

Real Property, Financial Services, & Title Insurance Update: Weeks Ending March 9 & 16, 2018

March 23, 2018

REAL PROPERTY UPDATE

- **Condition Precedent:** trial court properly rejected motion to dismiss for failure to satisfy condition precedent of pre-litigation non-binding arbitration, required by Chapter 718, Florida Statutes, because claim for breach of fiduciary duty is excepted from the requirement. [Palisages Owners' Association, Inc. v Browning](#), Case No. 1D17-2129 (Fla. 1st DCA March 15, 2018) (dismissal affirmed).
- **Unclean Hands:** argument that borrower was misled by lender regarding the terms of the loan and instructed to stop paying on the mortgage to qualify for a loan modification, where insufficient to support a defense of unclean hands. [McMichael v Deutsche Bank National Trustee Company](#), Case No. 4D16-3879 (Fla. 4th DCA March 14, 2018) (affirmed)
- **Reestablishment of Lost Note:** trial court is required to provide for adequate protection or make a finding that none is needed as a condition precedent to entering judgment reestablishing lost note. [Debish v Wells Fargo Bank, N.A.](#), Case No. 4D17-469 (Fla. 4th DCA March 14, 2018) (reversed and remanded).
- **Eviction:** County Court lacks subject matter jurisdiction to enter a final judgment of eviction. [Mesnikoff v. FQ Backyard Trading, LLC](#), No. 3D17-2803 (Fla. 3rd DCA March 7, 2018) (decision of circuit court appellate division quashed).
- **Foreclosure/Notice:** Plaintiff substantially complied with the notice of default requirement by sending notice to the address listed in a loan modification agreement, even though that address listed a different unit number than the one listed on the original mortgage documents and any defect in the notice did not prejudice borrowers. [Citigroup Mortgage Loan Trust Inc. v Scialabba](#), No. 4D17-401 (Fla. 4th DCA March 7, 2018) (reversed and remanded).

- **Foreclosure/Statute of Limitations:** Plaintiff was not barred by the statute of limitations where Plaintiff limited its recovery only to those defaults occurring within five years of the second foreclosure lawsuit (first foreclosure lawsuit was involuntarily dismissed). [Desai v. Bank of New York Mellon Trust Company](#), No. 4D17-0890 (Fla. 4th DCA March 7, 2018) (affirmed.)

FINANCIAL SERVICES UPDATE

- **TCPA:** Upon review of the FCC's 2015 Omnibus Order, (1) setting aside explanation of which devices qualify as auto dialers; (2) setting aside treatment of reassigned numbers, including one-call safe harbor; (3) sustaining treatment of revocation; and (4) sustaining scope of exemption for certain healthcare-related calls. [ACA International v. FCC](#), Case No. 15-1211 (D.C. Cir. Mar. 16, 2018) (granting in part appeal from agency rulemaking)
- **FDCPA:** affirming dismissal of FDCPA claim against Ocwen where plaintiff filed his initial complaint more than one year after Ocwen allegedly violated the FDCPA, and where the amended complaint did not allege facts demonstrating Ocwen used any instrumentality of interstate commerce in the collection of debt. [Cooley v. Ocwen Loan Serv., LLC](#), Case No. 16-14835 (11th Cir. Mar. 5, 2018)
- **TILA:** dismissing with prejudice TILA claim for failure to provide notice; "When there is no sale or transfer of a loan, but only a merger, and therefore no assignment, notification under § 1641(g) is not needed." [Arzamendi v. Wells Fargo Bank](#), Case No. 1:17-cv-01485, 2018 WL 1210978 (ED Cal. Mar. 8, 2018)
- **ECOA/RESPA:** granting dismissal of plaintiff's ECOA claim where plaintiffs were in default at time they submitted their loan modification applications, and "ECOA's 30-day notice requirements do not apply to a creditor's refusal to provide a loan modification to applicants in default"; and denying dismissal of RESPA violations because bank "was obligated to comply with section 1024.41's notice requirements ... after section 1024.41 became effective," and for failing to respond to borrower requests under section 1024.35 and 1024.36. [Hackett v. Wells Fargo Bank](#), Case No. 2:17-cv-7354, 2018 WL 1224410 (CD Cal. Mar. 5, 2018)
- **FCRA:** dismissing with prejudice a complaint premised on purported willful and negligent violation of FCRA. Plaintiff alleged lender wrongfully reported his mortgage as delinquent for 22 months because he had no obligation to make payments during this period, which included the period of time after the lender accelerated the loan. The Court rejected this argument because the acceleration notice and mortgage informed Plaintiff that he could reinstate the loan, there was no dispute that plaintiff did not make payments for the 22 months, and plaintiff failed to pay judgment after foreclosure judgment was entered. As a result, the information reported to the credit reporting agencies was not factually inaccurate and plaintiff had no cause of action pursuant to the FCRA. [Hunt v. JP Morgan Chase Bank, N.A.](#), 2018 WL 1183357, No. 17-CV-62094 (Feb. 26, 2018)

TITLE INSURANCE UPDATE

- **Salvage:** dismissing title insurer's salvage action against title search company on statute of limitations grounds – [Commonwealth Land Title Ins. Co. v. KCI Technologies, Inc.](#), No. 1:17-cv-01070 (D.D.C. March 13, 2018).
- **Escrow Agent's Duties:** affirming judgment for title insurer and escrow agent on policy claim and on claim that agent should have reported potentially fraudulent nature of purchase of five properties, holding that escrow agent need not go beyond plain terms of escrow agreement to investigate potential fraud – [C&G Farms, Inc. v. First American Title Ins. Co.](#), No. 1 CA-CV 16-0600 (Az. App. March 13, 2018).

Related Practices

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