IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

C. A. MITCHELL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 04L-10-042 FSS
	)	
TYRONE A. CHURCH,	)	
	)	
Defendant.	)	
	)	

Submitted: October 29, 2007
Decided: January 31, 2008

MEMORANDUM OPINION AND ORDER
Post-hearing Decision on the Merits

SILVERMAN, J.

This case is unusual. Mitchell is suing on a mortgage that Church denies signing. Moreover, due to the underlying debt's nature – it is a conditional sales contract for home improvement – the court denied holder-in-due-course status to Mitchell.[1] Thus, Mitchell has been obliged to overcome all of Church's defenses to the debt, including Mitchell's dissatisfaction with the contractor's work, the fact that the mortgage was not properly notarized and that a lawyer did not participate in the settlement. To make matters worse, the events at issue happened in 1998, and Mitchell's predecessors-in interest did not attempt to collect, and the contractor is long gone.

I.

On October 2, 2007, the court held a bench trial and the parties submitted post-trial memoranda. Church also amended his Answer to add a counterclaim requiring Mitchell to satisfy the alleged mortgage, so that it is not a cloud on Church's title.

II.

At trial, the court made several findings of fact. The court found that Church signed the contract and the mortgage, and he did it in Delaware. No lawyer

[1] *Mitchell v. Church*, Del. Super., C.A. No. 04L-10-042, Silverman, J. (Jul. 31, 2006) (Letter Op.).

participated in the mortgage settlement. The contractor, Allstar Remodeling Company, Inc., then took the papers to New Jersey, where they were falsely notarized. The contractor did the work on Church's house called for by the contract. When the job was nearly done, the lender, Chevy Chase Bank, FSB, sent the final loan proceeds to Church. According to Church, and the court accepts his testimony, the contractor intercepted the checks and cashed them.

In some ways the work was done poorly. For example, the contractor cut corners on electrical fixtures and moldings. Some of the contractor's work caused drainage problems. For the most part, however, the work was satisfactory. For example, a significant part of the job was aluminum siding that was done nicely. Moreover, there is evidence that poor maintenance caused or contributed to some of the problems. On balance, Church largely got the improvements he borrowed the money for, yet he paid nothing on the loan.

In September 1999, Church sued Allstar over its alleged, shoddy work.[2] The pivotal allegation supporting Church's damages was his claim in paragraph 14:

> As a direct result and foreseeable consequence of [Allstar's] material breaches, [Church] has become personally indebted to Chevy Chase Bank and [Church's] property has been encumbered with an additional

[2] *Church v. Allstar Remodeling Co.*, Del. C.C.P., C.A. No. 1999-09-059, Smalls, J. (Jan. 25, 2002).

mortgage.

Thus, Church's complaint acknowledged and relied on the mortgage, which he now says was invalid. (Ultimately, Church's suit was dismissed for failure to prosecute.[3] Apparently, Allstar disappeared.)

III.

There are three, post-trial, legal questions: If the notarization is invalid, is the mortgage valid? Does a typographical error in the mortgage have an effect on the mortgage's validity? And, does the fact that an attorney was not present at the mortgage's signing invalidate the mortgage?

A.

Invalid Notarization

As mentioned above, Church signed the contract and mortgage in Delaware. The papers were taken by the contractor to New Jersey. The mortgage was then falsely notarized.

There is, however, no statute requiring notarization of the mortgagor's signature. To the contrary, although 25 *Del.C.* § 2101(a) provides a mortgage form that is legally "sufficient," and it includes a notarized acknowledgment, §2101(c) provides that nothing in §2101 invalidates a mortgage that does not follow the

[3] CCP Civ. R. 41(e).

statutory form. By the same token, the notarial acts law provides that although a notary is authorized to take an acknowledgment,[4] the law does not require that a mortgagor's acknowledgment has to be notarized in order to make the mortgage valid.[5] In the end, the issue is not whether the mortgagor's signature was notarized. The issue is whether the mortgagor knowingly signed the mortgage.

Although neither is directly on point, two cases have addressed issues with some bearing on this one. *Handler Construction, Inc. v. Corestates Bank, N.A.*,[6] on which Church relies, was a foreclosure in equity. *Handler* is useful here. There, the holder of a sealed, recorded mortgage had actual and constructive notice of a prior recorded, unsealed, equitable mortgage on the property. *Handler* held that the form of the mortgage simply determined in which court to sue.[7] The mortgage's form did not control its validity.[8] *Borders v. Townsend Associates*, held that an unnotarized mortgage modification was, nonetheless, valid.[9]

This case is an object lesson as to why mortgage lenders should insist on

---

[4] 29 *Del. C.* § 4321 (4) (2006).

[5] *See* 25 *Del. C.* § 2101 (2006).

[6] 633 A.2d 356 (Del. 1993).

[7] *Id*. at 363.

[8] *Id.*

[9] 2002 WL 725266 (Del. Super.).

properly notarized acknowledgments, and not cut corners. If this mortgage had been properly notarized, some of the litigation here would have been avoided. Nevertheless, based on the record – including Church's testimony, his signature's appearance, and the Complaint he filed against the contractor – the court is satisfied that Church knowingly signed the mortgage.

