

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

BANK OF GUAM, a Guam Banking Corporation,)

Plaintiff,)

vs.)

DOLORES S. GUERRERO, a/k/a)
DOLORES SABLAN GUERRERO, a/k/a)
DOLORES S. DELEON GUERRERO)
ROSA G. BORJA, FRANCES)
PANGELINAN HILL and BANK OF SAIPAN,)

Defendants.)

ROSA G. BORJA,)

Defendant/Third Party Plaintiff,)

vs.)

CARRIE C. REMUDARO,)

Third Party Defendant.)

Civil Action No. 99-0309D

**ORDER ON MOTIONS
FOR SUMMARY JUDGMENT AND
MOTION TO DISMISS REMUDARO'S
COUNTERCLAIM**

INTRODUCTION

Two mortgages are at issue in this matter. The first, recorded as file number 94-124 on January 12, 1994, involves property owned by Defendant Rosa G. Borja in Papago and is claimed to secure a \$77,000 promissory note given by Borja's sister, Defendant Delores DL Guerrero, to Plaintiff, the Bank [p. 2] of Guam. The second, recorded as file number 94-1464, involves the same Papago property and was given by Guerrero to the Bank of Guam to obtain a second loan for \$99,000 on or about April of 1994. *See* Rotbart Decl. I at A-1. Although the Bank seeks to foreclose the Second Mortgage, Borja claims that both mortgages are void or unenforceable, in part because they were never properly executed and were obtained through fraudulent means.

FOR PUBLICATION

II. BACKGROUND

A. Procedural Posture of This Dispute

1. These matters originally came before the court on December 15, 1999 on Plaintiff's motion for summary judgment against all Defendants (the "Motion"), Defendant Francis P. Hill's cross-motion for summary judgment ("Hill's Cross-Motion") and Defendant Rosa G. Borja's cross-motion for summary judgment ("Borja's Cross-Motion"). Joaquin C. Arriola, Esq. appeared for the Bank of Guam, and Charles R. Rotbart, Esq. appeared on behalf of Defendant, Rosa G. Borja. Neither Delores S. Guerrero, Francis P. Hill, nor the Bank of Saipan appeared at the hearing,¹ nor did Defendants Guerrero or Bank of Saipan file an opposition to the Motion.² Following the hearing, the court entered summary judgment against the Bank of Saipan, continued the matter to February 2, 2000, and announced its tentative ruling denying all motions.
2. Shortly thereafter, Borja filed her motion for summary judgment against Third Party Defendant Carrie C. Remudaro, claiming that Remudaro's violation of her duties as a notary public rendered her liable as a matter of law to Borja, Hill and the Bank for damages.³ On July 5, 2000, the court [p. 3] issued its tentative ruling granting Borja's motion. The following discussion sets forth the court's conclusions and rationale in support of its rulings.

B. Facts

3. In August of 1993, Borja received by order of final distribution title to lot A.H. 474-11, located in Papago. *See* Certificate of Title appended to Declaration of Charles C. Rotbart, filed January 24, 2000 [Rotbart Decl. I'] at A-6. Several months later, Guerrero, then an

¹ After the December 15, 1999 hearing, counsel for Defendant Hill contacted the court's clerk to inform her that the hearing had been rescheduled to February 2, 2000. *See* Order dated December 15, 1999 at 2. Although the file did not contain any Order rescheduling the hearing on the Hill Cross-Motion, the court permitted counsel for Defendant Hill, John Chambers, either to reset the matter for hearing or submit on the pleadings. The parties continued the hearing until February 2, 2000.

² *See* Orders Dated January 12, 2000 (Orders entering Summary Judgment as against Bank of Saipan and declaring mortgage liens inferior to those of Plaintiff).

³ Hill joined in Borja's Motion on June 16, 2000.

assistant vice president at the Bank of Guam, obtained a loan from the Bank in the amount of \$77,000. Rotbart Decl. I at A-14, B-6, B-7 and B-10. Borja contends that without her knowledge, consent, or approval, and in order to obtain the loan, Guerrero provided the Bank with a mortgage dated December 16, 1993 that was secured in part by Borja's Papago property (the "First Mortgage"). Rotbart Decl. I at B-1 (mortgage); B-9 (promissory note dated December 16, 1993); Declaration of Rosa G. Borja, filed January 24, 2000 at ¶ 2 ("Borja Decl"). Although the First Mortgage purports to contain Borja's signature and bears the notary seal of Maria Igisaiar, Borja maintains that she never received, reviewed or signed the First Mortgage, and that she never appeared in front of a notary. *Id.* at ¶¶ 3-5. She further attacks the mortgage as a product of fraud, claiming it is void and unenforceable.

