To be Argued by:
JARED B. FOLEY
(Time Requested: 30 Minutes)

APL-2019-00145
Kings County Clerk's Index No. 23423/09
Appellate Division–Second Department Docket No. 2016-01722

Court of Appeals

of the

State of New York

US BANK NATIONAL ASSOCIATION, as Trustee for Deutsche ALT-A Securities Mortgage Loan Trust, Series 2007-2,

Plaintiff-Respondent,

– against –

KENYATTA NELSON and SAFIYA NELSON,

Defendants-Appellants,

– and –

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as nominee for Knightbridge Mortgage Bankers, NEW YORK CITY CRIMINAL COURT, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, PEOPLE OF THE STATE OF NEW YORK, JANE DOE #1, JOHN DOE #1, KERRY NEWES, LAMEKA MATTHEWS, SHAINA NELSON and SHAUNA LEWIS,

Defendants.

BRIEF FOR DEFENDANTS-APPELLANTS

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PRELIMINARY STATEMENT

The divided decision of the appellate division should be reversed because, as noted in the well-reasoned minority opinion, the defendant properly raised the issue of whether the bank owned and held the note ("Note") which it was foreclosing upon, and the bank failed to present evidence that it actually owned or held the Note it was suing upon. It is important to remember that U.S. Bank, the plaintiff below, did not make this loan. And in seeking a judgment upon the loan, it failed to provide sufficient evidence that it was even a holder of the Note, as required as an essential element to obtain a judgment of foreclosure. The appellate division minority opinion correctly decided that the foreclosure judgment should be reversed.

U.S. Bank's improper attempt to foreclose on a Note it did not own, provides a quintessential example of the chaos and fallout from the reckless actions by mortgage brokers and lenders in their giddy rush to make loans during the heyday of the real estate bubble, when this loan was made.

In a recent report, the New York State Senate observed that "[b]eginning with the financial crisis in 2007 and in the subsequent decade, there has been a significant nationwide increase in foreclosures. However, in foreclosure actions initiated by lenders and trusts based upon securitized debt obligations, some have called into question the legality of the proceedings due to the plaintiffs' lack of standing and, in many cases, the ambiguity regarding who actually owns the mortgage or debt. . . .

Despite the fact that in order to have an appropriate foreclosure proceeding the filing party must legally have 'standing to commence a foreclosure action' against a mortgagor or borrower, many lenders and trusts alike continue to move forward with a legal action against borrowers when they don't even own the debt."[1]

Ownership of the note and mortgage is an *essential element* of a foreclosure claim. In accordance with CPLR 3018(b) and New York case law, when U.S. Bank specifically pled this element on the face of its own Complaint, the Nelson Defendants properly made this a disputed issue when they denied the bank's specific allegation. As a result, on summary judgment, U.S. Bank was obligated to submit proof of its ownership of the Note, which it did not do. U.S. Bank never should have succeeded on summary judgment or its motion for Judgment of Foreclosure and Sale. Trial should have proceeded on the question of U.S. Bank's ownership of the Note and mortgage ("Mortgage").

U.S. Bank's efforts in the courts below to excise the element of "ownership" of the Note from the foreclosure cause of action, and to avoid its obligation to come forward with sufficient evidence to demonstrate its connection with the Note and Mortgage it is suing upon, have the troubling result of permitting U.S. Bank to take the Nelson Defendants' home without proof that it ever owned the debt.

[1] "An Act to Amend the Real Property Actions and Proceedings Law, in Relation to the Failure to Raise the Defense of Lack of Standing in a Mortgage Foreclosure Action", S5150, "Justification" (2019).

This dangerous outcome was predicted by Chief Justice Kaye, of the Court of Appeals, who presciently warned in 2006 that continued use of the MERS system,[2] which was used with this loan,[3] would have the effect of obfuscating the

[2] The "MERS" System (an acronym for Mortgage Electronic Registration Systems, Inc.) was devised by the lending industry as a means to try to avoid the recording requirements for the transfer of mortgages which provides a clear record of ownership. *See* John Patrick Hunt, et al., *Rebalancing Public and Private in the Law of Mortgage Transfer*, 62 Am. U. L. Rev. 1529, 1557 (2013).

Under state law, every time a financial instrument containing mortgages is sold, state laws require that the sale of each such mortgage (or deed of trust) be recorded in the local county courts in order to preserve certain rights (e.g., the right to foreclose non-judicially), which triggers an obligation to pay corresponding recording fees. *See, e.g.,* N.Y. Real Property Law § 291.

The financial industry, eager to trade in mortgage-backed securities, needed to find a way around these recordation requirements, and this is how the MERS system was born to replace public recordation with a private one. *See MERSCORP, Inc. v. Romaine*, 8 N.Y.3d 90, 96 (2006) ("In 1993, the MERS system was created by several large participants in the real estate mortgage industry to track ownership interests in residential mortgages…[A]ssignments are not publicly recorded; instead they are tracked electronically in MERS's private system.").

Members of the MERS System contractually agree to appoint MERS to act as their common agent on all mortgages they register in the MERS system. *MERSCORP, Inc.*, 8 N.Y.3d at 96. The initial MERS mortgage is recorded in the County Clerk's office with "Mortgage Electronic Registration Systems, Inc." named as the lender's nominee or mortgagee of record on the instrument. *Id.* During the lifetime of the mortgage, the beneficial ownership interest or servicing rights may be transferred countless times among MERS members (MERS assignments), but not a single one of these assignments is ever publicly recorded. *Id.*

[3] The mortgagee in this case was given to "MERS (solely as nominee for Lender [Knightsbridge Mortgage Bankers] and Lender's successors in interest) and its successors in interest". (R. at 125.)

true ownership of mortgages, insulate a noteholder from liability, mask lender error and hide predatory lending practices. *MERSCORP, Inc. v. Romaine*, 8 N.Y.3d 90, 104 (2006).[4]

Here, this foreclosure action was brought by U.S. Bank, purportedly acting as a "Trustee" for some unknown trust, purportedly known as the "Deutsche ALT-A Securities Mortgage Loan Trust, Series 2007-2", which had purportedly received an "assignment" of the Mortgage from an entity known as "MERS", which was purportedly acting as a "nominee" for the mortgage broker Knightsbridge Mortgage Brokers. (R. at 109.) Only a copy of the Note, not the original, was submitted in the court below. (A-394.) The photocopy of the Note, which is payable to Knightsbridge Mortgage Brokers (not U.S. Bank), is accompanied by a photocopy of an undated "Allonge to Promissory Note", payable to the order of Wells Fargo

[4] Judge Kaye wrote: "While MERS necessarily opted for a system that tracks both the beneficial owner of the loan and the servicer of the loan, its 800 number and Web site allow a borrower to access information regarding only his or her loan servicer, not the underlying lender. ***The lack of disclosure may create substantial difficulty when a homeowner wishes to negotiate the terms of his or her mortgage or enforce a legal right against the mortgagee and is unable to learn the mortgagee's identity. Public records will no longer contain this information as, if it achieves the success it envisions, the MERS system will render the public record useless by masking beneficial ownership of mortgages and eliminating records of assignments altogether. Not only will this information deficit detract from the amount of public data accessible for research and monitoring of industry trends, but it may also function, perhaps unintentionally, to insulate a noteholder from liability, mask lender error and hide predatory lending practices.*** *" Romaine*, 8 N.Y.3d 90, 104 (emphasis added).

