SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN Justice PART 7

BLUE DANUBE PROPERTY LLC,

Plaintiff,

-against-

MAD 52 LLC,

Defendant.

INDEX NO. 118124/09

MOTION SEQ. NO. 002

MAD 52 LLC,

Third-Party Plaintiff,

THIRD-PARTY INDEX NO. 590066/10

-against-

LIZA LEVINE and BROWN, HARRIS, STEVENS ON SITE MARKETING AND SALES, LLC,

Third-Party Defendants.

The following papers, numbered 1 to 3, were read on this motion.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ■ No

Motion sequence numbers 002, 003 and 004 are hereby consolidated for purposes of disposition.

In motion sequence number 002, third-party defendant Brown, Harris, Stevens On Site Marketing and Sales, LLC (collectively, "Brown Harris") moves, pursuant to CPLR 3211(a)(1) and (5), to dismiss the cross-claims as asserted against it by third-party defendant Liza Levine (Levine), on the ground that it is barred by a general release. In motion sequence number 003, Brown Harris moves, pursuant to CPLR 3211(a) to dismiss the third-party complaint and cross-claim as asserted against it. Defendant/third-party plaintiff Mad 52 LLC (Mad 52) cross-moves,

pursuant to CPLR 3212, for partial summary judgment: (1) dismissing the single affirmative defense to the third-party complaint asserted by Brown Harris; (2) declaring that Brown Harris is conditionally liable for the negligent acts of its employee Levine; and (3) for an assessment of damages in the event that plaintiff is awarded judgment on its complaint.

In motion sequence number 004, plaintiff Blue Danube Property LLC (Blue Danube) moves, pursuant to CPLR 3212(e), for partial summary judgment on the complaint to the extent of immediately cancelling and vacating the collateral mortgage, document number CRFN 2009000179359, on the grounds that said document is forged, false and fraudulent. Plaintiff also seeks to sever its claims for slander of title and damages and permitting same to proceed to a hearing on assessment of damages.

BACKGROUND

This action concerns a collateral mortgage on a residential condo unit in Manhattan known as Unit 945, Cipriani Club Residences at 55 Wall Street (the Unit). The collateral mortgage is in favor of defendant Mad 52, dated April 15, 2009 and notarized June 16, 2009 by Levine, and is purportedly signed on behalf of Blue Danube by one of its members, Ralf Preyer (Preyer). Blue Danube maintains that this collateral mortgage is a forgery. According to Blue Danube, it purchased the Unit in 2007 using all cash, and until the filing of the alleged fraudulent mortgage, it was at all times owned by Blue Danube free and clear of all mortgages, liens and encumbrances (*see* Preyer Affidavit, ¶ 2).

Brown Harris was the exclusive sales agent for a condominium development project known as One Madison Park, whose principals were Ira Shapiro (Shapiro) and Mark Jacobs (Jacobs). Levine was an executive assistant employed by Brown Harris, who, shortly after being employed by Brown Harris, was assigned to work exclusively on the One Madison Park project. Levine maintains that she was also instructed by her supervisor at Brown Harris to follow the instructions of Shapiro and Jacobs.

At the request of Shapiro, Levine notarized the collateral mortgage that is the subject of this litigation, during the time that she was employed by Brown Harris. According to the affidavit of Kevin Kovesci (Kovesci), an executive vice-president of Brown Harris, submitted in support of motion sequence number 003, Levine's duties for Brown Harris did not include notarizing or acknowledging documents. At his deposition, Kovesci testified that Brown Harris neither encourages nor discourages employees from becoming notaries and that, typically, Brown Harris employees do not have notary public licenses (*see* Cross-Motion, exhibit H, I).

In her deposition (Motion sequence number 003, exhibit 4), Levine testified that she had been directed by Shapiro to notarize the signature of Preyer, the signatory appearing on the collateral mortgage. Levine stated that, since Preyer was not before her, she knew that notarizing the signature was improper, but claimed that Shapiro was screaming at her and that she was intimidated by him (*id.*). In addition, Levine averred that she never spoke to anyone at Brown Harris about her notarizing the collateral mortgage that is the subject of this litigation (*id.*). Levine also testified that she became a notary public at Shapiro's request, and that Shapiro paid for her training to take the notary exam (*id.*).