4. The Bank's policies and procedures authorize loans to employees, but only upon approval of the Bank's President/Chief Executive Officer and its Executive Vice President/Chief Operating Officer. Rotbart Decl. at Ex. G-2.⁴ CNMI law, moreover, requires that mortgages be executed by all signatories in front of the notary acknowledging the signature.⁵ Notwithstanding these [p. 4] requirements, only Delores Guerrero was present when the First Mortgage was notarized.⁶ According to Guerrero, after learning that she would need additional collateral to obtain a \$77,000 bank loan, she went to Guam to obtain a mortgage on Borja's property. *Id.* at 30-31:4-9. After obtaining Borja's consent to use her property as collateral, Guerrero returned to Saipan and had the loan papers prepared. *Id.* at 32. Once the mortgage was prepared, she returned to Guam and gave the papers to Borja for signature.

⁴ Although handwritten notations by vice president and credit administrator Daniel L. Perez, appearing on a March 14, 1994 Loan Report, indicate that the \$99,000 debt consolidation loan was approved by the President and Vice President, no documentation was submitted to establish Bank approval of the \$77,000 loan.

⁵ *E.g.*, 2 CMC § 4521 (requiring mortgages, amendments, renewals, and extensions of mortgages to be acknowledged or proven, and permitting such acknowledgment to be made by a notary); 2 CMC § 3321 (empowering a notary public to administer oaths and affirmations, receive proof and acknowledgment of writings, and present and protest commercial paper). *See also* Notice of Adoption of Amendments Regulating the Commissioning and Practices of Notaries and Regulations, 14 Com. Reg. 9642, 9644 (Sept. 15, 1992) at § 1-105 (requiring acknowledgment to take place in notary's presence).

⁶ *See* Rotbart Decl. in Support of Borja's Mot. for Leave to File Third Party Complaint against Maria Bernadita Igisaiar ("Rotbart Decl. II"), at ¶ 5; Excerpts from Deposition Testimony of Dolores S. Guerrero (filed on December 27, 2000) ["Guerrero Dep."] at 37:13-17.

Id. at 32-38. Maria Bernadita Igisaiar, the notary attesting to Borja's signature on the First Mortgage, admitted that she notarized the document at the direct instructions and request of Guerrero, who was her superior at the time. Rotbart Decl. II at ¶¶ 3, 6. Igisaiar's notary journals, however, show no entry for a document notarized on behalf of Dolores Guerrero. *Id.* at ¶ 7; Ex. B.

5. Guerrero admits that neither she nor Borja appeared in front of Igisaiar to execute the document. *See* Guerrero Dep. at 34:3-34:14; 39:3-4. She also admits to knowing that the document should have been executed in the notary's presence. *Id.* at 37. Although Guerrero denies asking Igisaiar to notarize her signature (Guerrero Dep. at 39-40), there is no dispute that, based upon the First Mortgage, the Bank provided funds to or on behalf of Dolores Guerrero in the amount of \$77,000. As a result, a mortgage lien was placed on Borja's property.
6. One month later, the Bank loaned Guerrero an additional \$13,000, and it appears that at some point, the loans were combined. *See, e.g.,* Rotbart Decl. I at A-12 to 14. Loan documentation provided by Guerrero reflects a second mortgage dated April 11, 1994 that secures an April 11, 1994 promissory note of \$99,000 (the "Second Mortgage").⁷ Although the Second Mortgage also purports to contain Borja's signature and is notarized by Defendant Carrie C. Remudaro, Borja maintains, once again, that she never received, reviewed or signed the Second Mortgage. [p. 5] She further insists that she never appeared in front of Remudaro to execute the document. Borja Aff. at ¶ 12.
7. According to Borja, on April 4, 1994, Guerrero arrived in Guam to visit Borja on her birthday. Guerrero Dep. at 34; Borja Aff. at ¶ 8. At this meeting, Guerrero asked Borja to assist her in obtaining a \$10,000 loan. *Id.* Guerrero told Borja that she would require Borja's Papago land to secure the loan, and that payments would only amount to \$200 monthly for five years. Borja Dep. at 15. Although Borja agreed to provide her property as collateral for the \$10,000 loan, she demanded that Guerrero come up with a repayment plan

⁷ *See* Rotbart Decl. I, Ex. A-1 (mortgage); A-12 to 19 (loan memoranda); Affidavit of William D. Leon Guerrero in Opp. to Borja Reply and Ex. K (Promissory Note).

not to exceed five years. She told her sister that in the event she did not make payments as required, with such a plan, Borja would be able to make payments for her. *Id.* at 16.