Bank. (A-401.) This allonge is accompanied by a separate and also undated "Allonge for the Purpose of Endorsement", by Wells Fargo Bank, endorsed in blank, without specifying who it was given to, and without indicating who currently holds the original Note. (A-402.) The photocopies of the Note and the undated allonges were also accompanied by a photocopy of a Limited Power of Attorney, dated May 31, 2012, appointing Wells Fargo Bank as an "Attorney-in-Fact for U.S. Bank, as trustee for a schedule of various unidentified trusts, with the power to take any lawful action to recover on the Note. (A-438.)

Moreover, in connection with U.S. Bank's summary judgment motion, the Vice President of Loan Documentation of Wells Fargo Bank, N.A., purportedly acting as servicer for U.S. Bank, stated in an affidavit dated February 7, 2014 in bald conclusory fashion that U.S. Bank or "an agent of U.S. Bank" was in possession of the Note, but did not attest that he ever personally saw the original Note or that U.S. Bank even held the original Note; nor did the affidavit provide any factual details of a physical delivery and failed to specify *when* U.S. Bank supposedly acquired the Note or whether U.S. Bank possessed the Note prior to the commencement of the action. (R. at 188-91.) There is no evidence as to when the Note was endorsed to Wells Fargo Bank, when the Note was endorsed in blank by Wells Fargo, and when (if ever) the original Note and allonges were ever given to U.S. Bank, the plaintiff. Moreover, it is impossible for anyone at Wells Fargo Bank, which was not appointed

attorney-in-fact until May 31, 2012, to have personal knowledge of the delivery of the Note and allonges prior to September 15, 2009, when the foreclosure action was commenced.

Additionally, the affidavit was deficient for failing to identify or attach any documents that the affiant relied upon showing U.S. Bank's possession or ownership of the Note. On top of this, the affidavit was legally insufficient because it did not mention or address possession of the allonges, which were also required to be in the possession of U.S. Bank.

Given the opacity of the process of transferring and assigning the beneficial interest in the loan, Associate Justice Duffy, writing the Minority Opinion, echoed Judge Kaye's concerns: "The issue of whether a plaintiff in a mortgage foreclosure action has standing is particularly significant given ***the financial crisis that certain banks plunged this country into in the early part of this century with their questionable and outright unethical business practices*** and the continuing allegations by the defense bar of ***rampant fraud in the industry, including whether plaintiffs actually have any connection whatsoever to the notes and debts sued upon in the cases before the courts."*** *U.S. Bank Nat'l Ass'n. v. Nelson*, 169 A.D.3d

110, 120 n.1 (2d Dep't 2019) (Duffy, J., dissenting in part and concurring in part).[5] (emphasis added).

The Second Department's decision below is not only at odds with the law but permits the unjust result of allowing U.S. Bank to foreclose on a debt of which it has not demonstrated ownership.

To the extent that U.S. Bank argues that the issue of U.S. Bank's ownership of the Note and Mortgage has not been preserved, this is also an error. A full review of the record reveals that the issues on appeal – namely, whether the Second Department properly affirmed the final judgment of foreclosure and found that the Nelson Defendants' waived the argument that U.S. Bank did not sufficiently demonstrate it is the owner and that it has standing – have been preserved for review by this Court.

[5] *See also Bank of N.Y. v. Silverberg*, 86 A.D.3d 274, 283 (2d Dep't 2011) (acknowledging the challenge that MERS has posed to the determination of ownership of a debt, finding that "[n]onetheless, ***the law must not yield to expediency and the convenience of lending institutions***. Proper procedures must be followed to ensure the reliability of the chain of ownership, to secure the dependable transfer of property, and to assure the enforcement of the rules that govern real property.") (emphasis added).

STATEMENT OF JURISDICTION

This appeal is taken from an order of the Appellate Division of the Supreme Court, Second Department ("Second Department") entered on January 23, 2019. (A-1234.) In that order, the Second Department modified a decision of the trial court (Noach Dear, J.), that granted plaintiff's motion for a judgment of foreclosure and sale and denied defendants' cross motion pursuant to CPLR § 3211(a) and RPAPL § 1303 to dismiss the complaint.

By decision entered on July 2, 2019, the Second Department granted the Nelson Defendants leave to appeal its January 23, 2019 Order to the Court of Appeals. The Second Department certified one question to this Court as follows: "Was the opinion and order of this Court dated January 23, 2019 properly made?"

The Court of Appeals has jurisdiction to entertain the appeal and review the question raised under CPLR §§ 5602 and 5713.

QUESTIONS PRESENTED

1. Did the Second Department err in concluding that the Nelson Defendants did not timely contest the "ownership" element of U.S. Bank's Foreclosure Cause of Action and, therefore, waived this defense?

2. Did the Second Department err in concluding that the Nelson Defendants did not timely raise the affirmative defense of "Lack of Standing" against U.S. Bank, and, therefore, waived this defense?

3. Did the Second Department err in failing to conclude that U.S. Bank did not make a prima facie showing that it owned the Note and Mortgage?

STATEMENT OF THE CASE

This appeal arises from an action for foreclosure of the property located at 740 88th Street, Brooklyn, New York 11236 (the "Property"). (R. at 25, 55, 158, and 202.) The issue on this appeal is whether the Second Department erred in affirming the decision of the trial court, which granted U.S. Bank's motion for Judgment of Foreclosure and Sale, and denied the Nelson Defendants' Cross-Motion to Dismiss U.S. Bank's Complaint.

By way of a background, on June 25, 2007, the Nelson Defendants executed a mortgage in favor of an entity known as the "Mortgage Electronic Registration Systems, Inc." ("MERS"), purportedly deriving its authority as the "nominee" for Knightsbridge Mortgage Bankers ("Knightsbridge"), to secure a home loan in the amount of $660,000.00. (R. at 123, 134.) The Mortgage was recorded in the Office of the Kings County City Register on July 9, 2007. (R. at 109, .) The Nelson Defendants also executed a Note in favor of Knightsbridge. (A-394.) Thereafter, an undated allonge endorsed the Note from Knightsbridge to "Wells Fargo Bank, NA DBA Americas Servicing Company without recourse." (A-401.) At some point, a second undated allonge was created by Wells Fargo, and endorsed in blank. (A-402.) U.S. Bank is not mentioned anywhere on the Note or allonge.

The Supreme Court, Kings County Action

On September 15, 2009, U.S. Bank, purportedly deriving its authority as a "trustee" of a trust known as the "Deutsche ALT-A Securities Mortgage Loan Trust, Series 2007-2", instituted a legal action for foreclosure upon filing the Summons and Complaint. (R. at 35, 46.) In the FIRST paragraph of the Complaint, U.S. Bank alleged that "Plaintiff . . . [is] the owner and holder of a note and mortgage being foreclosed." (R. at 37.) The THIRD paragraph of the Complaint further alleges that "[t]he mortgage was subsequently assigned to U.S. BANK . . . by assignment dated August 10, 2009 and sent for recording in the Office of the Kings County Clerk." (R. at 38.) The Complaint did not attach the aforementioned Note or documentation reflecting the alleged "assignment" of the Note by the purported "nominee," which purportedly assigned the Note and Mortgage to U.S. Bank, which claimed to be acting as the "trustee," on behalf of the unknown "Trust."

