

Real Property & Title Insurance Update: Week Ending August 19 & 26, 2016

August 30, 2016

REAL PROPERTY UPDATE

- **Lis Pendens/Subsequent Liens:** lis pendens statute only serves to discharge liens that exist or arise prior to entry of foreclosure judgment but does not affect liens that arise after entry of judgment, even if they arise before the ultimate sale of the property pursuant to the judgment – [Ober v. Town of Lauderdale-by-the-Sea](#), No. 4D14-4597 (Fla. 4th DCA Aug. 24, 2016) (affirmed)
- **Foreclosure/Standing:** bank failed to establish its standing to foreclose at time original complaint filed where assignment of mortgage attached to amended complaint reflected only transfer of mortgage and note contained no endorsement to successor – [Eaddy v. Bank of Am., N.A.](#) No. 2D15-630 (Fla. 2d DCA Aug. 26, 2016) (reversed and remanded for dismissal)
- **Foreclosure/Statute of Limitations:** although bank's complaint referenced initial default date that was more than five years from foreclosure complaint, allegations were sufficient to establish that foreclosure could be based on any of the missed payments subsequent to initial breach – [Bollettieri Resort Villas Condo. Ass'n, Inc. v. The Bank of New York Mellon](#), No. 2D15-3186 (Fla. 2d DCA Aug. 26, 2016) (affirmed and conflict certified).
- **Foreclosure/Standing:** plaintiff failed to establish its own standing to foreclose as substituted plaintiff, as well as standing of original plaintiff, because (1) there was no evidence as to when indorsement was placed on note or to whom note was payable at commencement of suit, (2) testimony regarding when note was lost did not demonstrate that note was indorsed in blank to predecessor prior to suit being filed, and (3) insufficient evidence to prove a transfer of note from original lender to predecessor as a nonholder in possession with rights of a holder – [Luiz v. Lynx Asset Servs., LLC](#), No. 4D15-558 (Fla. 4th DCA Aug. 24, 2016) (reversed)

- **Foreclosure/Negation of Affirmative Defenses:** plaintiff failed to meet its burden to refute borrowers' defense that plaintiff failed to comply with conditions precedent by not providing notice required under paragraph 22 of mortgage where plaintiff failed to present any evidence in support of summary judgment that it complied with paragraph 22 – [Suarez v. Wells Fargo Bank, N.A., as Trustee](#), No. 4D15-2541 (Fla. 4th DCA Aug. 24, 2016) (reversed and remanded)
- **Foreclosure/Prior Mortgages:** underlying judgment by holder of subsequent lien against mortgagee holding superior interest was void insofar as it purported to foreclose the superior mortgage – [The Bank of New York Mellon v. Sperling](#), No. 4D15-4207 (Fla. 4th DCA Aug. 24, 2016) (reversed and remanded with directions to vacate final judgment of foreclosure)
- **Preservation of Error:** where trial court committed reversible error by dismissing foreclosure action as a discovery sanction without addressing the Kozel factors, appellate court could not address the issue on appeal where lender failed to raise the issue at hearing on motion to dismiss or by subsequently filing a motion for rehearing or reconsideration - [Bank of Am., N.A. v. Ribaud](#), Case No. 4D15-278 (Fla. 4th DCA August 17, 2016) (Affirmed).
- **Foreclosure/Magistrate's Report:** trial court properly set aside magistrate's finding that borrower's default had been cured where conclusion reached was clearly erroneous based on evidence presented, and magistrate misconceived legal effect of evidence - [Stanley v. Bank of Am.](#), Case No. 4D15-290 (Fla. 4th DCA August 17, 2016) (Affirmed).
- **Pleading Special Damages:** prevailing party not entitled to special damages where special damages not specifically pled in complaint, despite losing party's knowledge that prevailing party intended to seek consequential damages - [JP Morgan Chase Bank N.A. v. Colletti Invs., LLC](#), Case No. 4D14-3778 (Fla. 4th DCA August 17, 2016) (affirmed in part, reversed in part and remanded).
- **Deficiency/Jurisdiction:** dismissal for lack of personal jurisdiction in favor of non-resident borrower in deficiency action improper, since Florida's long-arm statute, section 48.193(1)(a), allows Florida courts to exercise jurisdiction over non-resident who owns, uses, possesses or holds a mortgage or other lien on any Florida real property - [Dyck-O'Neal, Inc. v. Moniz](#), Case No. 5D16-137 (Fla. 5th DCA August 19, 2016) (reversed and remanded).

TITLE INSURANCE UPDATE

- **Limitation of Liability:** court refused to dismiss a complaint where plaintiff bank alleged that its mitigation of damages by accepting settlement with borrowers was not "voluntary" within the meaning of Condition 10 of the lender's policy which terminates coverage where insured voluntarily releases its mortgage – [Wells Fargo Bank v. Stewart Title Guar. Co.](#), Case No. 3:16-1296-MBS (D. S. Car. Aug. 23, 2016) (denying motion to dismiss)

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