It is Brown Harris' contention that it cannot be held vicariously responsible for Levine's actions which she knew to be improper and which she did not discuss with anyone at Brown Harris. In her cross-claim, Levine seeks contribution from Brown Harris for any damages for which she may be found liable, based on the theory of respondeat superior.

In motion sequence number 002, Brown Harris seeks dismissal of this cross-claim, asserting that Levine executed a release on November 24, 2009 (Motion sequence number 002, exhibit 4), in conjunction with her termination, which states in pertinent part:

> "[Levine] hereby fully unconditionally and FOREVER RELEASES, WAIVES AND DISCHARGES [Brown Harris] ... and covenants and agrees not to institute any action or actions, causes or causes of action (in law or unknown) in state of federal court, based upon or

> arising by reason of any damage, loss, or in any way related to [Levine]'s employment with [Brown Harris or any of its related entities] ... .
>
> [Levine] further agrees, to the extent permitted by law, to indemnify all Released Parties from any and all loss, liability, damages, claims, suits, judgments, attorney's fees and other costs and expenses whatsoever kind or individually, they may sustain or incur as a result of or in connection with the matters hereinabove released and discharged by [Levine]."

The consideration given to Levine pursuant to this release was the sum of $861.57 as full termination benefits (*id.*).

In opposition to motion sequence number 002, Levine maintains that the terms of the release that she signed were unconscionable and, therefore, unenforceable. It is Levine's contention that her termination benefits were made contingent upon her signing the release. The Court notes that these allegations appear in the affidavit of Levine's counsel and are not supported by an affidavit from Levine herself. Also, according to Levine, at the time that her employment with Brown Harris ended, her salary was $56,000.00 per year (Motion sequence number 003, exhibit 4).

In motion sequence number 003, Brown Harris seeks to dismiss the third-party complaint and Levine's cross-claims based on its contention that, if the allegations of the complaint are true, Levine knowingly and improperly notarized Preyer's signature without Preyer being present, and she did so without telling anyone at Brown Harris, thereby negating any liability on the part of Brown Harris based on the theory of respondeat superior.

In opposition to motion sequence number 003, Levine submits an affidavit in which she avers that her employers at Brown Harris told her to follow the instructions of Shapiro and Jacobs, who were principals of One Madison Park but not employed by Brown Harris, and that she did what she was instructed to do. Therefore, Levine asserts that Brown Harris is potentially liable to Blue Danube, pursuant to the theory of respondeat superior.

In its cross-motion, Mad 52 seeks to dismiss Brown Harris' only affirmative defense, which contends that it is not liable for Levine's actions under the doctrine of respondeat superior. Mad 52 argues that it was foreseeable that Levine would be called upon to notarize documents for Brown Harris' clients and, consequently, Brown Harris is vicariously liable, under the doctrine of respondeat superior, for Levine's negligent or intentional acts.

In reply, Kovesci, on behalf of Brown Harris, states that notarizing documents was not part of Levine's employment agreement with Brown Harris, evidenced by the fact that at the time that she was hired, Levine was not a notary. Further, Kovesci says that there is no need for Brown Harris to engage notaries, since they are paid by commission for sales and all of the agreements are negotiated by lawyers. Under these circumstances, Brown Harris maintains that Levine's notarization of Preyer's signature was not a foreseeable consequence of her employment and, hence, Brown Harris cannot be held vicariously liable for her actions.

In motion sequence number 004, Preyer affirms that his signature on the collateral mortgage is forged because, on April 15, 2009, the date of the collateral mortgage, and on June 16, 2009, the date of the acknowledgment of his purported signature, both stating that they were executed in New York, he was out of town and not in the United States. Further, Preyer claims that not only had he never heard of Mad 52, he never agreed to the mortgage, and he was unaware of the collateral mortgage until months after its alleged execution. Preyer further avers that the signature on the mortgage is not his and that he never appeared before Levine.