Appearing without counsel, on October 13, 2009, the Nelson Defendants filed their Verified Answers *pro se*. (R. at 71-75, 180-84, and 224-28.) In their Answers, the Nelson Defendants denied the allegations in the FIRST and THIRD paragraphs of the Complaint that U.S. Bank owned and held the Note and Mortgage and that it had been assigned to U.S. Bank. (R. at 72, 74, 181, 183, 225, and 227.)[6]

[6] It is hornbook law that the Nelson Defendants' allegation of lack of information or knowledge acts as a denial, as a matter of New York procedural law. CPLR 3018(a).

On October 20, 2011, the parties appeared before the Foreclosure Settlement Part. The referee Dale Berson directed U.S. Bank on January 19, 2012 to produce "certified copies of the note, mortgage and all assignments" and "an affidavit/affirmation from a person with knowledge that the original loan documents are in plaintiff's possession." (A-179.) There is no record evidence that any such documentation was ever provided.

Subsequently, on September 17, 2014, U.S. Bank filed a motion for Summary Judgment and for an Order of Reference, among other things. In support of its motion, U.S. Bank furnished a *photocopy* of the Note, along with the two undated allonges, the last of which was endorsed in blank. Because U.S. Bank was not the original lender, these documents did not provide any evidence of acquisition of the debt by U.S. Bank.

U.S. Bank provided an affidavit by Chad Stone, the Vice President of Loan Documentation of Wells Fargo Bank, N.A., an Assignment of Mortgage document, and a Limited Power of Attorney for Wells Fargo dated May 2012. Notably, Mr. Stone never attests that U.S. Bank has the original Note, or that he personally examined the Note. And he, neither, attached nor cited to any documents or facts reflecting the physical delivery of the Note to U.S. Bank. Indeed, Mr. Stone could not have had personal knowledge of the delivery of the Note because Wells Fargo did not become a loan servicer for the bank until May 2012, after the beginning of

the litigation. Moreover, none of the documentation furnished on this motion reflects an assignment of the Note. The Assignment of Mortgage document does not purport to convey the Note. (*See* R. at 230.)

On December 2, 2014, despite U.S. Bank's complete failure to provide any evidence or documentation whatsoever that it actually owned the loan (which was originally made by Knightsbridge), the lower court issued a Decision and Order that granted U.S. Bank's Motion for Summary Judgment and for an Order of Reference. (R. at 92-102 and 249-60.) The Court, thereby, appointed Steven Z. Naiman, Esq. as referee to ascertain and compute the amount due to U.S. Bank for principal, interest, and other disbursements advanced, and whether the mortgaged premises should be sold in parcels. (R. at 267-68.)

On August 11, 2015, U.S. Bank filed its new and separate motion for a judgment of foreclosure and sale, which is required before any judgment can be entered in a foreclosure proceeding. Real Property Actions and Proceedings Law ("RPAPL") § 1351. (R. at 22-24.)

The Nelson Defendants, acting with counsel, filed a Cross-Motion to Dismiss the Complaint on October 15, 2015 which sought an order dismissing the Complaint on the grounds that U.S. Bank failed to demonstrate that it owned the Note and Mortgage and, therefore, that U.S. Bank lacked the beneficial interest in the loan. (R. at 155-56 and 164-68.)

In opposition, U.S. Bank failed to produce the original Note, and did not provide sufficient evidence that it was the holder in possession of the Note and allonges. Thus, U.S. Bank failed to make out its prima facie case.

Despite the utter lack of evidence that U.S. Bank actually owned the Note, nevertheless, the lower court, by Decision and Order dated December 15, 2015, incorrectly granted U.S. Bank's Motion for Judgment of Foreclosure and Sale and denied the Nelson Defendants' Cross-Motion to Dismiss the Complaint. (R. at 9-10, 17-18, and 20-21.) The lower court also incorrectly determined that the Nelson Defendants' argument could not even be asserted because it had been waived. (R. at 9-10, 17-18, and 20-21.)

The Second Department Appellate Division Appeal

On February 2, 2016, the Nelson Defendants appealed the lower court's determination. (R. at 1-2.) In an order dated January 23, 2019, the Majority undertook appellate review of the question of whether the Nelson Defendants had timely raised their defenses. The Majority held that the Nelson Defendants' assertion that U.S. Bank lacked standing to bring the mortgage foreclosure action had been waived due to the Nelson Defendants' failure to state the defense separately in their Answers as an "affirmative defense." *Nelson*, 169 A.D.3d at 113.

Associate Justice Duffy, writing the Minority Opinion, disagreed. In Associate Justice Duffy's well-reasoned opinion, she held that, not only had the

standing defense not been waived by the Nelson Defendants and had, also, been preserved for appellate review by the Appellate Division, but also that the Bank had failed to present evidence that it was the owner and holder of the Note. Therefore, the judgment of foreclosure should never have been entered. Associate Justice Duffy held that she would modify the Appellate Division's order by denying U.S. Bank's Motion for Judgment of Foreclosure and Sale. *Nelson*, 169 A.D.3d at 120 (Duffy, J., dissenting in part and concurring in part) ("I disagree with my colleagues in the majority to the extent that they conclude that the order should be affirmed on the ground that the [Nelson Defendants] waived the issue of standing.").

Motion to Reargue or, in
the Alternative, for Leave to Appeal to the Court of Appeals

Because of the obvious importance of these issues in terms of public policy, and the lack of clarity in terms of Appellate Division opinions on these issues, the Second Department held that the issues raised by its Opinion are ripe and appropriate for review by this Court, and granted the Nelson Defendants' motion to appeal to the Court of Appeals (*see* 22 NYCCR 500.22(b)(4)). (A-1234.)

As stated in its motion, granted by the Second Department, the Nelson Defendants' argument can be boiled down to a single simple assertion: Because U.S. Bank alleged that it owns the Nelson Defendants' Note and Mortgage by assignment in the FIRST and THIRD paragraphs of its Complaint, and the Nelson Defendants denied those assertions, those issues were preserved for adjudication.

(A-1292.) The Majority and Minority Opinions were correct to address these issues on appellate review, and the Minority Opinion was correct to hold that the issue had not been waived below and that the Bank had failed to meet its burden in the trial court to obtain a final judgment.

On July 2, 2019, the Appellate Division entered its Decision and Order, granting leave to appeal:

> ORDERED that the branch of the motion which is for leave to appeal to the Court of Appeals is granted and that the following question is certified to the Court of Appeals: "Was the opinion and order of this Court dated January 23, 2019, properly made?"

(A-1234.) Further, in granting leave to appeal, the Second Department added: "*Questions of law* have arisen, which, in our opinion, ought to be reviewed by the Court of Appeals (*see* CPLR 5713)." (*Id*.) (emphasis added).

In granting the Nelson Defendants' leave to appeal to the Court of Appeals, the Second Department rejected U.S. Bank's argument in opposition to the Nelson Defendants' Motion for Leave that the Nelson Defendants failed to preserve the issue of ownership—for a *second* time.