B.

Typographical Error in Mortgage

As mentioned above, the mortgage has a typographical error concerning Church's obligation to pay. Specifically, the mortgage provides:

> . . . . said indebtedness being a total sum of $20,150.00, which includes interest, and payable in SEPTEMBER 2008 (EST), consecutive payments of $300.74 each, beginning on the date set forth in the Contract and continuing on the same day each month thereafter . . . .

Read literally, that suggests Church did not have to start repaying the loan for roughly ten years. The words immediately after "SEPTEMBER 2008 (EST)" manifest a clear intent that Church would make monthly payments starting a month after settlement.

Citing the *Restatement (First) of Contracts*, Church argues that any ambiguity must be construed against the drafter. That may be so, where " . . . . words or other manifestations of intention bear more than one reasonable meaning . . . ."[10]

[10] *Restatement (First) of Contracts*, § 236 (1932).

Here, the intent is apparent.

Mercantile-Safe Deposit & Trust Co., v. Inproject Corp., found that despite ambiguity in a mortgage, intent was clear.[11] Applying the reasoning of *Rohner v. Niemann* (concerning construction of a deed), *Merchantile-Safe Deposit* held that when "uncertainties appear in a grant," they must be construed in favor of the grantee, "as long as such a construction does not violate any apparent intention of the parties to the transaction."[12]

C.

No Attorney at Mortgage Signing

Church relies on *In the Matter of: Mid-Atlantic Settlement Services, Inc.*,[13] for his assertion that the mortgage is invalid because no attorney was present at settlement. Church's reliance on *Mid-Atlantic* is misplaced. First, the Board on the Unauthorized Practice of Law's decision, adopted in *Mid-Atlantic*, states among other things that an attorney is required to conduct a closing in sales and refinancings of Delaware real property. It does not say that mortgage settlements conducted without an attorney are invalid. Second, in its analysis, the Board specifically provides that

---

[11] 1987 WL 10526 (Del.Ch.).

[12] *Id.* at *3 (citing *Rohner v. Niemann*, 380 A.2d 549, 552 (Del. 1977)).

[13] Del. Supr., No. 102, 2000, Holland, J. (May 31, 2000).

the decision "does not affect a home equity loan in which the borrower is acting *pro se*, because no one in that situation would be acting in a representative capacity."[14] Here, Church represented himself.

Mitchell relies on *Hancock v. Citifinancial, Inc.,*[15] which explains that the Board's and the Court's decisions in *Mid-Atlantic* did not determine that the absence of Delaware counsel invalidates a mortgage. Church attempts to distinguish *Hancock* because unlike the Hancocks, he is inexperienced in real estate transactions and he "did not receive the benefits of the loans since Chevy Chase changed the procedures it was to follow, submitting checks prematurely, and then Allstate Remodeling intercepted and forged [Defendant's] endorsements thereon."

Hancock specifically holds that *Mid-Atlantic* did not determine "that the absence of Delaware counsel operates to invalidate, or render unenforceable, the underlying transaction against the mortgagors who receive the benefit of the loan."[16] Even though Church may not be as sophisticated as the Hancocks, one of whom was a mortgage broker, Church intended to "secure a debt with a pledge of real

---

[14] *Id.* at 21.

[15] Del. Supr., No. 311, 2004, Jacobs, J. (July 6, 2005) (ORDER).

[16] *Id.*

property."[17] The contractor, for better or worse, did the work for Church, and the mortgagee paid for it on Church's behalf.

Mitchell claims that he is entitled to the mortgage's principal, $20,150, and the stated interest,12.99%, from October 14, 1998. He also claims a right to attorney's fees under 10 *Del. C.* § 3912, and late charges for each month from November 13, 1998. Church argues Mitchell is only entitled, at most, to the mortgage's principal amount, since Mitchell's predecessor in interest failed to perform.

IV.

No one demanded payment until Mitchell filed this suit on October 13, 2004. Meanwhile, Church tried to knock down the debt when he filed suit in 1999. Until now, Church's debt was unliquidated. Although, Church should have known that he at least owed something.

If the mortgagee had pressed for payment, or the contractor responded to Church's lawsuit, the actual amount that Church owed would have been established. Then, Church could have refinanced this loan as interest rates fell. (The mortgage does not include a prepayment penalty.) Thus, because of the mortgagee's inaction and the contractor's disappearance, Church suffered prejudice. This

[17] *Handler*, 633 A.2d at 363.

situation is as much Mitchell's fault, as he stands in the mortgagee's and the contractor's shoes, as it is Church's. In effect, Mitchell is estopped by the mortgagee's and the contractor's acts from insisting on interest at 12.99% from 1998.

In summary, Church got 60% of the agreed on home improvements, or $12,090. Church's obligation to pay Mitchell began when this suit was filed, October 13, 2004.

Finally, the court will consider whether Mitchell is entitled to attorney's fees if an application and supporting documents, including Mitchell's memorandum of law, are filed. Before anything is submitted, however, the parties shall confer.

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

Cc: Prothonotary (Civil)
Douglas A. Shachtman, Esquire
John R. Weaver, Jr., Esquire