8. Guerrero produced a mortgage agreement form in blank and asked Borja to sign the last page. Borja Dep. at 15. Although Borja admits executing the last page of some document, she insists that there was no notary present. Borja claims that she signed the last page of what she understood was to be a mortgage securing a loan of \$10,000. Borja Aff. at ¶¶ 5-7, 12. Although the Second Mortgage reflects that it was notarized in Saipan on April 11, 1994, Rotbart Decl. I, Ex. A-5, Borja testified several times during the course of her deposition that she never signed either the First or Second Mortgage. *E.g.*, Borja Dep. at 20-22; *see also* Borja Aff. at ¶¶ 2-5. Nor was she even on Saipan on the date the Second Mortgage was purportedly executed. Borja Aff. at ¶ 12.
9. Guerrero recalls the events leading up to the execution of the Second Mortgage somewhat differently. According to Guerrero, she told her sister that she required additional funds because there was a loan, omitted by mistake, that needed to be consolidated. Guerrero Dep. at 42. Guerrero told Borja that as a result, the paperwork had to be redone. *Id.* at 43. Guerrero recalls traveling to Guam with the Second Mortgage in order to obtain Borja's signature on the document. She further recalls telling Borja that the consolidated loan was for \$99,000. *Id.* at 46-48.⁸ [p. 6]
10. Defendant Carrie Remudaro also admits that she notarized the Second Mortgage but never witnessed Borja's signature. According to Remudaro, then vice-president Franz Reksid, telephoned on April 11, 1994 and asked her to notarize a document as a favor for Delores Guerrero, Operation's Office Manager for the Bank of Guam. Remudaro Dep. at 5-6. At the time, Remudaro was employed by Isla Financial as a notary. *Id.* at 6. To accommodate Reksid, Remudaro agreed to notarize the documents. *Id.* As a long time Bank employee,

⁸ Guerrero also recalls a discussion with Borja concerning the sale of the Papago property. Guerrero Dep. at 48-49. According to Guerrero, Borja was concerned because she wanted to sell the land. Guerrero told Borja that there would not be any problem if she decided to sell the property, because the proceeds from the sale could be used to pay down Guerrero's loan. *Id.* at 49. Guerrero believed that after paying down the loan, she could re write a new loan, using only her own property as security. *Id.* at 98-99.

Remudaro knew that loan documents had to be executed in front of a loan officer. Remudaro, however, assumed that the signatories had appeared before the loan officer, that the loan officer witnessed the signatures, and that somehow she could notarize a document on behalf of the officer who actually witnessed the signature. *Id.* at 6, 12. Thus, after the documents arrived by courier, Remudaro notarized the Second Mortgage attesting to the authenticity of both Borja's and Guerrero's signature. *Id.* at 13. Neither Borja nor Guerrero, however, were present. Remudaro also admits that she knew the signatories were required to appear in front of her personally, but she notarized the \$99,000 mortgage anyway. Remudaro Dep. at 17, 33-34. Remudaro's notary log, moreover, does not reflect an entry for the transaction (*id.* at 3-4).

11. Guerrero never showed Borja the complete mortgage, either in blank or after the required information had been added. Borja Aff. at ¶¶ 5-7. When, in June of 1994, Borja inquired about the status of the loan, Guerrero told her that she had canceled the mortgage (Borja Dep. at 47). When Borja asked Guerrero for the paper she had signed, Guerrero told her that she had torn it up and thrown it away (*Id.*). Borja claims that without knowledge of the Second Mortgage, she later executed a warranty deed transferring a portion of the real property used as collateral for the Second Mortgage to Hill in December of 1997.
12. Notwithstanding the differing versions of the facts, it is undisputed that using Borja's Papago property as collateral, Guerrero obtained a \$77,000 loan and that the Bank later advanced her [p. 7] additional funds secured by a promissory note of \$99,000. Although the Second Mortgage references Borja's property as collateral for the \$99,000 loan, the promissory note evidencing Guerrero's obligation and attached to the Complaint in this proceeding makes no mention of Borja's property as security. Instead, the Note references a mortgage dated April 11, 1994 on real property located in Guam. *See* Complaint, Ex. A. During the course of discovery in this proceeding, moreover, Borja uncovered yet another promissory note dated May 15, 1994 and executed by Guerrero (the "May 15 Note"), containing terms significantly different from those in the Second Mortgage. *Compare* May 15 Note (Rotbart Decl. I at A-20) *and* April 11 Note, attached to Complaint as Ex. "A" *with* Second Mortgage (Rotbart