Motion to Dismiss the Appeal Brought Before the Court of Appeals

In a misguided effort to short-circuit the appeals process, on August 30, 2019, U.S. Bank filed a motion to dismiss the appeal on the grounds that the issues on appeal had not been preserved for review, despite the fact that the Second Department itself had specifically certified the case for appeal. This was the *third*

time that U.S. Bank made this same argument. In the alternative, U.S. Bank sought to narrow the question for review by the Court of Appeals. (A-1235-36.)

The Nelson Defendants opposed this improper and misguided motion on the grounds that any challenge to whether the issues on appeal were properly preserved was premature; and, in any case, U.S. Bank's argument betrayed a lack of familiarity with the record and New York law, and was wholly lacking in merit.

On October 23, 2019, the Court of Appeals denied U.S. Bank's motion to dismiss this appeal. (A-1314.)

ARGUMENT

POINT I
THE NELSON DEFENDANTS PLACED U.S. BANK'S OWNERSHIP OF THE NOTE AND MORTGAGE AT ISSUE WHEN THEY DENIED U.S. BANK'S ALLEGATIONS THAT IT OWNED THE NOTE AND MORTGAGE

The Second Department erred when it concluded that the Nelson Defendants had waived their objection to U.S. Bank's allegation that it owned the Note and Mortgage. Because "ownership" of a note is an element of a foreclosure cause of action, the Nelson Defendants placed that fact at issue, and preserved it for adjudication, when they denied U.S. Bank's specific allegations in its Complaint that it owned and held the Note and Mortgage.

A. Ownership of the Mortgage Note is an Essential Element of a Foreclosure Cause of Action

The Majority Decision ignored clear precedent of the New York Court of Appeals, as well as the Appellate Division, that owning or holding a note and

mortgage is an essential element of a foreclosure cause of action. The courts have repeatedly held that "[o]wnership of the note is part of a Plaintiff's prima facie case and its burden of proof. In a foreclosure case, the Plaintiff must plead and prove as part of its prima facie case that it owns the note and mortgage and has the right to foreclose." *Bank of N.Y. v. Waters*, 2013 N.Y. Slip Op 50585(U), 2013 WL 1633119, at *3 (N.Y. Sup. Ct. Apr. 15, 2013); *see also Campaign v. Barba*, 23 A.D.3d 327, at *1 (2d Dep't 2005) ("To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant's default in payment."); *Ocwen Fed. Bank FSB v. Miller*, 18 A.D.3d 527, at *1 (2d Dep't 2005) (same); *Silverberg*, 86 A.D.3d at 279 ("Consequently, the foreclosure of a mortgage cannot be pursued by one who has no demonstrated right to the debt."); *Witelson v. Jamaica Estates Holding Corp. I*, 40 A.D.3d 284, 284 (1st Dep't 2007) ("A prima facie showing to warrant summary judgment foreclosure of a mortgage requires the movant to establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant's default in payment."); *HSBC Bank USA Nat'l Ass'n v. Roumiantseva*, 975 N.Y.S.2d 709 at *2 (N.Y. Sup. Ct. June 11, 2013), *aff'd* 130 A.D.3d 983 (2d Dep't 2015) ("Plaintiff's ownership of the note is not an issue of standing but an element of its cause of action, which it must plead and prove.").

To succeed, a bank seeking to foreclose on a property must, first, show that it has a stake in or connection to the loan that it is suing on. This Court has held that in order to "cross the threshold and seek judicial redress," a litigant must "have something truly at stake in a controversy." *Saratoga Cty. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 812 (2003). Accordingly, the First Department acknowledged that a "[p]laintiff's attempt to foreclose upon a mortgage in which he had no legal or equitable interest [is] without foundation in law or fact." *Katz v. East-Ville Realty Co.,* 249 A.D.2d 243, 243 (1st Dep't 1998).

These principles are consistent with the overwhelming body of law that finds that, in order to sue to recover on a debt, one must *own* the debt. *Von Hesse v. Mackaye*, 8 N.Y.S. 894, 896 (N.Y. Gen. Term. 1890), *aff'd,* 24 N.E. 1099 (N.Y. 1890) ("Any one claiming to own the debt may, it is true, sue the debtor wherever he finds him.").

In similar cases, arising from actions brought by debt-buyers to enforce claims for debts that were assigned to them, New York courts have repeatedly and explicitly held that the plaintiff debt-buyer must prove that it owns the debt as part of its prima facie case. *See Midland Funding, LLC v. Giraldo*, 961 N.Y.S.2d 743, 755 (N.Y. Dist. Ct. Mar. 22, 2013) (When a debt buyer seeks the courts' aid in enforcing an assigned debt claim, the debt buyer should not commence the action unless it can readily obtain admissible proof that would make out a prima facie case. ***Such proof should***

include evidence that it actually owns the debt, that the defendant was given notice of the assignment, and that the underlying debt claim is meritorious.) (emphasis added); *see also Midland Funding LLC v. Wallace*, 946 N.Y.S.2d 67, at *5 (N.Y. City Ct. Jan. 5, 2012) (imposing sanctions on plaintiff law firm where the purchaser of debt commenced an action without having a chain of assignment or proper documentary proof of a claim); *CACH LLC v. Fatima*, 936 N.Y.S.2d 58, at *1 (N.Y. Dist. Ct. Aug. 3, 2011) ("assigned debt claimants must submit satisfactory proof, … to establish their rights as an assignee and the defendant's lawful indebtedness to it under the law of assignment. It is the assignee's burden to prove the assignment. It must further prove that the defendant's particular account was included in the assignment.") (citations and quotations omitted); *DNS Equity Grp. Inc. v. Lavallee*, 907 N.Y.S.2d 436, at *1-2 (N.Y. Dist. Ct. Feb. 22, 2010) (denying summary judgment on debt collection claim because plaintiff failed to provide proof a valid assignment of the obligation); *Rushmore Recoveries X, LLC v. Skolnick*, 841 N.Y.S.2d 823, at *2 (N.Y. Dist. Ct. May 24, 2007) (holding that a plaintiff debt buyer failed to make out its prima facie claim for recovery of a debt because it failed to prove that the account was assigned to the plaintiff); *Palisades Collection, LLC v. Gonzalez*, 809 N.Y.S.2d 482, at *2 (N.Y.C. Civ. Ct. Dec. 12, 2005) (same).

Producing the note—together with its named payees, endorsement, and allonge—is critical to establish ownership of the debt. Whether U.S. Bank "owns"

or "holds" a mortgage note may be established by a written assignment or possession of a note endorsed in blank. *See Deutsche Bank Nat'l Tr. Co. v. Brewton*, 142 A.D.3d 683, 684-85 (2d Dep't 2016). A "holder" is the person in possession of the subject note "payable either to bearer or to an identified person that is the person in possession." UCC 1–201[b][21][A]; *Brewton*, 142 A.D.3d at 684-85. "If the instrument is payable to order it is negotiated by delivery with any necessary indorsement; if payable to bearer it is negotiated by delivery." UCC 3-202[1]It is well-established law by this Court that "***a transfer of the mortgage without the debt is a nullity, and no interest is acquired by it***. The security cannot be separated from the debt and exist independently of it. This is the necessary legal conclusion, and recognized as the rule by a long course of judicial decisions." *Merritt v. Bartholick*, 36 N.Y. 44, 45 (1867) (emphasis added); *Silverberg*, 86 A.D.3d at 280 (same and collecting cases).

