

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

***Present: HON. R A L P H P. F R A N C O, Justice***

**TRIAL/IAS, PART 16**

**FIDELITY NATIONAL INSURANCE CO. OF NY,  
as Subrogee of LAURA GROSSMAN,  
SARAH GROSSMAN, CHARLES GOREN,  
MELBA LIOTTA and TURBO CAPITOL CORP.**

**NASSAU COUNTY**

Plaintiff(s),

-against-

INDEX No.: 015151/98  
MOTION SEQ. NO: 3,4&5

**RENEE LYNCH, PORT ABSTRACT, INC.  
AMERILAND ABSTRACT SERVICE CORP., and  
PRIORITY FUNDING, INC.**

Defendant(s).

**RENEE LYNCH, PORT ABSTRACT, INC., and  
AMERILAND ABSTRACT SERVICE CORP.**

Third-Party Plaintiffs

-against-

**METROPOLITAN ABSTRACT CORP., and  
PETER T. ROACH,**

Third-Party Defendants

Cross-motion by Defendants, Renee Lynch, Port Abstract and Ameriland Abstract Services Corp., (Seq. No. 4) for an Order pursuant to CPLR 3212, dismissing the complaint is **granted**. Motion, Seq.

No. 3 by Third-Party Defendant, Peter T. Roach and cross-motion, Seq. No. 5, by Third Party Defendant, Metropolitan Abstract Corp., for an Order dismissing Third-Party Plaintiff's complaint is now **moot**.

Peter P. Roach, Third-Party Defendant, gave a mortgage loan, in the sum of \$175,000, to Deborah Karan Leo and her husband, David Leo. Title to the premises, secured by the loan, was only in the name of Deborah Karen Leo. On or about December 28, 1994, David Leo and an individual holding herself out to be Deborah Karen Leo appeared at the offices of Peter P. Roach for the closing of the mortgage loan. Also present at the closing were Peter P. Roach; Ida D'Angelo, attorney for mortgagors; Renee Lynch, title closer; and Paul Chedda, attorney for Peter Roach.

Lynch also served as Notary Public. She requested that the individuals executing the mortgage documents provide her with documentation proving their identifies. The individual purporting to be Deborah Karan Leo, presented as photo identification, a copy of a State

of New York Department of State Division of Licensing Services license to practice hairdressing and cosmetology, (hereinafter referred as the "photo identification"). A copy of a NYS Dept. of Motor Vehicles Interim License, in the name of Karan-Leo, Deborah was also presented as identification. For reasons unrelated to the true identify of the woman who was present at the closing, and who purported to be Deborah Karan Leo, the abstract companies, Port and Ameriland and their underwriter, the title insurance company, Stewart Title, declined to insure the mortgage. Ms. Lynch, the title closer and notary public collected the documents she prepared on behalf of the title company and left the closing with her paper work. The title company for whom Lynch was employed , declined to insure title because there were two existing private mortgages on the premises which were to be paid off from the proceeds of the mortgage loan itself. Third-party Defendant, Roach opines that normally title insurance companies request that on a private mortgage, a satisfaction of mortgage be delivered at the

closing table, rather than accepting a so-called pay-off letter with an undertaking representing that a satisfaction of mortgage will be delivered upon receipt of the pay-off funds by the lender.

After Ameriland and Port declined to insure the mortgages, Roach immediately contacted Metropolitan Abstract and requested that it insure the mortgage. Metropolitan Abstract sent a title closer, Andrew Winston, to review the title and insure the mortgage. Metropolitan Abstract agreed to close on the strength of the pay-off letters from the attorneys' representing the interests of the private mortgagees, without the actual delivery of the two satisfactions of mortgage to the closing table. The subject mortgage was insured by **Metropolitan Abstract through Fidelity National Title Insurance Company of New York.**

The mortgage document and the Mortgage Note, which were prepared by Roach's office and already executed earlier in the day by Lynch, were used as the documents for the mortgage loan transaction by Metropolitan Abstract. Subsequent to the closing, Roach assigned

the mortgage to Laura Grossman, Sarah Grossman, Charles Goren, Melba Liotta, and Turbo Capital.

Upon the mortgagors Deborah Karan Leo's and David Leo's failure to make monthly mortgage payments when due, a foreclosure action was commenced against them by the assignees.

It was later learned through investigation that the woman who appeared with David Leo at the closing was **not** Deborah Karan Leo, but an **imposter**, who conspired with David Leo to fraudulently obtain the mortgage loan. The Nassau County District Attorney brought charges against David Leo.