Decl. I at A-1). Not only do the interest rates, the amount of monthly payments, and the balloon payments recited in these documents differ, but conspicuous in its absence from both the April 11 Note and the May 15 Note is any mention of Borja's Papago property as security.⁹

13. Predictably, Guerrero fell behind on her loan payments, and The Bank provided written notice of default to her at her Saipan addresses.¹⁰ When attempts to reach a workout failed, the Bank sent notice of default and foreclosure to Guerrero. The Bank never notified Borja, however, of the default, nor did it notify her of the foreclosure. Borja Aff. at ¶ 14; Aff. of Larry Philip, submitted in support of the Motion.
14. Guerrero later declared bankruptcy, and the Bank's collection efforts were stayed until May of 1999 when it filed the instant complaint for mortgage foreclosure. *See* Complaint, ¶¶ 4-5; Exs. "A" and [p. 8] "B."¹¹ The Bank filed a Second Amended Complaint, asserting identical allegations but naming Frances Pangelinan Hill and the Bank of Saipan as Defendants, on June 29, 1999. Borja, however, never learned of the default or any proceedings involving her or her land until she was served with the second amended complaint in July of 1999. Borja Aff. at ¶ 14. On or about August 19, 1999, Borja filed her answer to the Second Amended Complaint and counterclaimed against the Bank for wrongful foreclosure, slander of title, fraud, and negligence. Borja also cross-claimed against

⁹ The Second Mortgage makes reference to an April 11, 1994 Note bearing an interest rate of 7.750% for a period of five years. This Note required monthly payments of \$939.18 for sixty months, and called for a balloon payment of \$78,799.28 on April 15, 1999, the date of its maturity. Rotbart Decl. I, Ex. A at A-1 to A-2. The April 11 Note, moreover, also bore an interest rate of 7.75% and called for total payments of \$134,210.90. The May 15, 1994 Note, however, reflects an interest rate of 8.75%, monthly payments of \$997.15, and a balloon payment of \$80,103.95 on May 15, 1999. In contrast to the April 11, 1994 Note, the May 15 Note calls for total payments of \$138,935.80. *See* Rotbart Decl. I at Ex. A-20 to 21. The May 15, 1994 Note further refers to a mortgage dated May 15, 1994 that references certain real property located in Guam as collateral for the loan. The May 15 Note makes no mention of Borja's Papago property.

¹⁰ The Bank asserts that it notified Borja of Guerrero's default by letter dated May 28, 1998. Mot at 2. However, the letters appended to Motion were never sent to Borja's address. In an affidavit attached to the Motion, Bank employee, Larry Philip, states that he tried to serve Borja with notice in 1996, but did not do so because he thought she was off-island. There is no dispute that the Bank never attempted to effect service by publication or substituted service on Borja.

¹¹ The Note attached to the Complaint as Exhibit "A" is dated April 11, 1994 and indicates it is secured by a Mortgage dated April 11, 1994. The Mortgage, attached as Exhibit "B" to the Complaint, is dated April 11, 1994, contains a signature purporting to be that of Defendant Borja, and was notarized by Carrie C. Remudaro on April 11, 1994.

Guerrero for fraud, negligence and slander of title, and filed a third party complaint against notary Carrie Remudaro for indemnification and declaratory relief.

15. On August 13, 1999, Hill filed an Answer to the First Amended Complaint and cross-claimed against Borja, accusing Borja of misrepresentation and fraud, charging her with breaching express and implied warranties of marketable title, and seeking compensatory and punitive damages. Notary Remudaro also counterclaimed against the Bank of Guam, asserting that the Bank violated CNMI law and breached its internal operating procedures, each of which proximately caused the damages to Borja.¹² Remudaro further counterclaimed against Guerrero, asserting that Guerrero had not only obtained Borja's signature on the final page of the mortgage instrument under false pretenses and improperly altered the document, but also that Guerrero had wrongfully permitted and facilitated the processing, approval and payment of a loan to a bank employee (¶¶ 15,17). *See* Remudaro's Answer and Affirmative Defenses to Plaintiff's Complaint and Counterclaim (filed Sept. 28, 1999). [p. 9]
16. Guerrero never filed an answer to the Complaint in this action, and default was entered against her on June 7, 1999. *See* Corrected Default Decree of Foreclosure and Order of Sale.¹³ On September 3, 1999, however, Guerrero filed an Answer to Borja's cross-claim in which she denied ever obtaining her sister's signature under false pretenses, denied substituting the first and second pages of the mortgage instrument, and denied wrongfully permitting or facilitating the processing, approval and payment of the loan. *See* Answer to Cross-Claim at ¶¶ 45-47 (filed Sept.3, 1999).¹⁴

¹² The Bank of Guam moved to dismiss Remudaro's counterclaim on grounds that it failed to state a claim upon which relief could be granted. *See* Motion to Dismiss for Failure to State a Claim (filed Oct. 14, 1999). Because Remudaro's counterclaim consisted of the wholesale duplication of Borja's counterclaim against the Bank – including a request for relief for Borja – the Bank contended that she was not entitled to relief of any sort. The Bank and Remudaro stipulated to the voluntary dismissal of Remudaro's counterclaim against the Bank on November 15, 1999.

¹³ Default entered against Guerrero on August 13, 1999, and a judgment entered against Guerrero in the amount of \$134,903.54 on June 7, 2000. The Order of Sale concerned Guerrero's separately held property that she provided to the Bank as partial security for the loan. Guerrero's property sold for \$50,000 on October 4, 2000. *See* Certificate of Sale (filed Oct. 4, 2000).

¹⁴ On October 17, 2000, Guerrero also filed a motion to set aside the default, claiming her bankruptcy as a defense to the debt and a conversation with the Bank's attorney's in which she claimed that, notwithstanding the bankruptcy, the Bank was still seeking funds from her. Guerrero later filed an ex parte motion to take the motion off-calendar in which

17. Although Remudaro also counterclaimed against the Bank and Guerrero, Remudaro later stipulated to the dismissal of her counterclaim against the Bank.¹⁵ Remudaro's claim against Guerrero – that Guerrero fraudulently obtained Borja's signature to the mortgage instruments, violated CNMI law, and breached the Bank's internal operating procedures -- is still pending. Borja and Hill have also filed third party complaints against Igisaiar, alleging claims identical to those asserted against Remudaro.
18. Notwithstanding the factual discrepancies and its possible involvement in what may prove to be fraudulent conduct, the Bank seeks summary judgment against all Defendants, essentially asserting that because Borja admitted in her deposition to executing a blank mortgage to secure Guerrero's loan, Borja had no one but herself to blame if the terms turned out differently than she planned. Pointing further to the affidavit of Bank executive vice-president and chief operating officer, William D. Leon Guerrero, the Bank denied any wrongdoing and allegations that its officers, directors, or employees violated CNMI law and its own operating procedures. Borja and Hill oppose the [p. 10] Motion, asserting that the mortgage upon which the Bank relies is void, illegal, and unenforceable. In the event that the Second Mortgage proves valid, however, Borja and Hill seek summary judgment against Remudaro, claiming that her false acknowledgment and other breaches of her statutory duties as a notary render her liable to Borja for all damages as a matter of law.

II. QUESTIONS PRESENTED

1. Whether the Second Mortgage is void, voidable, or unenforceable as to Rosa Borja because (1) the mortgage was fraudulently obtained by her sister, Defendant Dolores Guerrero; (2) the mortgage was not acknowledged as required by 2 CMC § 4521; (3) the Bank failed to provide timely notice of default to Borja; and/or (4) the mortgage was novated by the May 15, 1994 Promissory Note.

she withdrew the motion on the basis of correspondence from the Bank's attorneys, indicating that no deficiency against her would be sought.

¹⁵ See Stipulation to Voluntary Dismissal/Order (filed Nov. 15, 1999)

2. Whether the Bank is entitled to summary judgment as a matter of law and should be permitted to foreclose its interest in Borja's property.
3. Whether Remudaro's false notarization and failure to comply with statutory and regulatory requirements render her liable to the Bank and/or Borja for damages as a matter of law.

III. ANALYSIS

1. Hill and Borja claim that the Second Mortgage is void and unenforceable because it was fraudulently obtained, because the Bank failed to provide Borja with timely notice of default, and because the Second Mortgage was not acknowledged as required by 2 CMC § 4521. Borja also attacks it as void because it secures a non-existent promissory note.
2. Plainly, a mortgage obtained by fraud is void *ab initio* or voidable.¹⁶ The factual issues underlying the formation of both Notes and Mortgages, however, are open to widely divergent interpretations. Although Hill and Borja contend that the underlying mortgages were procured by fraud, Guerrero denies obtaining Borja's signature under false pretenses, denies substituting pages of the mortgage instruments, and denies wrongfully permitting or facilitating the processing, approval, and payment [p. 11] of the loans. Since the court "cannot weigh the evidence and make findings on disputed factual issues on a motion for summary judgment," *Rios v. MPLC*, 3 N.M.I. 512, 519 (1993), the court cannot make a finding at this juncture that the Second Mortgage is unenforceable. In addition to the factual circumstances giving rise to the execution of both mortgages, there may also be factual disputes as to the extent of the Bank's participation in what may turn out to be a fraudulent scheme and the extent to which Guerrero and both notaries acted in the transactions as the Bank's agent. Because assessments of credibility and all choices between available inferences are matters to be left for the jury, it will be up to the jury to evaluate the credibility of the evidence and the competency of its source. *Cabrera v. Heirs of De Castro*, 1 N.M.I. 172 (1990) (summary judgment necessitates uncontroverted material facts).

¹⁶ *E.g. Colorado Plasterer's Pension Fund v. Plasterers' Unlimited, Inc.*, 655 F.Supp. 1184, 1186 (D. Colo. 1987); Restatement (Second) of Contracts § 164 (1981). *See also* 12 D. THOMAS, THOMPSON ON REAL PROPERTY § 101.01(c)(1) at 336 (1994)(when a mortgagor has a valid defense to enforcement of the obligation, there is no debt and hence no mortgage).

3. Regarding Borja's claim that the mortgage is unenforceable because it was not acknowledged as required by Commonwealth law or because of statutory prohibitions against loans to insiders, the court finds otherwise. First, although mortgages in the Commonwealth must be acknowledged,¹⁷ "the lack of an acknowledgment shall not, in and of itself, affect the validity of an instrument as between the parties thereto." 4 CMC § 3712. While a defectively acknowledged instrument cannot be recorded and may, under certain circumstances, be treated as if were not acknowledged at all,¹⁸ when the defect is not apparent on the face of the instrument, recording still acts as constructive notice to third persons who may be affected by the transaction at issue. *In re Aerocolor, Inc.*, 256 F.Supp. at 85-86. There is no dispute that the Second Mortgage bore a certificate of acknowledgment in lawful form by a Commonwealth notary empowered to acknowledge writings. Likewise, there is no dispute that the Second Mortgage was duly recorded [p. 12] on June 4, 1994. Because the defective acknowledgment does not void the mortgage as Borja and Hill contend, they are not entitled to summary judgment on these grounds.
4. Similarly, while all banks doing business in the Commonwealth are subject to and must be operated in accordance with Commonwealth law,¹⁹ Borja cites no authority holding that loans made in violation of statutory provisions governing loans between banks and their employees are void or voidable as a matter of law. Nor can she. While the banking statutes do authorize criminal penalties and injunctive relief for statutory violations,²⁰ they do not render loans made in violation of the conflict of interest or unlawful concealment prohibitions void or voidable. Therefore, even assuming that the loans to Guerrero violated

¹⁷ See 4 CMC § 4521. Mortgages which are not acknowledged in accordance with CNMI law, moreover, cannot be recorded. 4 CMC § § 3712, 4522.

¹⁸ See *In re Aerocolor, Inc.*, 236 F.Supp. 84, 86 (S.D.Cal. 1964): "If a statute requires that an instrument, before it shall be recorded ...be acknowledged, and there is either no acknowledgment or a purported acknowledgment is defective in such a way as to render the instrument ineligible for recordation, the general rule is that if it is nevertheless recorded the recordation does not impart constructive notice to anyone of its existence or contents."

¹⁹ See, e.g., 4 CMC § 6104.

²⁰ See 6 CMC §§ 6813-6814.

statutory proscriptions against loans to insiders, and even assuming that the Bank is responsible for the acts or omissions of employees who knowingly and wilfully commit unlawful acts, the mortgages are not void on these grounds.²¹

5. Nor is the Second Mortgage void and unenforceable because the Bank failed to notify Borja that Guerrero's loan was in default. 2 CMC § 4524(e) provides that where there is more than one mortgagor on a mortgage, proper notice upon one mortgagor shall constitute service upon all mortgagors. Since Guerrero was properly notified in accordance with the statute, the Bank's failure to notify Borja of the default cannot by itself render the mortgage unenforceable.
6. Whether the Second Mortgage can be enforced in light of the May 15 Promissory Note is, at this stage of the proceedings, also unclear. The Bank concedes, as it must, that the Note it is seeking to enforce contains no reference to Borja's property as collateral, and that the collateral referenced in that Note references property situated in Guam along with an April 11, 1994 mortgage. *See* D. Leon Guerrero Aff. in Opp. to Borja's Reply and Ex. K. The Bank, moreover, offers no explanation for the May 15 Note unearthed during discovery. At the same time, and [p. 13] notwithstanding the reference in the May 15 Note to a May 15, 1994 mortgage, the only mortgage produced by both parties is the Second Mortgage. While the Note which the Bank is seeking to enforce contains payment terms that are consistent with those referenced in the Second Mortgage,²² the payment terms referenced in the May 15 Note differ substantially from those set forth in the April 11 (the "Second") Mortgage. Notwithstanding these discrepancies, however, Borja's conclusion that a novation must have occurred is unwarranted.
7. The essential elements of a valid novation are a previously valid obligation, the agreement of all parties to a new contract, the extinguishment of the old obligation, and the validity of

²¹ *See, e.g.*, RESTATEMENT, CONTRACTS (SECOND) at § 178(1): "A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."

²² *Compare* Ex. K (Promissory Note) with Second Mortgage, Rotbart Decl. at A-1 to A-4.

the new one. *Adelman v. Christy*, 90 F.Supp.2d 1034 (D. Az. 2000). Assent and acceptance of the terms of a valid novation need not be shown by express words, but may be implied from the facts and circumstances surrounding the transaction and the conduct of the parties thereafter. *See Dunbar v. Steiert*, 31 Ariz. 403, 253 P. 1113 (1927); *United Security Corp. v. Anderson Aviation Sales Co., Inc.*, 23 Ariz.App. 273, 275, 532 P.2d 545 (1975). A novation has been found to exist where the terms of a subsequent agreement changed with respect to the same subject property. *E.g., Simmons v. Sweeney* 13 Cal.App. 283, 109 P. 265 (1910). Absent some understanding of how Guerrero met her payment obligations and whether a new mortgage was in fact executed, it is not at all certain whether the Note which the banks seeks to enforce was novated.

8. In this case the dispute goes directly to the intent of the parties who executed the May 15, 1994 promissory note. The question is whether the new note was executed with intent to extinguish the old obligation. Documents submitted by Borja and the Bank establish that but for Borja's property, the Bank would never have released \$99,000 to Guerrero. Since there is no evidence that the mortgage on Borja's property was released, no evidence that specific property in Guam was offered as additional consideration or substituted for a new loan, and no evidence that Guerrero performed under the May 15 obligation, it is unreasonable for Borja to assume a [p. 14] novation had occurred, particularly when the payment terms set forth in the May 15 Note are less favorable than those set forth in the Second Mortgage. *See* note 9, *supra*.
9. Summary judgment is inappropriate where the court, as fact-finder, must resort to determining the parties' intent because of an ambiguity arising from disputed relevant evidence. *Riley v. Public School System*, Appeal No. 93-027 (N.M.I. Sup. Ct. Feb. 9, 1994). In *Simmons*, as in the instant case, the terms of the two agreements were entirely inconsistent and thus could not be operative at the same time. 13 Cal.App. at 288, 109 P. at 265. Unlike *Simmons*, there are no facts in this case establishing that the parties acted in pursuance of the second agreement. While Borja may be able to present such evidence at trial, the existence of the May 15 Note by itself does not establish the existence of a novation.