Therefore, the requirement that plaintiff demonstrate that it owns the note (or obligation to pay) is not a mere technical requirement. Its purpose is to show that the purported assignee of the note has a right to sue to recover as an *owner* of the debt or "holder" of the negotiable instrument—and establish an essential element of the foreclosure cause of action. This purpose is made clear by Section 3-804 of the UCC which concerns "destroyed or stolen instruments." The official commentary provides that, whereas one who is in possession of a note or instrument has a "prima

facie right to recover," one who does not have possession "must establish the terms of the instrument and his ownership, and must account for its absence." N.Y. U.C.C. Law § 3-804 (McKinney) (emphasis added).

B. The Nelson Defendants Placed Ownership of the Note at Issue When They Denied that U.S. Bank Owned the Note.

U.S. Bank's Complaint, together with the Nelson Defendants' Answer, squarely placed the question of U.S. Bank's ownership of the Note at issue and, thus, preserved the issue for adjudication. On September 15, 2009, U.S. Bank, purportedly acting as the "Trustee" for some unknown "Deutsche ALT-A Securities Mortgage Loan Trust, Series 2007-2", brought an action for foreclosure upon filing the Summons and Complaint. (R. at 35, 46.) In the FIRST paragraph of the Complaint, U.S. Bank alleged that "Plaintiff . . . [is] the owner and holder of a note and mortgage being foreclosed." (R. at 37.) The THIRD paragraph of Complaint further alleges that "[t]he mortgage was subsequently assigned to U.S. BANK . . . by assignment dated August 10, 2009 and sent for recording in the Office of the Kings County Clerk." (R. at 38.) The Complaint did not attach the aforementioned note or a document reflecting assignment of the mortgage to U.S. Bank.

On October 13, 2009, the Nelson Defendants filed their Verified Answer *pro se* on a form provided by the Court. (R. at 71-75, 180-84, and 224-28.) In their Answer, the Nelson Defendants specifically contested the allegations that U.S. Bank is the owner and holder of the Note and Mortgage and that the Mortgage was

assigned to it. The Nelson Defendants stated that they lacked "knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph(s) 1, [and] 3. . ." (R. at 72, 74, 181, 183, 225, and 227) thereby placing the question at issue.

Because U.S. Bank alleged that it owns the Nelson Defendants' Note and Mortgage by assignment in the FIRST and THIRD paragraphs of its Complaint and the Nelson Defendants denied those assertions, those issues were not waived. It is well recognized that, "a mere denial of one or more elements of the cause of action ***will suffice to place them in issue***, and 'there is no reason to [additionally] assert as an affirmative defense the opposite of what the pleading party is [already] required to prove.'" *Nelson*, 169 A.D.3d at 113, 93 N.Y.S.3d at 142 (*quoting* 5-3018 Weinstein-Korn-Miller, *N.Y. Civ. Prac.* CPLR ¶ 3018.00) (emphasis added).

This conclusion is further supported by a plain reading of CPLR 3018(b), which provides that "a party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise" OR "*would raise issues of fact not appearing on the face of a prior pleading*." CPLR § 3018(b) (emphasis added). The Official Commentary to 3018(b) explains that, "[i]t is really the second definition above that offers a sturdy guidepost to the kind of thing that would constitute an affirmative defense." CPLR § 3018, C3018:13 Affirmative Defense, Defined (McKinney). Where a plaintiff's complaint "touches on the matter the defendant

wants to raise against the complaint," the matter need not be treated or pleaded as an affirmative defense. *Cf. id*.

Here, the factual allegation, and element, of ownership of the Note and Mortgage appears prominently on the face of U.S. Bank's Complaint in the FIRST and THIRD paragraphs. Thus, U.S. Bank's Complaint, "touches on the matter the defendant wants to raise against the complaint"—that U.S. Bank has not shown that it actually owns the debt at issue. CPLR § 3018, C3018:13 Affirmative Defense, Defined (McKinney). Therefore, under the second criteria of section 3018(b), there is no requirement that the legal ramifications of this fact be pleaded as an affirmative defense.

Once U.S. Bank's ownership of the Note was placed at issue, U.S. Bank as the proponent of the summary judgment motion was obligated to submit proof of its ownership of the Note as part of its prima facie case—which, it did not do. *See Roumiantseva*, 2013 WL 2500829, at *5 (finding that, once the debtor denied the element of ownership in a foreclosure action and thus placed ownership at issue, the plaintiff bank failed to prove ownership of the mortgage and note). *See also supra* at 15-16 (listing cases).

As explained in Associate Justice Duffy's Minority Opinion, U.S. Bank utterly failed to demonstrate that the Note was physically delivered to it payable either to the bearer or to U.S. Bank, or that the Note had been assigned to it prior to

the commencement of the action. *See* UCC 3-202[1] (ownership established by physical delivery).

The documentation provided by U.S. Bank failed to demonstrate that U.S. Bank owned the Note. In their Answers, the Nelson Defendants placed "ownership" at issue. Despite a Court Order, there is no record that U.S. Bank furnished an original copy of the Note. In connection with the summary judgment motion, U.S. Bank provided the Court with only a *photocopy* of the Note signed by Knightsbridge (who is not a party) and the Nelson Defendants along with an undated allonge from Knightsbridge to Wells Fargo, and another undated allonge by Wells Fargo indorsed in blank. There is no documentation in the Record of an assignment of the Note to U.S. Bank. The Assignment of Mortgage document (from MERS, as nominee for Knightsbridge, to U.S. Bank) (R. at 186) fails to indicate an intent to, also, assign the Note. *See Deutsche Bank Nat'l Tr. Co. v. Guevara*, 170 A.D.3d 603, 603, (1st Dep't 2019) (assignment of mortgage did not purport to say anything about the assignment or physical transfer of the underlying note); cf. *Wells Fargo Bank, N.A. v. Walker*, 141 A.D.3d 986, 988 (3d Dep't 2016) (assignment of note indicated where assignment of mortgage, by its terms, conveyed the mortgage "together with the bond or note or obligation described in said mortgage").

Moreover, the affidavit of Chad Stone, the Vice President of Loan Documentation of Wells Fargo Bank, N.A., which served as a servicer for U.S.

Bank, failed to demonstrate that the Note was physically delivered to U.S. Bank and that it was in possession of U.S. Bank when the action was commenced. The affidavit stated in bald conclusory fashion that U.S. Bank or an agent of U.S. Bank was in possession of the Note, but did not attest that he personally viewed the Note or that U.S. Bank held the original Note; nor did the affidavit provide any factual details of a physical delivery and failed to specify *when* U.S. Bank acquired the Note or whether U.S. Bank possessed the Note prior to the commencement of the action. (R. at 188-91.) Additionally, this affidavit (1) failed to show that the servicer's records had any connection with U.S. Bank's records; (2) failed to specify which records were reviewed; (3) failed to show how the servicer's records pertained to the note at issue; and (4) did not attach the records. (*Id*.)