In support of his contentions, Preyer, an Austrian citizen, has submitted copies of his passport, which do not indicate his being in the United States at the pertinent period (*see* Motion sequence number 004, exhibit 2), the United States Homeland Security Report, indicating that he was not in the United States during the pertinent period (*id.,* exhibit 3), and copies of his airline tickets for his travels in 2009 (*id.,* exhibit 4, 5 & 6), which do not indicate

travel to the United States during the pertinent period.

Based on this affidavit and associated documents, Blue Danube argues that Preyer's signature was a forgery and that the collateral mortgage should be immediately vacated. In opposition, Mad 52 states that the collateral mortgage is presumptively valid, since the signature was acknowledged, and that plaintiff has failed to prove that Preyer's signature was a forgery.

Mad 52 points to several of plaintiff's corporate resolutions that evidence that plaintiff was authorized to lend up to $8 million to an entity known as Level One US Property, LLC, the purpose of which was to invest in the One Madison Park project (*see* Opp., Motion sequence number 004, exhibit B, C and D). In addition, at the deposition of Ian Bruce Eichner (Eichner), a member of Mad 52, Eichner testified that it was his understanding that there was a business relationship between Mad 52, Blue Danube and Preyer (*id.,* exhibit K).

Mad 52 also provides an unrevoked power of attorney, that was executed by another member of Blue Danube in 2007, naming Elizabeth Kovac as agent for Blue Danube to handle the closing of the acquisition of a residence in Manhattan, said power of attorney generally giving the agent the authority to handle a whole range of real estate transactions. Mad 52 argues that this power of attorney raises a question of fact as to whether Blue Danube ratified the collateral mortgage. Further, Mad 52 claims that the affidavit provided by Preyer fails to comply with the requirements of CPLR 2309(c), in that, since the affidavit was taken outside of the United States, it needs to attach a certificate as to the official character of the person administering the oath to Preyer, which it did not have.

In reply, Blue Danube points out that Mad 52 has not challenged the assertion that Preyer was not in the United States at the time of the execution of the collateral mortgage, nor that he did not appear before Levine.

Blue Danube states that, whereas Elizabeth Kovac was authorized to act as Blue

Danube's agent for the acquisition of a condominium unit that is not the subject of this litigation, she was never authorized to act as the agent to acquire any other realty on behalf of Blue Danube. Moreover, there is no evidence that Elizabeth Kovac was involved in the instant transaction.

Preyer also challenges whether he had any financial interest in One Madison Park, except for a minor 4.8% interest in Level One US Property, LLC's profit, which he asserts that he cashed out prior to the date that the collateral mortgage was allegedly executed. Lastly, Preyer avers that he went to the U.S. embassy in Vienna where his affidavit was notarized and was told that further authentication of the notary's authority is not necessary since the notary is an official with the U.S. Department of State.

Blue Danube has also provided the affidavit of Elizabeth Kovac who avers that she has never seen the collateral mortgage, that her signature does not appear anywhere on the document, and that she was not authorized to act on behalf of Blue Danube with respect to the collateral mortgage.

At the oral argument on this motion, Mad 52 argued that, whereas the notarization was improper, there is still a question of fact as to whether Preyer signed the collateral mortgage in Europe and then had it sent to the United States. In other words, even if the notarization was improper, Mad 52 contends that the signature may be genuine and that, to date, there has been no expert analysis of the signature.

STANDARDS OF LAW

Dismiss

CPLR 3211(a), provides that:

> "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> > [1] A defense is founded upon documentary evidence; and
> > [5] the action may not be maintained because of... release"

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and

accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268 [1997]; *Salles v Chase Manhattan Bank,* 300 AD2d 226 [1st Dept 2002]).

