WHEN A LENDER MIGHT HAVE TO SUE THE NOTARY PUBLIC!

By: Bruce J. Bergman

Many a lender's after hours war story is the one about the time the notary public attested to the legitimacy of the signature, except that Mr. Jones wasn't the borrower's husband after all, merely her boyfriend. Worse still, he didn't own the mortgage property! The **real** Mr. Jones knew nothing about the proposed mortgage. Nor did he know that his loving wife would take all the mortgage proceeds and abscond to parts unknown with the phony spouse.

Chagrined though the cuckolded husband was, the lender's emotions also ran high. The result of the now inevitable foreclosure was that Mrs. Jones' interest alone in the property could be sold because she was the only owner who pledged the property. The value of buying a share in the house at a foreclosure sale with the forlorn Mr. Jones was limited to say the least. So, no one but the lender was left to undertake that hapless role.

Of course there was mortgage title insurance, but the immediate default on the loan meant that accruing interest created a debt in excess of the policy. Consequently, the lender suffered a loss in the end — probably not surprisingly.

Leaving the checking and verification of a borrower's identity to a notary public was a poor enough idea to begin with that lenders learned this lesson some years ago. Nowadays, it is only the rarest closing where solid identification will not be demanded as a prerequisite to issuance of a mortgage. But some mortgage transactions, perhaps particularly more expansive commercial situations, can involve documents which are submitted from outside.

One example of such a paper is a guarantee. For various reasons, it can happen from time to time that a guarantor, maybe one from a distant office, will send his guarantee through the mails, signed and notarized of course. If the supposed or expected guarantor was not in actuality the person who affixed his signature, there **can** be a cause of action against the notary public who falsely or carelessly attested to the genuineness of the inscription.

If the lender needed to seek redress against the notary public, is that a recognized path? Fortunately, the answer generally is "yes." In New York, for example, this liability on the part of the notary is said to be based upon common law,[1] although there is a statute with particular application.[2] That law — again in New York for illustrative purposes — provides that a notary public shall be liable to a party injured by the notary's misconduct in the performance of his duties for all damages sustained.

That the notary can indeed be liable is highlighted by a case of recent vintage which helps make the point.[3] There, a notary authenticated a guarantee, and upon default, the lender sued the guarantor. The guarantor, in turn, asserted that she never signed the guarantee. Through handwriting analysis, the lender-bank unhappily confirmed the truth of the defense and thereupon proceeded to sue the notary public on the grounds of fraud and notarial misconduct.

Because the statute of limitations upon such a claim was held to be six years commencing from the time the loan was made — not from the moment the lender discovered this damage caused by the bogus signature — the lender was unable to recover. Of course, the applicable statute of limitations will vary among the different states, as will interpretation of the moment from which measurement of the time period is to begin.

Nuance here is not inconsiderable and an aggrieved lender may very well not learn of the notary's deviousness until it is too late to sue. While such practical considerations are certainly of consequence, the message is that notaries **can** be liable. Lenders are far better off finding their remedy in the value of the property, but these days that otherwise traditional luxury is not always available. Knowing an additional alternative should it be necessary can contribute to success in special cases.

[1] *Independence Leasing Corp.* v. *Aquino,* 111 Misc. 2d 1039, 445 N.Y.S.2d 893 (1981).

[2] Executive Law §135

[3] *Marine Midland Bank* v. *Stanton,* 147 Misc. 2d 426, 556 N.Y.S.2d 815 (1990).

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