There is no evidence as to when the Note was endorsed to Wells Fargo Bank, when the Note was endorsed in blank by Wells Fargo, and when (if ever) the original Note and allonges were ever given to U.S. Bank, the plaintiff. Moreover, it is impossible for anyone at Wells Fargo Bank, which was not appointed attorney-in-fact until May 31, 2012, to have personal knowledge of the delivery of the Note and allonges prior to September 15, 2009, when the foreclosure action was commenced. Furthermore, the affidavit was legally insufficient because it did not mention or address possession of the allonges, which were also required to be in the possession

of U.S. Bank. *See Green Tree Servicing, LLC v Molini*, 171 AD3d 880, 883-84 [2d Dept 2019] (J. Duffy, dissent).

Where, as here, the plaintiff was not the original lender, and the Note and allonge was endorsed in blank, "a conclusory statement in an affidavit will not suffice" to establish physical possession by the plaintiff prior to the commencement of the action. *Guevara*, 170 A.D.3d at 603. Courts have routinely denied summary judgment in foreclosure proceedings where, as here, the representative of a loan servicer failed to attest in his affidavit that he had personal knowledge of the physical transfer of the note to the plaintiff, that the note was acquired by the plaintiff prior to the commencement of the litigation, or that he personally examined the original Note. Similarly disqualifying is the representative's failure to identify and attach documents on which he relied that showed physical possession by the plaintiff. *See Bank of New York Mellon v. Ettinger*, 176 A.D.3d 1152, (2d Dep't Oct. 30, 2019) (finding plaintiff bank did not make its prima facie case for foreclosure where it was not the original lender, and the copy of the note it filed was not endorsed, the allonge was undated and endorsed in blank, and the representative did not attest that the plaintiff possessed the note prior to the commencement of the action, or that she had personal knowledge of such possession.); *Residential Credit Sols., Inc. v. Gould*, 171 A.D.3d 638, 639 (1st Dep't 2019) (summary judgment reversed where affiant's purported knowledge was based on unidentified and unproduced records, and she

never claimed that plaintiff possessed the original note); *Guevara*, 170 A.D.3d 603 (reversing summary judgment where loan servicer representative who gave affidavit lack personal knowledge since the loan servicer was appointed after the action began, affiant failed to identify documents showing physical possession, assignment of mortgage did not purport to assign note, affiant did not say he personally viewed the note); *Walker*, 141 A.D.3d 986, 988 (affiant failed to demonstrate that plaintiff physically obtained the Note because the affiant makes no representative as to have examined the original note and relies upon documents not in the record); *JP Morgan Chase Bank, Nat. Ass'n v. Hill*, 133 A.D.3d 1057, 1058 (3d Dep't 2015) ("Since the note has only an undated indorsement in blank from the original lender, it does not evidence plaintiff's possessory interest". The affidavit was insufficient because it was "devoid of any detail as to how plaintiff actually acquired possession of the original note" and lacked a representation that the affiant examined the original note.)

For all of these reasons, Mr. Stone's affidavit lacks any probative value. Accordingly, U.S. Bank failed to establish that it was the owner and holder of the Note prior to commencing the action. Issues of fact remained on the question of ownership of the Note.

The Majority Opinion's throw-away use of the term "standing" distracts from the immutable principle that ownership is an element of U.S. Bank's cause of action

and to make out its prima facie case and succeed on summary judgment, and to shift the burden to the Nelson Defendants with respect to any affirmative defense, U.S. Bank must, *first*, show that it actually owns the Note. *See supra* at 15-16. This requirement is critical because of the undisputed fact that U.S. Bank did not make this loan. It is suing upon a Note it undeniably did not make, without ever establishing its right to recovery. (*See* A-394.)

The question of U.S. Bank's ownership of the Note was not waived because the Nelsons denied this essential element as set forth above. And U.S. Bank did not meet its burden to succeed on summary judgment or on its motion for judgment of foreclosure and sale. Accordingly, the trial court never should have granted summary judgment in U.S. Bank's favor—and U.S. Bank's motion for judgment of foreclosure and sale should have been denied .

POINT II

VIEWED IN TERMS OF "STANDING," THE NELSON DEFENDANTS' ANSWER PLACED U.S. BANK'S OWNERSHIP OF THE NOTE AND MORTGAGE AT ISSUE

Alternatively, even if this Court construes the Nelson Defendants' challenge to U.S. Bank's ownership of the Note as a challenge to its "standing," given the inescapable fact that U.S. Bank alleged on the face of its Complaint that it had standing, the Nelson Defendants were only required to deny the allegation to place it at issue. CPLR § 3018(b). Thereafter, U.S. Bank was required to produce a record of the assignment of the Note, *which it failed to do*.

A. The Nelson Defendants Placed "Standing" in Issue, and U.S. Bank Failed to Meet its Burden.

As explained above, CPLR 3018(b) requires one to plead matters as an affirmative defense if it "would raise issues of fact not appearing on the face of a prior pleading." CPLR § 3018(b). Accordingly, in the authoritative text *New York Practice*, Professor David Siegel explains that ***when "the plaintiff introduces in the complaint a matter that would ordinarily be an affirmative defense for the defendant to plead, the defendant's omission to plead it should not be held a forfeiture***." David Siegel, *N.Y. Prac.* § 223 [6th ed. Dec. 2018 Update] (emphasis added); *see also Nelson*, 169 A.D. 3d at 130 (Duffy, J., dissenting in part and concurring in part).

Where, as here, the issue of "standing" already appears on the face of U.S. Bank's Complaint, the Nelson Defendants need not plead a separate affirmative defense. One need only deny the allegation. As outlined in Associate Justice Duffy's well-reasoned dissenting opinion, U.S. Bank's allegation that it is the "owner and holder of [the] note and mortgage being foreclosed," and that the mortgage was assigned to U.S. Bank is tantamount to an allegation that U.S. Bank has "standing". *Nelson*, 169 A.D. 3d at 126-28 (Duffy, J., dissenting in part and concurring in part); *see also U.S. Bank, N.A. v. Noble,* 144 A.D.3d 786, 787 (2d Dep't 2016) ("A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that, when

the action was commenced, it was either the holder or assignee of the underlying note.") (citations omitted). Because U.S. Bank specifically alleged that it had "standing" in the FIRST and THIRD paragraphs of the Complaint in its mortgage foreclosure action (R. 37-38), the Nelson Defendants' specific denial (or denial of knowledge or information of the allegations) was legally sufficient to place the contention at issue and avoid the penalty of waiver or forfeiture of the issue.

