Real Property Case Law Update

Recent Opinions of Interest to Real Property Litigators and Practitioners

Week Ending September 21, 2012

By the Carlton Fields Real Property Litigation Practice Group

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Real Property Litigation

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Selection of Real Property Litigation Case Summaries

I. FLORIDA STATE CASES - ILAN NIEUCHOWICZ

- Quiet title: trial court lacked jurisdiction to extinguish easement on property in quiet title action where only relief sought in complaint was to confirm title to the property - Keys Island Props., LLC v. Crowe, No. 3D12-360 (Fla. 3d DCA September 19, 2012) (reversing final judgment)
- Attorney Fees: section 57.105(7) allows mortgagor to recover attorneys' fees from mortgagee when foreclosure action is involuntarily dismissed; however, mortgagor is not entitled to fees if sufficient evidence to establish reasonableness of fees is not presented at the original hearing. mortgagor is not entitled to a second hearing to produce evidence to support award of fees after court denied fees in first hearing – Raza v. Deutsch Bank, No. 2D11-4505 (Fla. 2d DCA September 21, 2012) (affirming denial of attorneys' fees)
- Standing: transfer of mortgage years after foreclosure complaint was filed is irrelevant for purpose of determining standing at the time foreclosure commenced because note or other debt secured by the mortgage could have been transferred without formal assignment and mortgage follows the debt – Cutler v. US Bank N.A., No. 2D10-5709 (Fla. 2d DCA September 21, 2012) (reversed and remanded)

II. 11TH CIRCUIT CASES – JIN LIU

- Assignment of Rents: bank who purchased from FDIC 4 cross-defaulted loans was entitled to enforce assignment of rents on the three loans secured by income-producing properties even though only the fourth loan secured by non-income producing property was in original default because, among other reasons, (1) under the cross-default provisions, a default under one loan triggered the bank's right to assignment of rents as to properties covered by all of the cross-defaulted loans, (2) defendants demonstrated neither that there was a signed writing for a purported loan modification nor the existence of separate consideration supporting the purported modification so the bank was not bound by, and thus could not breach, any purported modification, and (3) the bank did not waive any rights by accepting post-default and acceleration payments from defendants when the bank had sent a letter to the defendants stating that the

bank would accept and apply post-acceleration payments but such practice does not waive the existing default – Stearns Bank, N.A. v. Shiraz Investments, LLC, No. 8:12-cv-313-T-33TGW (M.D. Fla. Sept. 14, 2012) (granting plaintiff's motion to enforce assignment of rents)

III. TITLE INSURANCE CASES - CHRIS SMART

- Parties in Possession Exclusion: insurer has no duty to defend or indemnify insured for claims based on possession and not recorded in the public records – Fischer v. First American Title Ins. Co., Case no. WD74633 (Mo. Sept. 18, 2012) (affirming judgment notwithstanding verdict)
- Duty to Defend: court's declaratory judgment confirming that condominium purchasers owned the common areas did not obviate plaintiff's claims under the policies as had the insurer defended against the cloud on title the purchasers might have been able to sell their units before the real estate market crashed – Donovan v. Flamingo Palms Villas, LLC, Case No. 2:08-cv-01675 (D. Nev. Sept. 13, 2012) (denying motion to for clarification and reconsideration)
- Date of Loss: where policy does not specify date for measuring loss, it is ambiguous and should be construed in favor of the insured, and the date for measuring loss should be the date of purchase of the policy – Whitlock v. Stewart Title Guaranty Company, Case No. 27169 (S.C. Sept. 12, 2012) (answering certified question) (J. Pleicones dissenting)
- Conflicts: law firm's representation of both plaintiff and defendant's parent corporation does not mean (i) that law firm has an attorney client relationship with the wholly owned subsidiary defendant, (ii) that legal work for parent puts it in an adversarial position to defendant, or (iii) that law firm will be materially limited in its representation of plaintiff, and disqualification is not necessary or appropriate – FDIC v. Commonwealth Land Title Ins. Co., Case No. 1:08VC2390 (N.D. Ohio Sept. 7, 2012) (denying motion to disqualify counsel)

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