property because jury’s damages calculation was not supported by evidence – [Orange Cnty. Florida, etc. v. Buchman](#), No. 5D14-3544 (Fla. 5th DCA Jan. 8, 2016) (affirmed)
- **Real-Estate Broker Fraud/Florida Real Estate Recovery Fund:** appellants that obtained default final judgments against licensed Florida real-estate brokers for fraud in connection with underlying transactions were entitled to reimbursement for losses against the Recovery Fund – [Hendricks v. Dep’t of Bus. & Prof’l Regulation](#), Nos. 5D14-4051, 5D14-4052, 5D14-4053, 5D14-4054, 5D14-4055, 5D14-4057, 5D14-4058 (Fla. 5th DCA Jan. 8, 2016) (reversed and remanded)
- **Rule 1.540/Lack of Service of Order:** trust was entitled to relief under Rule 1.540(b) where lack of service of order denying Trust’s rehearing motion resulted in its inability to file a timely notice of appeal – [Leicester Trust, Trust Number 1920 v. Fed. Nat’l Mortg. Ass’n](#), No. 2D15-1390 (Fla. 2d DCA Dec. 23, 2015) (vacating order denying rehearing and reentering that order so as to restart the clock for appellate purposes)
- **Foreclosure/Third-Party Motion to Set Aside Judgment:** non-party purchaser of property at foreclosure sale was stranger to foreclosure action and lacked standing to vacate final judgment of foreclosure – [Thriving Investments, LLC v. Chao](#), No. 3D15-1599 (Fla. 3d DCA Dec. 23, 2015) (dismissing appeal)

FINANCIAL SERVICES UPDATE

- **Foreclosure/FDCPA:** plaintiff's FDCPA claims against mortgage servicers failed because foreclosing on property that secured a debt is not "collection of a debt" within meaning of FDCPA - [Trotter v. Bayview Loan Servicing](#), No. 2:15-cv-00301-CWD (D. Idaho Dec. 15, 2015) (dismissing plaintiff's claims with prejudice)

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