The Second Department's holding to the contrary upends New York case law. Pursuant to CPLR 3018(b), New York courts have generally recognized that ***where factual allegations are pled on the face of the complaint, a denial, alone, puts that fact at issue and obviates the need for defendants to plead a separate affirmative defense***. *See Green Bus Lines v. Consolidated Mut. Ins. Co.*, 74 A.D.2d 136, 142-43 (2d Dep't 1980) (defendant was not required to expressly plead the applicability of coverage exclusions as an affirmative defense in its answer because the factual allegations relating to the coverage exclusions already appeared on the face of the Complaint); *Stevens v. N. Lights Assocs.*, 229 A.D.2d 1001, 1001 (4th Dep't 1996) (held defendant not required to plead a separate affirmative defense: "Plaintiff alleged in her complaint that [Defendant] 'managed, operated and controlled' the property and, by the general denial in its answer, [Defendant] denied that allegation. The question of such control, therefore, became a factual issue that [Defendant] sufficiently raised by the denial in its answer."); *Florio v. Fisher Dev., Inc.*, 309

A.D.2d 694, 696 (1st Dep't 2003) (held defendant not required to plead a separate affirmative defense challenging the choice of law. "This choice of law claim was not 'likely to take [plaintiffs] by surprise' and did not 'raise issues of fact not appearing on the face of a prior pleading' (CPLR 3018[b]). Plaintiff was presumably aware of the potential applicability of Connecticut law, as its complaint asserted the fact that the accident occurred in Westport, Connecticut.").[7]

This analysis is also consistent with the bespoke approach taken by Associate Justice Duffy which requires a court to assess each individual pleading on a case-by-case basis: "Not every complaint in a mortgage foreclosure action will be construed as raising the issue of standing and not every answer will be deemed to specifically deny any such allegation; rather, each complaint is sui generis, and consistent with the purposes of the CPLR, must be examined, together with the

[7] *See also Gulati v. Gulati*, 60 A.D.3d 810, 811-12 (2d Dep't 2009) (held that, where the plaintiff alleged in her divorce petition that the defendant abandoned the marital residence without cause or provocation, and the defendant denied these allegations in his answer, defendant did not need to further allege "justification" as an affirmative defense since "it is not a claim that would be likely to take the plaintiff by surprise, and does not raise issues of fact not appearing on the face of the complaint"); *Giraldo v. Washington Int'l Ins. Co.*, 103 A.D.3d 775, 776 (2d Dep't 2013) ("Contrary to the plaintiffs' contention, the defendant did not waive its defense regarding the applicable coverage limit by failing to plead it as an affirmative defense, since this defense did not take the plaintiffs by surprise, and did not raise issues of fact not appearing on the face of the complaint (*see* CPLR 3018[b])."); *Smith v. D.L. Peterson Tr.*, 254 A.D.2d 479, 479 (2d Dep't 1998) ("Since the question of permissive use appeared on the face of the complaint and was denied in the answer, the Trust arguably was not required to plead nonpermissive use as an affirmative defense.").

answer, to ascertain what issues are in controversy and what issues are not." *Nelson,* 169 A.D. 3d at 125 n.6 (Duffy, J., dissenting in part and concurring in part) (citations omitted). By the denials in their Answer, the Nelson Defendants expressly put standing at issue.

Because U.S. Bank was indisputably not the original lender and the Nelson Defendants put standing at issue, ***U.S. Bank was required to provide evidence that it received the Mortgage and Note by a proper assignment to succeed on summary judgment***. *Agho*, 121 A.D.3d at 347-48 (2d Dep't 2014) ("Where the plaintiff is not the original lender and standing is at issue, the plaintiff seeking summary judgment must also provide evidence that it received both the mortgage and note by a proper assignment . . . which can be established by the production of a written assignment of the note."). It is well-established law by this Court that "***a transfer of the mortgage without the debt is a nullity, and no interest is acquired by it***. The security cannot be separated from the debt and exist independently of it. This is the necessary legal conclusion, and recognized as the rule by a long course of judicial decisions." *Merritt v. Bartholick*, 36 N.Y. 44, 45 (1867) (emphasis added); *Carpenter v. Longan*, 83 U.S. 271, 274 (U.S. 1872) ("The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity."). *See also Citimortgage, Inc. v. Stosel*, 89 A.D.3d 887, 888 (2d Dep't 2011)

("an assignment of the mortgage without assignment of the underlying note or bond is a nullity.") (emphasis added); *Silverberg*, 86 A.D.3d at 280 (same and collecting cases); *U.S. Bank Nat. Ass'n v. Madero*, 80 A.D.3d 751, 753 (2d Dep't 2011) (same); *U.S. Bank, N.A. v. Adrian Collymore*, 68 A.D.3d 752 (2d Dep't 2009) ("Where a mortgage is represented by a bond or other instrument, an assignment of the mortgage without assignment of the underlying note or bond is a nullity".); *Kluge v. Fugazy*, 145 A.D.2d 537, 538, 536 N.Y.S.2d 92, 1988 WL 140474 (2d Dep't 1988) ("foreclosure of a mortgage may not be brought by one who has no title to it and absent transfer of the debt, the assignment of the mortgage is a nullity").

As explained above, U.S. Bank utterly failed to demonstrate that the Note was physically delivered to it payable either to the bearer or to U.S. Bank, or that the Note had been assigned to it prior to the commencement of the action.

The documentation provided by U.S. Bank failed to demonstrate that U.S. Bank owned the Note. Despite a Court Order, there is no record that U.S. Bank furnished the original Note. In connection with the summary judgment motion, U.S. Bank provided the Court with a *photocopy* of the Note signed by Knightsbridge (who is not a party) and the Nelson Defendants along with an undated allonge from Knightsbridge, and another undated allonge by Wells Fargo, endorsed in blank, which made it a negotiable instrument. These photocopied documents are insufficient to evidence that U.S. Bank was in fact the owner and holder of the Note.

Hill, 133 A.D.3d 1057, 1058. There is no documentation in the Record of a valid of assignment or delivery of the Note to U.S. Bank. Additionally, the Assignment of Mortgage document fails to indicate an intent to, also, assign the Note. *See Guevara*, 170 A.D.3d 603, 603; cf. *Walker*, 141 A.D.3d 986, 988.

Moreover, as set forth above, the affidavit of Chad Stone, the Vice President of Loan Documentation of Wells Fargo Bank, N.A., failed to demonstrate that the Note was physically delivered to U.S. Bank prior to the commencement of the litigation. The affidavit of as servicer for U.S. Bank, stated in conclusory fashion that U.S. Bank or an agent of U.S. Bank was in possession of the Note, but did not attest that he personally viewed the Note or that U.S. Bank held the original Note; nor did the affidavit provide any factual details of a physical delivery and failed to specify *when* U.S. Bank acquired the Note or whether U.S. Bank possessed the Note prior to the commencement of the action. (R. at 188-91.) Additionally, this affidavit (1) failed to show that the servicer's records had any connection with U.S. Bank's records; (2) failed to specify which records were reviewed; (3) failed to show how the servicer's records pertained to the note at issue; and (4) did not attach the records. (*Id*.; A-867-68.) Associate Justice Duffy acknowledged that a bare statement from U.S. Bank's serving agent that the original note is in the possession of U.S. Bank, without factual details concerning the physical delivery of the note, or supporting documents, is ***insufficient*** to establish standing as a matter of law. (A-867-68.) *See*

Guevara, 170 A.D.3d at 603; *Ettinger*, 176 A.D.3d 1152; *Gould*, 171 A.D.3d 638, 639; *Guevara*, 170 A.D.3d 603; *Walker*, 141 A.D.3d 986, 988; *Hill*, 133 A.D.3d 1057, 1058.

Moreover, MERS, being listed in the underlying mortgage instrument as a "nominee" and mortgagee for the sole purpose of recording the mortgage, was never the actual holder or assignee of the underlying Note, and, therefore, did not have authority to assign the Note. (R. at 125, 167-68.) *See Silverberg*, 86 A.D.3d 274, 281.

Thus, U.S. Bank did not make out its prima facie case, and summary judgment should not have been granted in its favor, and U.S. Bank's motion for judgment of foreclosure and sale should have been denied.

