

Real Property & Title Insurance Update: Week Ending March 31 & April 7, 2017

April 12, 2017

REAL PROPERTY UPDATE

- **Foreclosure/Deficiency Judgment:** where a foreclosing bank acquires *in rem* jurisdiction via service by publication in underlying foreclosure action, bank may still seek personal service over an individual to pursue deficiency judgment - [Dyck-O'Neal, Inc. v. Meikle](#), Case No. 4D15-3911 (Fla. 4th DCA April 5, 2017) (reversed and remanded)
- **Foreclosure:** foreclosing bank's witness does not need to know when blank indorsement placed on note where copy of already-indorsed note attached to foreclosure complaint; further, bank's witness does not need to have personal knowledge of acceleration letter being sent where witness may testify that bank's business records show that acceleration letter was sent - [JPMorgan Chase Bank N.A. v. Pierre](#), Case No. 4D16-1119 (Fla. 4th DCA April 5, 2017) (reversed and remanded)
- **Foreclosure/Intervention:** "Whoever purchases property that is the subject of a foreclosure lawsuit in which a mortgagee has previously filed a lis pendens is a purchaser pendent lite . . . [and] is not entitled to intervene or otherwise be made a party to the ongoing lawsuit" - [Investor Trustee Services, LLC v. DLJ Mortgage Capital, Inc.](#), Case No. 5D15-3082 (Fla. 5th DCA April 7, 2017) (affirmed)
- **Failure to State Cause of Action:** borrower could move for involuntary dismissal for failure to state a cause of action and prove an agreement at close of trial, but was not entitled to relief where mortgage note and short form mortgage provided prima facie evidence of agreement - [Khleif v Bankers Trust Co. of California, N.A., as Trustee](#), Case No. 2D15-4853 (Fla. 2nd DCA March 31, 2017) (affirmed)

- **Jurisdiction:** order denying borrower's motion to quash constructive service was a non-appealable, nonfinal order because order did not determine personal jurisdiction over borrower and only in rem relief was sought - [Archer v U.S. Bank National Association](#), Case No. 5D16-1970 (Fla. 5th DCA March 31, 2017)
- **Foreclosure/Objection to Sale:** trial court was required to conduct an evidentiary hearing on borrower's timely filed objections before clerk of court could issue certificate of title following judicial sale of borrower's property - [McKnight v Chase Home Finance, LLC](#), Case No. 4D16-2645 (Fla. 4th DCA March 29, 2017)
- **Foreclosure/Lost Note:** lender's witness proved loss of original note and entitlement to reestablish same by testifying that (1) the lender could not locate the note after it was sent to its counsel, (2) its procedure was to contact counsel in an attempt to locate the lost note, (3) it followed the procedure in this case, and (4) a copy of the lost note was presented into evidence - [Wells Fargo Bank, N.A. v Ayers, et al.](#), Case No. 4D16-288 (Fla. 4th DCA March 29, 2017) (dismissal reversed)

TITLE INSURANCE UPDATE

- **Duty to Defend:** duty to defend under title policy was triggered by filing of complaint challenging invalidity of mortgage rather than filing of summary judgment papers by insured asserting same arguments as to validity of mortgage. [Lupu v. Loan City, LLC](#), Case No. 12-4456 (E.D. Pa. Mar. 27, 2017) (Memorandum Opinion granting summary judgment in favor of Stewart Title Guaranty Company)
- **Duty to Defend (Scope):** notwithstanding Massachusetts case law as well as language of policy limiting scope of duty to defend, current Pennsylvania law requires title insurer to defend all the claims in lawsuit if insurer has duty to defend one claim. [Lupu v. Loan City, LLC](#), Case No. 12-4456 (E.D. Pa. Mar. 27, 2017)(Memorandum Opinion)
- **Escrow Agent – Duties:** escrow agent had no further duty to search for and disclose recorded documents and was permitted to rely on title commitment and thus escrow agent did not breach any duty to buyers of property for failing to find Declaration of Restrictive Covenants relating to septic tank on property belonging to adjoining lot owner. [Eleazer v. First American Title Ins. Co.](#), Case No. 75097-6-I (Wash. Ct. App. Mar. 27, 2017) (Unpublished Opinion)
- **Policy Exclusion 4(a):** title insurer properly denied coverage under Exclusion 4(a) when insured owners had pre-closing knowledge of septic tank and had agreed to provide easement for tank to adjoining lot owner - [Eleazer v. First American Title Ins. Co.](#), Case No. 75097-6-I (Wash. Ct. App. Mar. 27, 2017) (Unpublished Opinion)

- **Bad Faith:** title insurer did not act in bad faith in waiting to defend insured until filing of Fourth Amended Complaint when Court agreed with insurer’s interpretation of when duty arose and when insurer relied on valid precedent from another jurisdiction to argue that duty to defend was limited - [Lupu v. Loan City, LLC](#), Case No. 12-4456 (E.D. Pa. Mar. 27, 2017) (Memorandum Opinion)
- **Third Party Beneficiary:** a purchaser of property is not a third party beneficiary entitled to enforce an owner’s title insurance policy lender under Maryland law, where the title policy provides that an “insured” includes successors to the title of the Insured by operation of law as distinguished from purchase . . .” – [McRae v. Westcor Land Title Ins. Co.](#), Case No. RWT-16-2332 Case (D. Mar. Mar. 17, 2017)(granting motion to dismiss)
- **Double Recovery Doctrine:** FDIC is not precluded from pursuing title agent for damages under Nevada’s double recovery doctrine, where the FDIC settled a separate action with an appraisal company for allegedly inflating property values and the settlement does not apportion any amount recovered by the FDIC to loan at issue – [FDIC v. Nevada Title Co.](#), Case No. 2:14-cv-01567-JAD-GWF (D. Nev. Mar. 30, 2017)(denying motion for summary judgment)
- **Breach of Closing Instructions:** WAMU’s closing instructions which stated that agent was not authorized to pay fees to a broker or third party were not ambiguous, and required closing agent not to close escrow or disburse funds without contacting WAMU and waiting for further instructions – [FDIC v. Nevada Title Co.](#), Case No. 2:14-cv-01567-JAD-GWF (D. Nev. Mar. 30, 2017) (denying motion for summary judgment)
- **Breach of Closing Instructions:** FDIC not entitled to summary judgment for breach of closing instructions where title agent failed to inform WAMU regarding involvement of third parties, where the FDIC could not demonstrate that disbursement of \$1.2 million to third parties was material – [FDIC v. Nevada Title Co.](#), Case No. 2:14-cv-01567-JAD-GWF (D. Nev. Mar. 30, 2017) (denying motion for summary judgment)
- **Breach of Closing Instructions/HUD-1:** FDIC not entitled to summary judgment where it was not clear that escrow officer received information on disbursement of closing funds to third parties after estimated HUD-1 was submitted to WAMU – [FDIC v. Nevada Title Co.](#), Case No. 2:14-cv-01567-JAD-GWF (D. Nev. Mar. 30, 2017)(denying motion for summary judgment)

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