Pursuant to CPLR 3211(a)(1), in order to prevail on a motion to dismiss based on documentary evidence, "the documents relied upon musst definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Partnership.*, 221 AD2d 248, 248 [1st Dept 1995]; *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476 [1st Dept 1986]). A CPLR 3211(a)(1) motion "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Summary Judgment

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). The failure to make such a showing requires denial of the motion, regardless

of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION

Brown Harris' motion seeking to dismiss the cross-claim asserted by Levine (motion sequence number 002) is granted and Levine's cross-claim is dismissed. Levine does not challenge the fact that she signed a release relieving Brown Harris from any liability for her acts while she was employed by it. Levine's only opposition rests on the argument that the agreement was unconscionable and, hence, unenforceable because she was forced to sign the release in order to receive any termination benefits.

> "An unconscionable bargain is one which no person in his or her senses and not under delusion would make on the one hand, and no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense" (*Libert v Libert,* 78 AD3d 790, 791 [2d Dept 2010][a property settlement agreement found unconscionable where no provision was made for maintenance, even though

> defendant earned nine times plaintiff's income, and the couple had been married for 21 years] [internal quotation marks and citation omitted]).

In support of her contention that the release was unconscionable, Levine only cites to *Morad v Morad* (27 AD3d 626 [2d Dept 2006]), which found that, under the circumstances of that case, the settlement agreement entered into by the parties was not unconscionable, even though the wife was not provided with any maintenance, despite significant income disparity, the wife waived any portion of the husband's medical practice, and the wife assumed 43% of the marital debt.

In the instant matter, Levine argues that the only way that she could receive her termination benefits was to sign the release. However, the termination benefits totaled $861.57, approximately one week's worth of her take-home salary. The Court does not find that the amount of the benefits offered to be of such a significant number that a reasonable person would feel as though they were forced to sign the release because of economic duress. Moreover, by her own admission, Levine acknowledges that her notarization of Preyer's signature was improper, meaning that she is seeking indemnification from Brown Harris for her own wrongdoing.

Additionally, if Brown Harris were to be found vicariously liable for Levine's actions, Brown Harris would be entitled to seek damages from Levine, not the other way around. The doctrine of respondeat superior only protects the injured third person, not the wrongdoer. Therefore, based on the foregoing, the Court grants Brown Harris' motion seeking to dismiss Levine's cross-claim (motion sequence number 002).

Similarly, Brown Harris' motion seeking to dismiss the third party complaint as asserted against it (motion sequence number 003) is granted, and Mad 52's cross-motion is denied. The crux of this motion and cross-motion is the determination as to whether Brown Harris can be held vicariously liable for Levine's actions under a theory of respondeat superior.

"[U]nder the doctrine of respondeat superior, an employer may be held vicariously liable for torts committed by an employee when the employee acts negligently or intentionally, as long as the conduct complained of is generally foreseeable and a natural incident of the employment" (*Melbourne v New York Life Insurance Co.*, 271 AD2d 296, 298 [1st Dept 2000]). Although, generally, whether a particular act was within the scope of a worker's employment is factually dependant and usually a question left for determination by the trier of fact (*Riviello v Waldron,* 47 NY2d 297 [1979]), the issue may be decided by the courts as a matter of law when the undisputed facts provide no basis for the application of the doctrine (*Schilt v New York City Transit Authority,* 304 AD2d 189 [1st Dept 2003]). Such is the situation in the case at bar.

The affidavits and deposition transcripts submitted with these motions evidence the following: that being a notary was not a condition of Levine's employment; that Brown Harris did not engage notaries; that Levine became a notary based on Shapiro's request, not that of Brown Harris, that Shapiro, not Brown Harris, paid for Levine's notary training; and that Levine did not talk to anyone at Brown Harris about her improperly notarizing Preyer's signature.

In opposition, Mad 52 asks that the court take judicial notice that "duties of administrative assistants employed by large real estate development and sales companies include the notarization and acknowledgment of signatures on real estate documents" (Aff. of Eric J Mandel in Opp.). "[T]he test for judicial notice [is] 'whether the fact rests upon knowledge or sources so widely accepted and unimpeachable that it need not be evidentirily proven' [internal citation omitted]" (*Kingsbrook Jewish Medical Center v Allstate Insurance Company,* 61 AD3d 13, 20 [2d Dept 2009]). The opinion of Mad 52's attorney does not fall within this category, and as such Mad52's request for the Court to take judicial notice is denied.

