

**International Equine Acquisitions Holdings, Inc. v
Moshell**

2009 NY Slip Op 31247(U)

May 26, 2009

Supreme Court, Nassau County

Docket Number: 012921/2007

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 9

INTERNATIONAL EQUINE ACQUISITIONS
HOLDINGS, INC.,

Plaintiff,

INDEX NO.: 012921/2007
MOTION DATE: 03/10/2009
MOTION SEQUENCE: 004

- against -

STUART MOSHELL, MOSHELL & MOSHELL,
ESQS., PATRICIA RANCE, LANDMARK
ABSTRACT, LLC, PLAINFIELD FUNDING
ASSOCIATES,

Defendants.

The following papers read on this motion:

Notice of Motion, Statement of Material Facts, Affirmation, Affidavit &
Exhibits Annexed 1

PRELIMINARY STATEMENT

This is an unopposed motion by Commonwealth Land Title Insurance Company, as subrogee of Defendant Plainfield Funding Associates for an order granting summary judgment on the First, Second, Third, Fourth and Fifth cross-claims against the Defendants Stuart Moshell, Moshell & Moshell, Esqs. and Patricia Rance.

The five cross-claims interposed by Plainfield are as follows:

First: In the event the Note and Mortgage are found by the Court to be unenforceable against the Plaintiff, Defendant Moshell is liable on the Note as a signatory of Plainfield and as a result of this action;

Second: The Defendants Moshell and Moshell and Moshell misrepresented to Plainfield that the Mortgage had been authorized by the Plaintiff;

Third: If the Court determines that the signatures of Michael Iavarone and Richard Schiavo were forged on the corporate resolution, and that the signature of Michael Iavarone was forged on the guarantee documents, then the Moshell Defendants were aware at the time of their representations to Plainfield that such representations were false;

Fourth: Plainfield would not have made the \$875,000 loan without the guarantee documents signed by Michael Iavarone and notarized by Defendant Rance, and that if the Court determines that the Michael Iavarone did not sign the mortgage documents upon which his signature was notarized by Rance, then Rance is liable to Plainfield pursuant to Executive Law § 135 in the amount of \$875,000 as compensatory damages and for punitive damages;

Fifth: Rance owed a duty of care to Plainfield to perform her notary duties with the standard of care expected of a notary public; and if the Court determines that Michael Iavarone did not sign the guarantee documents, notarized by Rance, she failed to exercise her duties with the requisite standard of care and is liable to Plainfield in the amount of \$875,000.

BACKGROUND

The Moshell Defendants, by means of deception and forgery, caused an \$875,000 mortgage to be placed on three properties which the Plaintiffs had previously acquired. Moshell represented the Plaintiff in the acquisition of three Elmont properties, at 44, 109 and 111 Plainfield Avenue in March 2007. Soon thereafter, on June 13, 2007, Plainfield Funding Associates advanced \$875,000 on the strength of a corporate resolution, mortgage and mortgage guarantee. Moshell misrepresented himself as the president of the Plaintiff and executed the resolution. He forged the signatures of the principals of the Plaintiff on the Mortgage Note, Mortgage and Personal Guaranty. The foregoing is uncontradicted and had been admitted by Moshell in a deposition.¹

The closing on the mortgage was done without the knowledge of either of the principals of the Plaintiff, and they came to learn of it only by happenstance when they received a call from

¹ Exh. "D" to Motion at pp. 25, 28, 40, 46, 48, 49, 63, 65 — 68, 73, 74, 78, 89.

the lender thanking for them for their business. This proceeding, and the resignation of Moshell from the New York State Bar, followed.

Plainfield, Landmark Abstract, and Plaintiff entered into an So-Ordered Settlement Agreement whereby Plainfield agreed to discharge the mortgage in return for payment by Commonwealth to Plainfield in the sum of \$875,000. Landmark also paid to Commonwealth \$40,000 which it had been holding in escrow since the closing. Other than a short-rate interest payment at closing, there have been no other payments in reduction of the mortgage principal. Commonwealth, having paid Plainfield for its loss, is now subrogated to their claims against the Defendants.

DISCUSSION

The liability of Moshell and Moshell and Moshell, Esqs. for the actions of Stuart Moshell is painfully obvious. Movant Commonwealth is entitled to Summary Judgment on the First, Second and Third Cross-claims against Moshell and Moshell & Moshell, Esqs. The liability of Patricia Rance requires further analysis. The facts speak for themselves and it is clear that she falsely notarized the signatures of Iavarone on the Loan and Personal Guaranty. The question is whether this was an act of intentional misconduct, wherein she knew that the signature of Iavarone had been written by Moshell, or an act of negligence in violation of the Business Law, and lastly, whether it matters whether or not her conduct was intentional. The record is not clear as to whether or not she was advised by Moshell that the signature was genuine. The language of the statute is equally unclear as to the nature of activities which constitute "misconduct."

The duties and obligations of a notary are statutorily enunciated.² The mandates are, in pertinent part, as follows:

§ 135. Powers and duties; in general; of notaries public who are attorneys at law

Every notary public duly qualified is hereby authorized and empowered within and throughout the state to administer oaths and affirmations, to take affidavits and depositions, to receive and certify acknowledgments or proof of deeds, mortgages and powers of attorney and other instruments in writing; to demand acceptance

² Business Law § 135.

or payment of foreign and inland bills of exchange, promissory notes and obligations in writing, and to protest the same for non-acceptance or non-payment, as the case may require, and, for use in another jurisdiction, to exercise such other powers and duties as by the laws of nations and according to commercial usage, or by the laws of any other government or country may be exercised and performed by notaries public, provided that when exercising such powers he shall set forth the name of such other jurisdiction.

