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KARL J. MOCK, and ANN MOCK,

Plaintiffs,

vs.

LYNN BAE, ILS GRAND, LLC, SIM#3  
MANAGEMENT CORPORATION d/b/a  
EMPIRE BONDING AGENCY, and VALLEY  
NATIONAL BANK,

Defendants.

LYNN BAE,

Third Party Plaintiff

vs.

MAG BAE,

Third Party Defendant.

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SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION  
BERGEN COUNTY

Docket No. F-58854-10

CIVIL ACTION

**PLAINTIFFS' TRIAL BRIEF**

**Trial Date: September 19, 2012**

**On the Brief:**  
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## CONCISE STATEMENT OF THE NATURE OF THE ACTION

Plaintiffs Karl Mock and Ann Mock (collectively the “Mocks”) instituted this foreclosure action to enforce a \$200,000 mortgage (“Mortgage”) executed and delivered by defendant Lynn Bae as collateral in connection with a \$1.5 million business transaction in which her father (Mag Hee Bae) agreed to purchase the Mocks’ small business and the building from where it operated in Paterson, New Jersey. Lynn Bae disputes signing the mortgage in question despite a New Jersey licensed notary’s acknowledgment.

As far as plaintiffs are concerned, the sole issue to be decided at trial is whether the mortgage is valid. If plaintiffs prevail, then the Court should strike Lynn Bae’s Answer and Affirmative Defenses and return the matter to the uncontested foreclosure unit so that plaintiffs can complete the foreclosure process to the point of final judgment and judicial sale.

Plaintiffs intend to call 3 witnesses to testify; namely, the plaintiffs Karl and Ann Mock (collectively the “Mocks”), and Joseph Colella, Esq. who represented them in the underlying business transaction that produced the disputed mortgage. Depending on the number of witnesses called by defendants, plaintiffs anticipate concluding the trial in 1 ½ days, at most.

Plaintiffs maintain that Lynn Bae will not be able to rebut the presumption of validity that attaches to her notarized signature on the Mortgage and other closing documents. Critically, she has not retained a handwriting expert to corroborate her forgery claim - a fatal flaw in her defense. Not only does Ms. Bae’s notarized signature appear on the Mortgage and other loan documents but her drivers’ license is attached to the Notary’s Affidavit presented at the underlying business closing. Moreover, this case does not represent the only time that Lynn Bae agreed to pledge her real estate as collateral for her father. Subsequently she pledged the same property as collateral for a bail bond that another of her relatives needed in connection with to a

New York criminal matter. At that point, plaintiffs' Mortgage was already recorded with the Bergen County Clerk and thus part of the public record.

### **PROCEDURAL HISTORY**

Plaintiffs served a pre-foreclosure notice of intent on the defendant Lynn Bae on October 12, 2010. Having received no response, plaintiffs commenced this foreclosure action on December 1, 2010. Thereafter, plaintiffs filed an Amended Complaint on April 11, 2011, and an Amended Notice of Lis Pendens on April 25, 2011.

Default was entered against Lynn Bae on June 24, 2011. On September 15, 2011 Lynn Bae filed a motion to vacate the default, which the Court granted by Order entered on October 7, 2011 conditioned upon the payment of plaintiff's counsel fees in the amount of \$2,551.37 as is also reflected in an Order for Attorneys' Fees entered the same date. Lynn Bae thereafter filed an Answer and Third Party Complaint against her father Mag Bae, disclaiming her signatures on the Mortgage and other closing documents as forgeries, and blaming her father for creating this situation. Mr. Bae has not appeared in the litigation.

A trial date originally was scheduled for September 17, 2012, but was adjourned to September 19, 2012 at the request of plaintiffs' counsel.

### **ADMISSIONS**

The answering defendant Lynn Bae does not dispute the underlying loan transaction and the documents exchanged, except to deny having signed the documents, authorizing her signatures, or having any prior knowledge of same.

Ms. Bae admits that subsequent to the Mortgage in question that she pledged the same property to another lender – the defendant SIM#3 Management Corporation d/b/a Empire

Bonding Agency (“SIM#3”) – by executing and delivering a mortgage. SIM#3 has not appeared in the action even though its counsel acknowledged service of the Amended Complaint.