Moreover, the Court finds that Brown Harris has met its initial burden of providing sufficient evidence that notarization was not a part of Levine's employment duties such that her improper notarization was not a foreseeable incident of her employment, thereby rendering

Brown Harris vicariously liable, pursuant to the doctrine of respondeat superior. In opposition, Mad 52 has only argued supposition and conjecture, which is insufficient to defeat Brown Harris' motion (*see generally Flatbush Pacific Development Corp. v Markowitz,* 50 AD3d 294 [1st Dept 2008]).

Based on the foregoing, Brown Harris' motion to dismiss the third-party complaint as asserted against it (motion sequence number 003) is granted and the cross-motion is denied. That portion of Brown Harris' motion seeking to dismiss Levine's cross-claim has already been discussed and decided in its favor.

Blue Danube's motion (motion sequence number 004) seeking to direct the New York City Register to cancel and vacate the collateral mortgage (Document No. CRFN 2009000179359) is granted.

There has been no challenge made to Preyer's assertions that he was not in the United States at the time that he purportedly signed the collateral mortgage in New York or that Levine improperly notarized a signature that was alleged to be Preyer's. Further, Preyer insists that he never signed the collateral mortgage and that his purported signature thereon is a forgery. Hence, Blue Danube has established a prima facie entitlement to judgment, and the burden shifts to Mad 52 to oppose the motion with evidence in admissible form sufficient to raise a triable issue of fact.

Mad 52's first argument in opposition, that an acknowledged signature is presumptive proof of its authenticity, is found to lack merit, based on the uncontroverted evidence that Levine's notarization was improper. Mad 52's second argument in opposition, that Preyer's affidavit is insufficient because it lacks certification of the authority of the person administering the oath, is also found to be unpersuasive.

Since the person administering the oath was a United States official assigned to the United States embassy in Vienna, no such certificate of authorization is required (*see*

Pensionsversicherungsanstalt v Lichter, 2012 NY Slip Op 31208[U] [Sup Ct, NY County 2012]).

The third argument posited by Mad 52 is that, even though the acknowledgment was improper, it is still possible that Preyer's signature is genuine. However, Mad 52 has provided no evidence in admissible form to support this contention, and its conclusory assertions present no more than a feigned factual issue, which is insufficient to defeat a motion for summary judgment (*see Capraro v Staten Island University Hospital,* 245 AD2d 256 [2d Dept 1997]). Further, although Mad 52 argues that the signature should be submitted to a handwriting expert prior to making any determination, the Court notes that other samples of Preyer's signature have been submitted in connection with these motions and Mad 52 failed to submit them to an expert for analysis in support of its argument, even though it had the opportunity to do so.

Based on the foregoing, the Court grants Blue Danube's motion (motion sequence number 004) and vacates the collateral mortgage. The Court has considered all of the other arguments proffered by the parties and has found them to be unpersuasive.

CONCLUSION

Accordingly, it is hereby

ORDERED that Brown, Harris, Stevens On Site Marketing and Sales, LLC's motion to dismiss the cross-claims as asserted against it by third-party defendant Liza Levine (motion sequence number 002) is granted and said cross-claims are dismissed; and it is further,

ORDERED that Brown, Harris, Stevens On Site Marketing and Sales, LLC's motion to dismiss the third-party complaint as asserted against it (motion sequence number 003) is granted and the third-party complaint is dismissed as asserted against it, with costs and disbursements to said third-party defendant as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further,

ORDERED that Mad 52 LLC's cross-motion (motion sequence number 003) for partial summary judgment is denied; and it is further,

ORDERED that plaintiff Blue Danube's motion (motion sequence number 004) is granted and the New York City Register is directed to cancel and vacate the collateral mortgage, Document No. CRFN 2009000179359, immediately; and it is further,

ORDERED that plaintiff Blue Danube is directed to serve a copy of this Order with Notice of Entry upon all parties and upon the Clerk of the Court, who is directed to enter judgment accordingly.

Dated: 12/11/12

Paul Wooten J.S.C.

Check one: ☐ FINAL DISPOSITION ■ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST