

NY CLS CPLR R 4538

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New York

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Civil Practice Law And Rules (Arts. 1 — 100) >

Article 45 Evidence (§§ 4501 — 4551)

R 4538. Acknowledged, proved or certified writing; conveyance of real property without the state.

Certification of the acknowledgment or proof of a writing, except a will, in the manner prescribed by law for taking and certifying the acknowledgment or proof of a conveyance of real property within the state is prima facie evidence that it was executed by the person who purported to do so. A conveyance of real property, situated within another state, territory or jurisdiction of the United States, which has been duly authenticated, according to the laws of that state, territory or jurisdiction, so as to be read in evidence in the courts thereof, is admissible in evidence in the state.

History

Formerly § 4538, add, L 1962, ch 308; amd, L 1962, ch 315, § 1; L 1963, ch 532, § 23, eff Sept 1, 1963.

Annotations

Notes

Prior Law

Earlier statutes: CPA §§ 384, 386, 392; CCP §§ 935, 937, 946; 1 RS 761, § 27.

Advisory Committee Notes

The first sentence of this rule is a restatement of former § 386 and replaces the first sentence of former § 392 and subd 1 of former § 384. The exception for a bill of exchange has been stricken. In 1948, the exception for “a promissory note” was omitted from the section in connection with a revision of the Banking, Debtor and Creditor, Decedent Estate, Insurance, Personal Property, Public Housing, and Real Property Laws relating to mortgage notes. Laws 1948, c. 744, § 14. There is no reason for inhibiting the use of acknowledgments on bills of exchange even though it is unlikely that they will be used in practice. On the other hand, since subscribing witnesses are required for wills, an exception for wills is retained.

The last sentence of this rule is virtually identical with the last sentence of former § 392.

Notes to Decisions

I.Under CPLR

1.Generally

II.Under Former Civil Practice Laws

2.Generally

3.Transfer of corporate stock

4.Certificate of notary

I. Under CPLR

1. Generally

The prima facie proof of the authenticity of a signature may be rebutted by proof, credible to the trier of fact. *Dart Associates v Rosal Meat Market, Inc.*, 39 A.D.2d 564, 331 N.Y.S.2d 853, 1972 N.Y. App. Div. LEXIS 4878 (N.Y. App. Div. 2d Dep't 1972).

In an action to set aside an assignment of a mortgage by a corporation, it was error for the trial court to dismiss the case at the close of plaintiff's evidence based on plaintiff's failure to rebut the presumed validity of an acknowledged instrument, where the only evidence consisted of the testimony of plaintiff's secretary that the signature on the assignment, which was allegedly his own, was not in his handwriting and incorrectly listed him as president, even though he had never held that office, that the seal on the document was not that of the corporation due to a discrepancy in dates, and where the assignment was dated July 5, 1972, but was not acknowledged until April 8, 1974 and not recorded until December 24, 1980. *Royal Inn, Ltd. v M.A.F. Realty, Corp.*, 105 A.D.2d 835, 481 N.Y.S.2d 757, 1984 N.Y. App. Div. LEXIS 20956 (N.Y. App. Div. 2d Dep't 1984).

Presumption of authenticity of signature created by certificate of acknowledgement on power of attorney was rebuttable. *Hoffman v Kraus*, 260 A.D.2d 435, 688 N.Y.S.2d 575, 1999 N.Y. App. Div. LEXIS 3872 (N.Y. App. Div. 2d Dep't 1999).

Court properly denied plaintiff's summary judgment motion on its claim for indemnification where defendant submitted affidavit averring that signatures on indemnity agreements purported to be his and relied on by plaintiff were forgeries, and there were discrepancies on face of notary's acknowledgment. *Seaboard Sur. Co. v Earthline Corp.*, 262 A.D.2d 253, 692 N.Y.S.2d 375, 1999 N.Y. App. Div. LEXIS 7745 (N.Y. App. Div. 1st Dep't 1999).

In an action challenging the validity of a real estate conveyance, while a presumption existed as to the grantor's competence and an affirmation was submitted by the attorney who prepared the deed and witnessed its execution to establish that the deed was properly executed under N.Y. C.P.L.R. § 4538, plaintiff raised a triable issue of fact as to the grantor's incapacity by submitting a certified medical record along with deposition testimony and an affidavit containing her firsthand observations of the grantor's confusion and lack of judgment due to Alzheimer's

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disease during the time period at issue. *Preshaz v Przytazniuk*, 51 A.D.3d 752, 858 N.Y.S.2d 290, 2008 N.Y. App. Div. LEXIS 4208 (N.Y. App. Div. 2d Dep't 2008).

Petitions seeking dissolution of corporations were properly dismissed because the former shareholder sold his interests in the corporations before bringing his petitions; the former shareholder failed to raise a triable issue of fact as to the authenticity of the buy-out agreement and the notarization created a presumption of due execution. *Artigas v Renewal Arts Realty Corp.*, 22 A.D.3d 327, 803 N.Y.S.2d 12, 2005 N.Y. App. Div. LEXIS 10902 (N.Y. App. Div. 1st Dep't 2005).

II. Under Former Civil Practice Laws

2. Generally

Corporate acknowledgment of satisfaction of judgment, not certified in manner prescribed by law and without authority of board of directors, was insufficient. *Dream Homes, Inc. v Kessler*, 93 N.Y.S.2d 144, 196 Misc. 808, 1949 N.Y. Misc. LEXIS 2939 (N.Y. Sup. Ct. 1949).

3. Transfer of corporate stock

An assignment of and power of attorney to transfer stock duly acknowledged, is competent evidence of the transfer. *Holbrook v New Jersey Zinc Co.*, 57 N.Y. 616, 57 N.Y. (N.Y.S.) 616, 1874 N.Y. LEXIS 324 (N.Y. 1874).

4. Certificate of notary

Where certificate of notary fails to show that instrument was acknowledged or proved and certified in the manner required by law, the instrument is not of itself evidence. *In re Kroog's Estate*, 152 N.Y.S. 553, 89 Misc. 35, 1915 N.Y. Misc. LEXIS 669 (N.Y. Sur. Ct. 1915).

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Where document does not upon its face appear to have been a compliance with Real Property Law, § 301, subd 8, certificate of German notary, even if otherwise sufficient, does not render an instrument evidence where no “seal of the city or town in which the notary resides” appears upon the instrument. In re Kroog's Estate, 152 N.Y.S. 553, 89 Misc. 35, 1915 N.Y. Misc. LEXIS 669 (N.Y. Sur. Ct. 1915).

Research References & Practice Aids

Cross References:

Banking department; official documents; destruction of documents; official communications, CLS Bank § 11.

Registration of hotel and motel names, CLS Gen Bus § 209-a.

Requisites of acknowledgement and proof, CLS Gen Const §§ 10., 11.

Federal Aspects:

Proof of official record in United States District Courts, USCS Court Rules, Federal Rules of Civil Procedure, Rule 44.

Authentication and identification of records in United States courts, USCS Court Rules, Federal Rules of Evidence, Rule 901.

Documentary evidence: handwriting, 28 USCS § 1731.

Law Reviews:

Evidence symposium. 52 Cornell L.Q. 177.

Treatises

Matthew Bender's New York Civil Practice:

R 4538. Acknowledged, proved or certified writing; conveyance of real property without the state.

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 4538, Acknowledged, Proved or Certified Writing; Conveyance of Real Property Without the State.

1 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶ 102.01, 103.03.

Matthew Bender's New York Practice Guides:

LexisNexis Practice Guide New York e-Discovery and Evidence § 15.08. CHECKLIST: Authenticating ESI.

LexisNexis Practice Guide New York e-Discovery and Evidence § 15.09. Authenticating Various Types of ESI.

Warren's Weed New York Real Property:

Warren's Weed: New York Real Property § 2.02.

Matthew Bender's New York Evidence:

1 Bender's New York Evidence § 115.02. Authentication of Private Writings and Documents.

1 Bender's New York Evidence § 118.02. Authentication of Public and Official Documents Dealing with Natural Persons.

Forms:

Bender's Forms for the Civil Practice Form No. CPLR 4538:1 et seq.

LexisNexis Forms FORM 1434-19093.—CPLR 4538: Acknowledgment by Individual.

LexisNexis Forms FORM 1434-19094.—CPLR 4538: Acknowledgment by Corporation - Without Seal.

LexisNexis Forms FORM 1434-19095.—CPLR 4538: Acknowledgment by Corporation - With Seal.

Texts:

R 4538. Acknowledged, proved or certified writing; conveyance of real property without the state.

1 Bergman on New York Mortgage Foreclosures (Matthew Bender) § 1.20.

Jonakait, Baer, Jones, & Imwinkelried, New York Evidentiary Foundations (Michie), Ch 5
.Limitations of Credibility Evidence.

2 New York Trial Guide (Matthew Bender) §§ 20.20, 30.15.

Hierarchy Notes:

NY CLS CPLR, Art. 45

Forms

Forms

Form 1 Acknowledgment by Individual of Execution of Instrument

On this _____ day of _____, 20_____, before me personally appeared _____, the subscriber [or subscribers] to me known and known to me to be the person [or persons] described in and who executed the foregoing instrument, and he [or they severally] acknowledged to me that he [they] executed the same.

Notary Public or Com'r of Deeds

Form 2 Acknowledgment by Corporation of Execution of Instrument

State of New York

County of _____

ss.

On the _____ day of _____, 20_____, before me came _____ to me known, who being by me duly sworn, did depose and say that he resides at _____, city of _____, state of _____; that he is the [president] of _____, the corporation described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that it was so affixed by the order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

Notary Public

_____ County

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