### **FACTUAL CONTENTIONS**

This foreclosure matter stems from a business transaction between plaintiffs and ILS Grand, LLC, a New Jersey limited liability company (“ILS Grand”). Plaintiffs were the former owners of Karlan Service, Inc. (“Karlan”). In January 2009 the Mocks sold Karlan’s assets and the real estate in Paterson from where it operated to ILS Grand for \$1.5 million. The parties on each side of the business transaction were represented by counsel. The Mocks, as sellers, were represented by Joseph Colella, Esq., and Mag Bae and the purchasing entity ILS Grand were represented by the law firm of Hill Wallach.

At the closing ILS Grand was \$200,000 short. Notwithstanding, to induce the Mocks to proceed with the closing Mag Bae represented that his daughter Lynn Bae had agreed to pledge her condominium as collateral to secure the \$200,000 shortfall. The Mocks agreed, and at the closing were presented with: 1) a notarized \$200,000 Mortgage signed by Lynn Bae which ultimately was recorded in the Bergen County Clerk’s Office; 2) a notarized Affidavit of Lynn Bae disclaiming judgments appearing against a person having a similar name; 3) an Affidavit from the notary confirming Lynn Bae’s identity and signatures on the foregoing documents; 4) a limited guaranty from Ms. Bae limiting her exposure to the value of her real estate; and 5) a \$200,000 promissory note (“Note”) executed by ILS Grand, the limited liability company owned by Mag Bae that took title to the real estate at the closing. Mag Bae is or was a member of ILS Grand.

Prior to the closing the purchaser’s counsel Hill Wallach faxed a copy of the notarized Mortgage to the Mocks’ attorney Joseph Colella. The Mortgage encumbers real property

commonly known as 300 Winston Drive, Unit 1903 Cliffside Park, New Jersey (“the Property”). Plaintiffs have the first mortgage on the Property.

A notary public licensed in the State of New Jersey vouched for Ms. Bae’s signatures on the Mortgage, Guaranty, and Affidavit of Title. The notary, Kyong Chang, also completed an Affidavit of the Notary Public that provides a copy of Ms. Bae’s drivers’ license. Plaintiffs specifically relied on the validity of the notarized signatures on all of the loan closing documents. In absence of receiving this additional security to cover the \$200,000 shortfall, the Mocks would not have closed the business transaction with ILS Grand.

ILS Grand defaulted on the Note, and on July 28, 2010 filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the District of New Jersey, Newark Vicinage, Case No.: 10-33002-DHS. The Bankruptcy Court subsequently converted the case to Chapter 7 liquidation, and a bankruptcy trustee is administering the company’s assets. The Mocks obtained an order granting them relief from the automatic stay, and thereafter began the process of foreclosing on their Mortgage.

Indicative of Ms. Bae’s close relationship with her father and her propensity to pledge her real estate as collateral for her family debts, on or about June 10, 2009 she executed a “contingency mortgage” to defendant SIM#3 Management Corporation as collateral for a \$375,000 bail bond that one of her relatives needed in order to post bail in connection with a New York criminal case. The contingency mortgage was obtained after Ms. Bae entered into the Mortgage with plaintiffs and it concerns the same Property that is the subject of this foreclosure proceeding.

## LEGAL ARGUMENT

### POINT I

#### A VALID AND ENFORCEABLE MORTGAGE EXISTS, AND THE DEFENDANT LYNN BAE CANNOT SUSTAIN HER BURDEN OF REBUTTING ITS PRESUMPTION OF VALIDITY BY CLEAR AND CONVINCING EVIDENCE

Generally speaking, a mortgage is defined as “security for the payment of a debt that involves real estate.” Estate of Hammerle v. Director, Div. of Taxation, 22 N.J. Tax 342 (N.J. Tax 2005). In Feldman v. Urban Commercial, Inc., 64 N.J. Super. 364, 373 (Ch. Div. 1961), the court explained:

We recognize that, in form and under common law interpretation, a mortgage, in New Jersey, has been held to be in the nature of a ‘transfer or conveyance’ of the Legal title from the mortgagor to the mortgagee, subject to a re-vesting of title in the mortgagor upon payment of the mortgage.