.....

For any misconduct by a notary public in the performance of any of his powers such notary public shall be liable to the parties injured for all damages sustained by them.

It has been held that the notarization of a signature purporting to be a person who actually was out of the country at the time of the alleged signature, constituted sufficient misconduct to constitute a cause of action. The decision was silent as to the level of the notary's awareness of the falsity of the signature.³ In another matter, however, the Second Department affirmed the revocation of a real estate broker's license and notary public commission under circumstances in which an individual participated in a scheme to convey title to properties without the knowledge of the true owners.⁴ The Court there quoted from the Real Property Law which authorized the revocation of a broker's license where the broker is "guilty of fraud or fraudulent practices * * * or has demonstrated untrustworthiness or incompetency to act as a real estate broker or salesman"⁵, and relied upon the same standard to justify the revocation of the notary commission.

At the heart of the issue as to the liability of Rance is the meaning of the word "misconduct." It is not defined in the statute, and leaves the Court to decipher its plain meaning, if there is one. Movant cites the decision of an interim level trial court in which such an effort

³ *Plemmenou v. Anninos*, 12 A.D.3d 657 (2d Dept. 2004).

⁴ *Maneri v. New York State Department of State*, 240 A.D.2d 748 (2d Dept. 1997).

⁵ Real Property Law § 441-c (1) (a).

occurred.⁶ On appeal from the City Court of Buffalo, a notary appealed from the order of the lower court which awarded money damages to the defendant Aquino on a cross-claim against the notary. The notary, Tremblas, notarized the signature of a person purporting to be James Aquino, the father of Nicholas Aquino, who was leasing an automobile, but was required to obtain his father's signature as a guarantor. The lease was executed, and after the first and last payment, the leasing company brought a breach of contract against James Aquino, obtaining a default judgment against him. This was vacated and another action commenced, naming Kemplas and Bank of New York for their negligence in performing the duties of a notary.

The lower court concluded that a notary was responsible only for his intentional, but not negligent acts. In reversing, the County Court conducted an extensive review of Executive Law § 135 and its predecessors, and concluded that the term "misconduct" encompasses negligent as well as intentional actions.

In so doing, it relied on no less an eminent jurist than Justice Benjamin Cardozo, then a Justice of the Supreme Court sitting in the Appellate Division, First Department. In affirming a decision of the lower court,⁷ he stated that "(w)hatever may be said of the right of the plaintiff to maintain this action independent of the statute (3 R.S., 5th ed., 474, § 37) . . . there can be no doubt of their right to sue the defendant under the (statute) upon the ground of official misconduct. He was a public officer, and undertook to perform an official duty and neglected it. That is misconduct, for which an action lies."⁸

The issue as to liability for both negligent and intentional misconduct by notaries presents an interesting history, covering many jurisdictions. The Supreme Court of Missouri, in affirming a decision of a lower court⁹ claims that the lower court appropriately relied upon a decision of

⁶ *Independence Leasing Corp. v. Aquino*, 133 Misc.2d 564 (County Ct., Erie Co. 1986).

⁷ *Commercial Bank v. Varnum*, 3 Lans 86 (rev'd. on other evidentiary grounds, 49 N.Y. 269 (1872)).

⁸ 3 Lans, at 105.

⁹ *Koste v. Maryland Casualty Company*, 344 S.W.2d 55, 57 (1961).

the Supreme Court of Wisconsin in determining that it did not matter whether the damage resulting from the action of the notary was occasioned by fraud or negligence. But a reading of that case ¹⁰, and the statute which it interprets, ¹¹ presents a different situation. The statute in question provides that “if any notary public shall be guilty of any misconduct or neglect of duty in office he shall be liable to the party injured for all the damages thereby sustained.” It is quite clear from the language of the statute that both neglect and misconduct produce liability.

We do not have the benefit of such clarity of language in Business Law § 125. Nor does Real Property Law § 330 clarify the issue. That statute provides as follows:

§ 330. Officers guilty of malfeasance liable for damages

An officer authorized to take the acknowledgment or proof of a conveyance or other instrument, or to certify such proof or acknowledgment, or to record the same, who is guilty of malfeasance or fraudulent practice in the execution of any duty prescribed by law in relation thereto, is liable in damages to the person injured.

This statute would appear to be equally as applicable as General Business Law § 135 since the matter involves the acknowledgment of a conveyance or other instrument. The language of this statute speaks of a notary who is “guilty of malfeasance or fraudulent practice of any duty prescribed by law in relation thereto.”

While the language of both of these statutes is certainly less than clear, and the imposition of virtually unlimited monetary damages upon a notary who may, for example, have been assured by her employer that the signature appearing on the document is genuine, may shock the conscience of the Court, the language of J. Cardozo in *Varnum* cannot be ignored. For this reason the Court is constrained to grant the motion of Commonwealth, subrogee of Plainfield Funding, against the Defendant Patricia Rance.

¹⁰ *Governor of Wisconsin ex rel. Mlekus v. Maryland Casualty Co.*, 192 Wis. 472, 213 N.W. 287, 288 (1927).

¹¹ § 137.01 (2).

CONCLUSIONS

The Motion for Summary Judgment on the First, Second, and Third Cross-claims against the Defendants Stuart Moshell, Moshell & Moshell, Esqs. is granted. The Motion for Summary Judgment on the Fourth, and Fifth Cross-claims against the Defendant Patricia Rance is also granted.

This constitutes the Decision and Order of the Court.

Dated: May 26, 2009

J. B. Warshawsky
J.S.C.

ENTERED

JUN 01 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**