As a result of the forgery, the assignees brought a claim against Fidelity pursuant to the terms and conditions of the mortgage title insurance policy issued by Fidelity, through Metropolitan Abstract. Fidelity settled their claim with the assignees under the policy of mortgage title insurance and **was subrogated** to the assignee's rights. Thereafter on or about June 3, 1998, Fidelity, as subrogee of the

assignees, brought the subject main action against the Notary Public, Lynch, the abstract companies, Port and Ameriland, and the mortgage broker, Priority Funding, Inc., to recover from them the amount Fidelity paid out as insurance settlement to the assignees.

New York State Executive Law, Section 135, provides that

“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; . . .

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.”

New York State Real Property Law, Section 303, provides that

“An acknowledgment must not be taken by any officer unless he knows or has satisfactory evidence, that the person making it is the person described in and who executed such instrument.”

Notarial misconduct can be for the wilful, fraudulent or negligent

actions of a notary. The Plaintiff must also prove that he or she was injured and that there was reliance to his or her detriment on the alleged negligence of the Notary Public.

See: Rastelli v. Gassman, 231 A. D. 2d 507, 647 N. Y. S. 2d 253, (A. D. 2 Dept. 1996); Marine Midland Bank v. Stanton, 147 Misc. 2d 426, 556 N. Y. S. 2d 815, (Sup. Ct. Monroe County, 1990); Independence Leasing Corporation v. Aquino, 133 Misc. 2d 564; 506 N. Y. S. 2d 1003, (Eric Co. Ct., 1986).

The actual parties in interest to this action are sophisticated in the daily workings of residential mortgage closings. The Court has been provided with an affirmation from attorneys purporting to be experts in the field and competent to categorize what they perceive to be normal “custom and usage” during the course of a residential real estate mortgage closing.

All parties agree that the best proof of identification would be a valid New York State Drivers License with a photo identification. In

the absence of a driver's license with a photo identification, no party has presented any authority as to what should be the next best type of photo identification proof. There can be little disagreement that a valid passport with photo identification would be acceptable. In this action the imposter presented as photo identification, a copy of a State of New York Department of State, Division of Licensing Service, license to practice hairdressing and cosmetology.

Defendants have made out a prima facie showing of entitlement to judgment dismissing the complaint as a matter of law. The Court finds no negligence on the part of Ms. Lynch, the Notary Public at the aborted closing. Other than mere speculation as to what type of photo identification should have been accepted by the Notary Public, neither the Plaintiff nor Third-party Defendants have cited any legal authority to establish that the "photo identification" accepted by Lynch was inappropriate as documentation. Nor is there any evidence to suggest that Ms. Lynch did not use proper procedures for verifying the



signature and identity of the putative mortgagors. **See also: Am Jur 2d Acknowledgments Section 94-100.**

In reaching its decision, weight was given to the fact that Andrew Winston, the Notary Public and Representative fo Metropolitan Abstract Corporation, accepted the same proof under similar circumstances presented to Renee Lynch, the Notary at the aborted closing.

At the subsequent closing, Winston, the Notary Public and Title Closer for Third-party Defendant, Metropolitan Abstract Corp., took the signatures of Deborah Karan and David Leo, relying on the same identification that was shown to Renee Lynch. In short, Winston used the same exact identification and procedures for verifying the signature and identity of the Leo's that were utilized by Winston in his capacity as Notary Public at the subsequent closing.

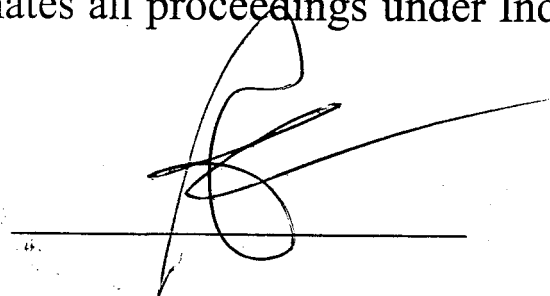
Incredulous is the opinion of Andrew Winston, the Notary Public and Title Closer for Metropolitan Abstract Corporation, who also

accepted the same photo identification when he took the acknowledgment on the **Affidavit of Title and Receipt and Deposit Agreement**, (Exhibit G and H of the cross-motion), that "it" was not utilized in connection with the insuring a mortgage. It was, what I call, a junk form for the purpose of the bank. Not something to be recorded." (Exhibit B to cross-motion, p. 52).

The New York State Department of State Division of Licensing Services should contemplate issuing Rules and Regulations setting forth with some degree of specificity the type of satisfactory evidence, (i.e., photo identification) acceptable as proof of identification contemplated by Executive Law Sec. 135 and Real Property Law Section 303.

This decision and order terminates all proceedings under Index No. 015151-1998.

Dated: June 7, 2000

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a series of loops and a long horizontal stroke extending to the right.

J.S.C.

Handwritten initials 'XXX' in black ink, with each 'X' formed by two intersecting diagonal lines.