The right to foreclose is an equitable right inherent in a mortgage, triggered by a borrower's failure to comply with the terms and conditions of the associated loan. Chase Manhattan Mortg. Corp. v. Spina, 325 N.J. Super. 42, 50 (Ch. Div. 1998), aff'd sub nom. Chase Manhattan Mortg. Corp. v. Heritage Square Ass'n, 325 N.J. Super. 1 (App. Div. 1999). To obtain relief in a mortgage foreclosure action, the mortgagee must establish, among other things, that the mortgage and loan documents are valid. See Great Falls Bank v. Pardo, 263 N.J. Super. 388, 394 (Ch. Div. 1993), aff'd, 273 N.J. Super. 542 (App. Div. 1994); Somerset Trust Co. v. Sternberg, 238 N.J. Super. 279, 283-84 (Ch. Div. 1989).

In New Jersey, duly executed, notarized and recorded mortgage instruments such as the Mortgage in the instant case are presumptively valid and enforceable, and are presumed to have been made for good and valuable consideration. See e.g., In re Shaw, 51 F.Supp. 566, 568

(D.N.J. 1943), and N.J.S.A. 12A:3-308.<sup>1</sup> Under New Jersey law, a mortgage instrument must be duly acknowledged, proved and certified at the time the loan transaction is consummated. N.J.S.A. 46:14-2.1 provides that in order for a deed or other instrument to be acknowledged, the maker of the instrument shall appear before an officer authorized to take acknowledgments or proofs and acknowledge that it was executed as the maker's own act. "If a deed or other instrument cannot be acknowledged or proved for any reason, the instrument may be proved in Superior Court by proof of handwriting or otherwise to the satisfaction of the court." N.J.S.A. 46:14-4.1. Under N.J.S.A. 46:14-4.2, ". . . a signature includes any mark made on a document by a person who thereby intends to give legal effect to the document. A signature also includes any mark made on a document on behalf of a person, with that person's authority and to effectuate that person's intent." Id.

N.J.S.A. 46:14-6.1 enumerates a list of "officers" of the State who are authorized to acknowledge signatures on documents, and includes a notary public. N.J.S.A. 46:14-6.1(2). A

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<sup>1</sup> N.J.S.A. 12:3-308 states as follows:

a. In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature. If an action to enforce the instrument is brought against a person as the undisclosed principal of a person who signed the instrument as a party to the instrument, the plaintiff has the burden of establishing that the defendant is liable on the instrument as a represented person under subsection a. of 12A:3-402.

b. If the validity of signatures is admitted or proved and there is compliance with subsection a. of this section, a plaintiff producing the instrument is entitled to payment if the plaintiff proves entitlement to enforce the instrument under 12A:3-301, unless the defendant proves a defense or claim in recoupment. If a defense or claim in recoupment is proved, the right to payment of the plaintiff is subject to the defense or claim, except to the extent the plaintiff proves that the plaintiff has rights of a holder in due course which are not subject to the defense or claim.

[ibid.][Emphasis added].

defendant's notarized signature is prima facie evidence that he/she signed the document without the need for the notary's testimony. N.J.R.E. 902(h); N.J.S.A. 2A:82-17. Moschillo v. Jovanov, 2010 N.J. Super. Unpub. LEXIS 3130 (App. Div. 2010).

A certificate of acknowledgement as to the execution of a mortgage is open to attack only in the case of fraud, and that in the absence of fraud the execution is conclusive even as to bona fide purchasers. See Mitschele-Baer, Inc. v. Livingston Sand & Gravel Sales Co., 108 N.J. Eq. 286 (N.J. Ch. 1931). "It should be the aim of the courts, when the mortgage is bona fide, to preserve and not to destroy." McDonald vs. H.B. McDonald Const. Co., 117 N.J. Eq. 181 (1934), citing Howell v. Stone & Downey, 75 N.J. Eq. 289 (E. & A. 1909). Our courts have long recognized that when the bona fides surrounding the giving of a mortgage are not questioned, "[T]he statute should not be used as an instrument of inequity any more than of fraud." McDonald, 117 N.J. Eq. at 183, citing Patrisco v. Nolan's Point Amusement Co., 10 N.J. Misc. 397 (N.J. Ch. 1932).

