

Real Property, Financial Services, & Title Insurance Update: Weeks Ending April 6 & 13, 2018

April 24, 2018

REAL PROPERTY UPDATE

- **Lis Pendens:** lawsuit to foreclose mortgage on real property is an action "founded on a duly recorded instrument" - [National American Home, LLC v Deutsche Bank Nat. Trust Co.](#), Case No. 4D17-2614 (Fla. 4th DCA April 4, 2018) (affirmed).
- **Foreclosure/Assessments:** notwithstanding 12 month assessment limitation applicable to first mortgage lenders that purchase property in foreclosure, lender could be liable for fees and costs incurred by association in connection with collecting assessments that accrued after certificate of title issued - [Emerald Estates Community Assoc. v U.S. Bank N.A.](#), Case No. 4D17-1278 (Fla. 4th DCA April 4, 2018) (reversed and remanded).
- **Pleadings/Amendment:** plaintiff that amended complaint once as a matter of right before any responsive pleading had been filed did not abuse privilege to amend and must have been allowed to amend at least once more following first order of dismissal - [If Six Were Nine, LLC v Lincoln Rd. III, LLC](#), Case No. 3D16-2614, 3D17-895 (Fla. 3d DCA April 4, 2018) (reversed and remanded).
- **Attorneys' Fees:** seller could not recover attorneys' fees from buyer under purchase and sale contract that buyer refused to sign, even though buyer had committed to enter into purchase and sale agreement in bidding contract between buyer and auctioneer - [Haas Automation, Inc. v Dr. Robert Fox](#), Case No. 3D16-1692, 3D17-173, 3D17-174 (Fla. 3d DCA April 4, 2018) (affirmed in part, reversed in part, remanded).
- **Attorneys' Fees:** trial court had authority to reconsider order granting attorneys' fees to defendant, subject to outcome of appeal, but reconsideration must be based upon record evidence; mere representations and argument of counsel legally insufficient to support ruling - [Radosevich v The Bank of NY Mellon](#), Case No. 3D16-1880 Fla. 3d DCA April 4, 2018) (reversed and remanded).

- **Note:** individual personally liable on promissory note given by entity because individual signed both as an officer of entity and individually - *Monique M. Agia and Lisa Agia v Fareed Ossi*, Case No. 2D16-4659 (Fla. 2d DCA April 6, 2018) (reversed and remanded).
- **Due Process /Notice:** trial court erred by considering and ruling on issues not noticed for hearing and by refusing to allow party to name additional expert witnesses after discovery cut-off without considering or determining prejudice - *Gaspar's Passage, LLC v Racetrac Petroleum, Inc.*, Case No. 2D17-55 (Fla. 2d DCA April 4, 2018) (reversed and remanded).
- **Foreclosure/Condition Precedent:** foreclosure judgment reversed and remanded for entry of involuntary dismissal where lender failed to prove notice of default to borrower, which was condition precedent to foreclosure - *Spencer v Ditech Financial, LLC, et al.*, Case No. 2D16-4817 (Fla. 2d DCA April 4, 2018)(reversed and remanded for entry of involuntary dismissal).

FINANCIAL SERVICES UPDATE

- **FCCPA/FDCPA/TCPA:** servicer's communications with represented parties was debt collection activity in violation of FCCPA and FDCPA where parties' attorney had entered appearance in foreclosure proceeding in which servicer sought deficiency; servicer was debt collector where servicer began servicing debt only after default; monthly mortgage loan statements and loss mitigation letters were debt collection activities; use of predictive dialer can constitute violation of TCPA; plaintiffs' claims not compulsory counterclaims which must have been filed in underlying foreclosure - *France v. Ditech Financial, LLC*, 2018 WL 1695405, No. 8:17-cv-3038, (M.D. Fla. Apr. 6, 2018) (denying motion to dismiss).
- **FDCPA/FCCPA:** putative class action alleging violation of FDCPA and FCCPA based upon servicer's practice of sending collections communications to consumers threatening foreclosure or additional fees even though consumers participating in Home Affordable Loan Modification Program should be certified - *Belcher v. Ocwen Loan Serv., LLC*, 2018 WL 1701963, No. 8:16-cv-690 (MD. Fla. March 9, 2018) (report and recommendation certifying class).
- **TCPA:** plaintiff seeking treble damages bears burden of proving consent issues as element of willfulness - *In re: Nicholas Sinclair Fields vs. Specialized Loan Servicing, LLC*, No. 8:14-bk-09347-MGW (Bankr. M.D. Fla. Mar. 30, 2018) (order vacated).
- **FDCPA:** claims against bank defendants acting in capacities of trustee and loan servicer dismissed because not "debt collectors" under FDCPA - *Johnson-Gellineau vs. Steine & Associates, P.C. et al.*, No. 16-CV-9945 (S.D.N.Y. Mar. 29, 2018) (dismissed)
- **Section 1692e:** claims predicated on communications not initiated by debt collector and representations made to a third party (rather than to borrower) dismissed for failure to state a claim - *Sandoval v. I.C. Systems*, No. 17-CV-3755 (E.D.N.Y. Mar. 29, 2018) (dismissed)

- **RESPA/FDCPA:** borrower's RESPA claims against loan servicer (for failure to timely acknowledge a loss mitigation application and failure to properly respond to a Qualified Written Request and Notice of Error) and FDCPA claim (predicated on default letter alleged to include time-barred debts and other improper fees) related to the mortgage and, thus, notice and opportunity to cure was required before filing suit - [Kurzban v. Specialized Loan Servicing, LLC](#), No. 17-cv-20713 (S.D. Fla. Mar. 30, 2018) (dismissed).
- **FDCPA/CIVIL RICO:** district court did not err in dismissing third amended pro se complaint with prejudice where complaint failed to allege facts sufficient to state claims against bank and other defendants under civil RICO and FDCPA statutes and only "mention[ed] in passing" other federal statutes - [Lapinski vs. Leech et al.](#), No. 17-13698 (11th Cir. Apr. 5, 2018) (dismissal affirmed)
- **FCRA:** summary judgment granted to all defendants under § 1681s-2(b) where plaintiff failed to establish willful or plausible actual damages as a matter of law; actual damages must be "attributable to defendants' unreasonable investigation" and "traceable to the inaccurate, FCRA-violating information - not just to the report that contained that information or to accurate data within the same report" - [Frederick v. Capital One Bank \(USA\), N.A. et al.](#), No. 14-CV-5460 (S.D.N.Y. Mar. 27, 2018) - (summary judgment granted)

TITLE INSURANCE UPDATE

- **Marketability of Title:** Policy's internal definition of "unmarketability of title" restricts coverage to issues of ownership or possession affecting the title to property, i.e. defects affecting rights of ownership rather than defects affecting physical condition or use of property, following Tenth Circuit - [Lauritzen v. First American Title Ins. Co.](#), Case No. 20160717-CA (Utah Ct. App. Apr. 5, 2018) (affirming in part and remanding in part)
- **Marketability of Title/Defect in Title:** In matter where insured purchased five lots based on plat which contained material defect because one of the five lots partially overlapped another parcel, marketability of title was implicated and title was defective, but only as to the overlapped lot, not all five as claimed by insured - [Lauritzen v. First American Title Ins. Co.](#), Case No. 20160717-CA (Utah Ct. App. Apr. 5, 2018) (affirming in part and remanding in part)

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