

Bergman on Foreclosures

Why Notarize a Mortgage or Other Document? (The Forgery Defense)

A primer now and again can be salutary. Basics are sometimes obscured by all the complexities attorneys encounter daily and so we proceed with that in mind.

In the world of mortgages, the various documents are typically notarized. But when is this critical and when is it not? The underlying question becomes, when must a lender or servicer insist that a document be notarized and when might it not be necessary to insist?

For a document to be recorded in the land records, it must be executed (as opposed to merely signed), which means the signature must be acknowledged before a notary public. Therefore, there is compelling need for the notary for a mortgage and related documents which must be recorded (satisfaction of mortgage, release of lien of mortgage, spreader agreement and many others).

That important point noted, that an acknowledgment may have been improperly taken is not itself sufficient to set aside a mortgage. And as between the parties themselves, a conveyance of real estate (that includes a mortgage) is effective even if the instrument is improperly acknowledged or completely unacknowledged.

A mortgage note is notarized not because it is recorded (it is not), but because the notarization both affords a presumption of due execution and allows the document to be introduced into evidence (should that become necessary) without laying a foundation.

The significance of the noted presumption is highlighted by a case where the guarantor of a loan defended the action upon the claim that her signature on the guaranty was a forgery.¹

The problem for the lender in that case was that the absence of the notary banished the presumption of due execution, making it easier for the guarantor to, in that case, present a driver's license and a passport that showed a signature at variance with that on the guaranty. While a bald assertion of forgery alone will fail, and while a claim of the protesting party alone is not given much weight, the lack of the notary removes that helpful presumption and was therefore a factor in defeating the lender's motion for summary judgment.



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So, what about a settlement stipulation, for example? It does not need a notary because it typically will not need to be recorded. And if it is signed in addition by the borrower's attorney, or if it was signed in the presence of those who could later testify, then there should not be much of an issue as to the authenticity of the borrower's signature. But if a borrower's disavowal of a document would be meaningful, and if there might be an issue about the signature, a notary helps.

Endnote

1. *TD Bank, N.A. v. Piccolo Mondo 21st Century, Inc.*, 98 A.D.3d 499, 949 N.Y.S.2d 444 (2d Dep't. 2012).