Some examples where our courts have invalidated mortgages based on irregularities include where the mortgage instrument misidentified the parties, New Jersey Bank v. Azco Realty Co., Inc., 148 N.J. Super. 159 (App. Div. 1977), cert. denied 74 N.J. 280 (1977)(Acknowledgment of mortgage held invalid under now repealed N.J.S.A. 4614-6 where on the face of the mortgage it listed mortgagee as mortgagor in 3 separate places); where a corporation gives a mortgage and it is signed by a person lacking authority to act on behalf of the corporation, see Pincus v. U.S. Dyeing & Cleaning Works, 99 N.J. Eq. 160 (N.J. Ch. 1926); and where the lender was unlicensed, see Gottesfeld v. Kaminski, 216 N.J. Super. 679 (App. Div. 1987)(Mortgage held void and unenforceable where lender engaged in secondary mortgage loan business without a license). None of these circumstances are present in the case at bar.



A party challenging his/her signature on a mortgage bears the burden of proof by clear and convincing evidence. See Fazio v. Equity One, Inc., 2006 N.J. Super. Unpub. LEXIS 2249 (App. Div. 2006) (Appeals court refused to disturb trial judge's conclusion that the forgery of the borrower's signature on a mortgage subordination agreement had been proven by clear and convincing evidence). Clear and convincing evidence "should produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." In re Purrazzella, 134 N.J. 228, 240 (1993) (quoting Aiello v. Knoll Golf Club, 64 N.J. Super. 156, 162 (App. Div. 1960)). It must be "so clear, direct, and weighty and convincing as to enable [either a judge or jury] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." In re Seaman, 133 N.J. 67, 74 (1993) (quoting Aiello, supra, 64 N.J. Super. at 162). Accordingly, Lynn Bae must establish by clear and convincing evidence that her notarized signatures on the Mortgage and other loan closing documents are forgeries. *She cannot meet this heavy burden absent an independent handwriting expert to corroborate her allegation.*

In Cornell v. Moussavian, et al., 2011 N.J. Super. Unpub. LEXIS 2861 (Ch. Div. 2011), this Court summarized the legal effect of a forgery by quoting Szelc v. Stanger, 2011 U.S. Dist. LEXIS 41827 (D.N.J. 2011) "It appears well-established that the effect of a forgery is that the forged document is null and void." Id. at p. 10 (internal citations omitted). ". . .the long-established rule in New Jersey is that '[a] forgery can pass no right, even to a bona fide purchaser.'" Id. at p. 13 (internal citations omitted).

In the instant case, the undisputed evidence will establish that plaintiffs' counsel received from the purchaser's counsel the signed Mortgage and other closing documents bearing Ms. Bae's notarized signatures, as well as an Affidavit from the Notary which attaches Ms. Bae's New Jersey photo driver's license. The evidence will further demonstrate that the Mortgage was

accepted for recording by the Bergen County Clerk's Office, and was in fact recorded on February 29, 2009 in Mortgage Book V33, at Page 80, et seq. The defendant's anticipated self-serving testimony that she didn't sign these documents, without corroboration from a handwriting expert, simply will not suffice to overcome the presumption of the Mortgage's validity.

## POINT II

### **IN THE UNLIKELY EVENT THE COURT DETERMINES THAT LYNN BAE'S SIGNATURE ON THE MORTGAGE IS A FORGERY, THE COURT SHOULD AWARD PLAINTIFFS AN EQUITABLE MORTGAGE**

The whole doctrine of equitable liens or mortgages is founded upon that cardinal maxim of equity which regards as done that which has been agreed to be, and ought to have been, done. To dedicate property, or to agree to do so, to a particular purpose or debt is regarded in equity as creating an equitable lien thereon in favor of him for whom such dedication is made. This wholesome equitable principle is one of wide, if not universal, recognition and application. Dean v. Anderson, 34 N.J. Eq. 496 (Ch. 1881); Cummings v. Jackson, 55 N.J. Eq. 805 (E. & A. 1897); Clark v. Van Cleef, 75 N.J. Eq. 152 (Ch. 1908);

The form which an agreement shall take in order to create an equitable lien or mortgage is quite immaterial, for equity looks at the final intent and purpose rather than at the form. If an intent to give, charge or pledge property, real or personal, as security for an obligation appears, and the property or thing intended to be given, charged or pledged is sufficiently described or identified, then the equitable lien or mortgage will follow as of course. See Robinson v. Urquhart, 12 N.J. Eq. 515 (E. & A. 1859); Griffin v. Griffin, 18 N.J. Eq. 104 (Ch. 1866); Brewer v. Marshall, 19 N.J. Eq. 537 (E. & A. 1868); Martin v. Bowen, 51 N.J. Eq. 452 (Ch. 1893).

