

Real Property & Title Insurance Update: Week Ending July 7, 2017

July 13, 2017

REAL PROPERTY UPDATE

- **Takings/Declaratory Relief:** plaintiff's request for a declaration that its further pursuit of a zoning application was futile was not a proper claim for declaratory relief – [GolfRock, LLC v. Lee County, Fla.](#), No. 2D15-2105 (Fla. 2d DCA July 7, 2017) (reversed and remanded with direction to dismiss)
- **Foreclosure/Standing:** plaintiff that was substituted in after complaint was filed failed to prove that its predecessor in interest had standing at the inception of the case – [Winchel v. PennyMac Corp.](#), No. 2D15-5601 (Fla. 2d DCA July 7, 2017) (reversed and remanded for judgment in defendant's favor)
- **Foreclosure/Intervention:** purchaser of property that was the subject of a foreclosure action was not entitled to intervene in the action where a notice of lis pendens had been recorded by foreclosing lender prior to said purchaser buying the property – [Tikhomirov v. Bank of New York Mellon f/k/a Bank of New York Successor Trustee](#), No. 16-1032 (Fla. 3d DCA July 5, 2017) (affirmed)
- **Foreclosure/Allonge:** an endorsement and assignment of note was, effectively, an allonge, and, as such, bank was required to, but did not, file original document, as it did not plead a lost note count – [U.S. Bank Nat'l Ass'n, as Trustee v. Kachik](#), No. 4D16-1776 (Fla. 4th DCA July 5, 2017) (affirmed)
- **Foreclosure/Standing:** disparity between name of trust in complaint and name of trust in special endorsement to promissory note did not create standing defect – [Bank of New York Mellon Trust Co., Nat'l Ass'n, as Trustee v. Ginsberg](#), No. 4D16-3168 (Fla. 4th DCA July 5, 2017) (reversed and remanded)

- **Foreclosure/Admissions:** because pleadings and other record evidence contradicted the bank's technical admissions caused by its failure to timely respond to requests for admission and there was no prejudice to borrowers, entry of summary judgment in favor of borrowers was improper – [Wells Fargo Bank, N.A. v. Shelton](#), No. 5D15-3283 (Fla. 5th DCA July 7, 2017) (reversed and remanded)
- **Foreclosure/Standing:** trustee failed to show its standing to foreclose at lawsuit's inception where there was an allonge indorsing note to a different entity and trustee's current servicer provided no evidence indicating when undated indorsement was placed on note – [Kumar v. U.S. Bank, N.A. Successor Trustee](#), No. 5D16-2889 (Fla. 5th DCA July 7, 2017) (reversed and remanded for entry of involuntary dismissal)

TITLE INSURANCE UPDATE

- **Title Insurance Coverage:** whether 18 months to cure title defect by litigating against holder of undisclosed second mortgage and then settling constitutes removal of the defect in a reasonably diligent manner is a fact question properly resolved by trial court's judgment. Costs invested in property by insured were not recoverable under title policy. And insured failed to prove causation when insurer testified it would have insured over defects if insured had told it she was seeking rehabilitation loan – [Wade v. Stewart Title Guaranty Co.](#), 2017 IL App (1st) 161765 (Ill App. 1st Div. June 30, 2017 (Affirming judgment for title insurer after bench trial).
- **Replacement Doctrine and Equitable Subrogation:** under the replacement doctrine, refinancing lender stepped into the shoes to the extent of the first mortgage lien ahead of a HELOC that was partially paid, but not satisfied at the closing, but equitable subrogation did not apply because the HELOC was not fully paid off – [US Bank, N.A. v. JPMorgan Chase Bank, N.A.](#), No. 1 CA-CV 16-0253 (Arizona App. Div. 1 June 29, 2017) (affirming in part and reversing in part summary judgment for refinancing lender).

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