10. When a mortgagor has a valid defense to the enforcement of an obligation, there is no debt and hence no mortgage. Similarly, a debt made unenforceable because of fraud practiced on the mortgagor cannot be secured by a mortgage. 12 THOMPSON ON REAL PROPERTY § 101.01(c)(1) at 336. In light of the factual discrepancies surrounding the formation of the mortgage and the Bank's involvement in what may prove to be a fraudulent scheme, the Bank's motion for summary judgment is denied.
11. Whereas a trial will be necessary to establish the material facts concerning the enforceability of the Second Mortgage, the facts giving rise to Remudaro's liability are undisputed. In the Commonwealth, a duly authorized notary is empowered to "administer oaths and affirmations, receive proof and acknowledgment of writings, and present and protest commercial paper." 4 CMC § 3321. Commonwealth law further requires that every person appearing before the notary admit in the notary's presence to having signed the document voluntarily and for its stated purpose. See § 1-105. The principal purpose of a certification of acknowledgment is to provide *prima facie* evidence of the truth of the facts recited in the certification and to establish the genuineness of the signature attached to an instrument. *Bernd v. Fong Eu*, 100 Cal.App.3d 71, 161 Cal.Rptr.58, 62 (1979). Thus a notary who certifies that a person is present, when he or she is absent is negligent, "rendering the notary liable on his bond as for a false certificate. Such conduct [p. 15] is also to be condemned and treated as serious professional misconduct." See *Lewis v. Agricultural Ins. Co.*, 82 Cal. Rptr. 509, 513, 2 Cal. App. 285 (1969).
12. Consistent with these principles, in September of 1992 and pursuant to 4 CMC § 3312, the Office of the Attorney General promulgated Rules and Regulations defining, in material part, an "acknowledgment" as a "notarial act in which a notary certifies that a signer, whose identity is personally known to the notary or proven on the basis of satisfactory evidence, has admitted, in the notary's presence, having signed a document voluntarily for its stated purposes." § 1-104(1), *printed in* 14 Com. Reg. 9644 (Sept. 15, 1992). The Regulations further require the notary to keep, as a public record, a chronological, permanently bound,

official journal of notarial acts, containing numbered pages. Regulations at § 4-101.²³ At the time of notarization, these same Regulations require the notary's journal to be signed by the person for whom a notarial act is performed and a credible witness swearing or affirming to the identity of the person for whom the notarial act is performed. § 4-103. A notary, his or her employer,²⁴ and the sureties of his or her official bond will be liable to any person for all damages proximately caused by the notary's official misconduct in performing a notarization. 4 CMC § 3316; Regulations, § 3-110; § 6-101 at 14 Com. Reg. 9661 (Sept. 15, 1992).²⁵

13. To recover damages from a notary or her employer, the notary's official misconduct need not be the sole proximate cause of the damages. Regulations at § 6-102. Thus it is not essential to Borja's recovery that Remudaro's misconduct be the sole and only cause of Borja's injury: it is sufficient if, in the natural course of events, either by itself or in conjunction with other causes, Remudaro's [p. 16] misconduct produced the damage. *McDonald v. Plumb*, 12 Cal.App.3d 374, 90 Cal.Rptr. 822, 824-825 (1970). Remudaro admits that she falsely acknowledged Borja's signature. Borja contends that by affixing her seal to a mortgage that was not signed in her presence, Remudaro deprived Borja of the opportunity to learn the true facts of the transaction and permitted Guerrero to defraud the Bank. The Bank admits that without a duly acknowledged mortgage, it would not have paid out the money to Guerrero and would not be attempting to foreclose its lien on Borja's property. Thus, regardless of whether the Bank participated in or masterminded the wrongful conduct, or whether Borja's failure to review the mortgage instrument contributed to the end result, to the extent that

²³ For every notarial act, a notary is required to record in the journal, at the time of notarization, detailed information concerning the notarial act, the signature and printed name and address of each person for whom a notarial act has been performed, and a statement that the person was "personally known" to the notary by noting a description of identification documents or the signature and printed name and address of a credible witness swearing or affirming to the person's identity. See also 3 CMC § 3323.

²⁴ The notary's employer will also be liable to any person for "all damages proximately caused ... by the notary's official misconduct in performing a notarization related to the employer's business, if the employer directed, encouraged, consented to, or approved the notary's misconduct, either in the particular transaction or, impliedly, by previous actions in at least one similar transaction subject to similar employer conduct." § 6-101 (c).

²⁵ See also *Summers Bros., Inc. v. Brewer*, 420 So.2d 197.

Borja loses her property or incurs other damages, the court finds Remudaro's misconduct to be a basic underlying cause of the loss. *See MacDonald*, 90 Cal. Rptr. at 824.

CONCLUSION

Accordingly, it is hereby ORDERED that the Bank's motion for summary judgment, Borja's cross-motion for summary judgment, and Hill's cross-motion for summary judgment are DENIED. Borja's motion for summary judgment against Carrie Remudaro is GRANTED. The Bank's motion to dismiss the counterclaim of Third-Party Defendant, Carrie C. Remudaro on grounds that the counterclaim fails to state a claim against the Bank upon which relief can be granted is hereby DENIED as moot.

SO ORDERED this 11 day of January, 2001.

BY THE COURT:

/s/ _____

TIMOTHY H. BELLAS, Associate Judge