Plaintiffs relied on the validity of receiving Lynn Bae's notarized signature on the Mortgage and other closing documents from the purchaser's attorneys Hill Wallach, a highly reputable New Jersey law firm. Under the totality of the circumstances, at a minimum an equitable mortgage should be awarded in favor of the Mocks. The fact that Lynn Bae subsequently pledged the same Property to defendant SIM#3 is indicative of her willingness to pledge the Property to help her family members secure loans. The Court can and should draw an adverse inference in this regard; i.e., that Ms. Bae pledged her Property as collateral when family members asked her to do so.

### **DAMAGES**

Plaintiffs' damages consist of the principal amount due on their mortgage, plus accrued interest, late fees and counsel fees permitted by Court Rule. If the Mocks prevail at trial this case should be returned to the uncontested foreclosure unit so that the Mocks can prove their damages in accordance with the final judgment procedure.

### **EXHIBITS**

Counsel have exchanged evidentiary documents and anticipate meeting and conferring for the purpose of stipulating joint trial exhibits into evidence.

### **EVIDENTIARY ISSUES**

1. Whether Mag Bae should be permitted to testify at trial without allowing plaintiffs the opportunity to depose him beforehand. Throughout the course of the case it has been represented to plaintiffs' counsel that Mr. Bae is out of the country. Attempts to serve Mr. Bae with process at the Paramus, New Jersey address identified in Lynn Bae's Interrogatory answers were futile. Mr. Bae has defaulted on the Third Party Complaint. If he is to present himself as a witness at the trial, plaintiffs respectfully request the opportunity to depose him before his trial testimony is heard.

2. Just 13 days prior to the trial date, on September 6, 2012 defendant Lynn Bae produced “new” documents outside the scope of her Interrogatory answers and after the time to amend same expired. These documents consist of a real estate contract and other documents in connection with a previously terminated transaction involving the same Property in issue in the subject foreclosure action. The purchaser in the previous contract is identified as Kathy Bae, who is believed to be Lynn Bae’s aunt. As the proponent of these documents, Lynn Bae will argue that the signatures of Kathy Bae are also forgeries. Kathy Bae is not a party to this foreclosure action, and her signature is not in issue nor should it be. Plaintiffs object to this untimely submission. Further, the documents sought to be introduced are not relevant to the disputed Mortgage in question. Even if the Court were to conclude that this information is relevant, the Court nonetheless can and should exclude it pursuant to N.J.E.R. 403 based on unfair prejudice.

3. Whether the Court should exclude self-serving e-mails purportedly sent by Mag Bae as inadmissible hearsay under N.J.R.E. 802. It is plaintiffs’ understanding that Lynn Bae will attempt to introduce these emails dated 9/7/11 and 9/5/12 even if her father fails to appear to testify at the trial. These documents are completely unreliable, and should be excluded from evidence absent Lynn Bae establishing the proper foundation and authenticity. Defendant cannot rely upon N.J.R.E. 803(b)(1) as a statement against interest of a party defendant. Mag Bae has not appeared in the action. Naming him as a third party defendant for the purpose of transforming inadmissible hearsay statements into admissions by a “party defendant” should not be countenanced.

**CONCLUSION**

Plaintiffs respectfully request that the Court enter a judgment declaring the Mortgage to be valid, striking the responsive pleadings of the defendant Lynn Bae, and returning the matter to the uncontested foreclosure unit for further prosecution.

Respectfully submitted,

LOFARO & REISER, L.L.P.  
Attorneys for Plaintiffs

By: \_\_\_\_\_

Glenn R. Reiser

Dated: September 10, 2012