B. <u>The Nelson Defendants' Answer Put U.S. Bank on Notice That It Had to Prove Its Ownership of the Note and Mortgage, and U.S. Bank was not Prejudiced.</u>

The Second Department's contention that the Nelson Defendants' Answer did not put U.S. Bank on notice that the Nelson Defendants intended to challenge U.S. Bank's ownership of the Note is also inconsistent with CPLR 3026 and 3013. The CPLR affords pleadings a liberal construction. Section 3026 expressly provides that: "Pleadings shall be liberally construed. *Defects shall be ignored if a substantial right of a party is not prejudiced*." (emphasis added).

U.S. Bank was *not* prejudiced by the Nelson Defendants' failure to include a separate heading for a separate affirmative defense, because U.S. Bank had a full and fair opportunity to argue the merits of the Nelson Defendants' argument that U.S. Bank did not own the Note when U.S. Bank opposed the Nelson Defendants' cross-motion to dismiss. *See Hanspal v. Washington Mut. Bank*, 153 A.D.3d 1329, 1331 (2d Dep't 2017) ("Contrary to the plaintiff's argument on appeal, the defendants did not waive this defense, as the plaintiff was not surprised or prejudiced by the defendants' collateral estoppel argument raised in their motion for summary judgment, and he had a full and fair opportunity to contest this argument in opposition to that motion"); *Int'l Fid. Ins. Co. v. Robb*, 159 A.D.2d 687, 689 (2d Dep't 1990) ("Despite the fact that the defendant Robb failed to assert the Statute of Frauds defense in his answer, he was entitled to partial summary judgment on the basis of that defense. Under the circumstances of this case, where the plaintiff had a full and fair opportunity to argue the merits of the Statute of Frauds defense in opposing the defendant Robb's motion for summary judgment, the omission of that defense from the answer did not constitute a waiver thereof").

On the other hand, the Nelson Defendants will be substantially prejudiced if U.S. Bank, without showing that it owns the Note and Mortgage or, otherwise, has a right to recover, forecloses upon their home.

Further, as set forth above, the Nelson Defendants' Answer puts U.S. Bank on notice that they intended to challenge U.S. Bank's ownership of the Note and Mortgage. CPLR 3013 provides that: "Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." The Second Department has specifically held that a nonmoving defendant is "'entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed[.]'" *S. Point, Inc. v. Redman*, 94 A.D.3d 1086, 1087 (2d Dep't 2012) (quoting *Federici v. Metropolis Night Club, Inc.*, 48 A.D.3d 741, 743 (2d Dep't 2008)).[8]

The Nelson Defendants' specific denials of the FIRST and THIRD paragraphs provided U.S. Bank with ample notice that they intended to contest U.S. Bank's ownership of the Note and Mortgage. As explained in Associate Justice Duffy's minority opinion, "the paragraphs at issue did not lump together a set of allegations

[8] Commentators and practice treatises have similarly observed that "[p]arties must generally be granted wide latitude in framing their pleadings so as to raise and have determined every question affecting their interest in the subject matter of the litigation." 84 N.Y. Jur. 2d Pleading § 1. "As long as the pleading may be said to [give notice to the other side], in whatever terminology it chooses, this [pleading requirement dictated by CPLR 3013)] is satisfied[.]" CPLR § 3013, C3013:2 Requirement One: Pleading Should Give Notice (McKinney). "The test is entirely sui generis." *Id*. Indeed, one of the very reasons the CPLR was adopted was "to make pleadings less rigid." David Siegel, *N.Y. Prac* § 208 [6th ed. Dec. 2018 Update].

pertaining to a variety of matters. Rather, the FIRST paragraph of the complaint in each respective case set forth that [U.S. Bank] had standing to commence the action, to wit, that it was the owner and holder of the note and mortgage at issue, and, in each case, the [Nelson Defendants] specifically denied that allegation or [denied knowledge and information] as to the truth of that allegation." *Nelson*, 169 A.D. 3d at 133 (Duffy, J., dissenting in part and concurring in part) (citations omitted).

The Nelson Defendants' separate, identical answers consisted of handwritten responses on court-issued forms. (R. 72-75.) On these forms, the Nelson Defendants' only option was to list the number of each paragraph in designated spots either admitting allegations in the paragraph or denying knowledge or information sufficient to form a belief as to the truth of the allegations in the paragraph.

Pro se pleadings in particular—like the *pro se* Answer submitted here—should be afforded and granted a liberal and broad interpretation to their papers. *See Hughes v. Rowe*, 449 U.S. 5, 9-10 (1980) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)); *Pezhman v. City of New York*, 29 A.D.3d 164, 168 (1st Dep't 2006); *Ward v. New York City Transit Auth.*, 95 N.Y.S.3d 779, 780 (N.Y. Sup. Ct. Mar. 6, 2019).

Thus, the Nelson Defendants specifically denied U.S. Bank's allegation that it was the owner and holder of the Note at the time the action was commenced and,

by doing so, put U.S. Bank on notice that standing was at issue, consistent with CPLR §§ 3018(b), 3026 and 3013.

POINT III
THE QUESTION OF OWNERSHIP HAS BEEN PRESERVED FOR APPEAL

To the extent that U.S. Bank argues that this issue has not been preserved for appellate review by this Court because the question of "ownership" was not raised on the motion for summary judgment, U.S. Bank is mistaken. The leading treatise on Court of Appeals practice explained that a question of law is preserved where it was presented to the trial court by motion or objection at a time when the court had an opportunity to act upon it:

> As previously noted, the general rule, subject to certain exceptions, is that in order for a claim of error to present a question of law reviewable by the Court of Appeals, it must have been preserved for appellate review by an appropriate motion, objection, protest or other action in the court of first instance.
>
> This requirement is designed to provide the court below with an opportunity to correct any error at a time when that may be readily done. The requisite objection or protest to a particular ruling or instruction may be made either at the time of such ruling or instruction or *'at any subsequent time when the court had an opportunity of effectively changing the same.'*

Arthur Karger, *The Powers of the NY Court of Appeals* § 21:11 (emphasis added). *See also Mohassel v. Fenwick*, 5 N.Y.3d 44, 53 (2005) (finding that an argument of error should have been raised earlier on the administrative appeal "at a time when

the underlying circumstances could have been explored and any apportionment error timely corrected"); *People v. Lopez*, 71 N.Y.2d 662, 666 (1988) ("In order for there to be a question of law reviewable by this court, the trial court generally must have been given an opportunity to correct any error in the proceedings below at a time when the issue can be dealt with most effectively.").

In foreclosure actions, arguments need not be raised on a motion for summary judgment to be preserved for appeal. In New York, there is a unique procedure governing foreclosure actions, which includes a) motion for summary judgment, b) the appointment of a referee, and c) a subsequent separate motion for judgment of foreclosure and sale, *before* a final judgment of foreclosure can be entered by the court. *See* 2 Mortgages and Mortgage Foreclosure in N.Y., § 36:2 ("Once the report of the referee to compute has been duly completed and submitted, the plaintiff must move for its confirmation and for judgment of foreclosure and sale.").

New York Courts have frequently acknowledged the capacity of defendants in foreclosure actions to raise issues on a cross-motion to dismiss, following a motion for judgment of foreclosure and sale, relevant to defenses or Plaintiff's prima facie case. And the courts have held that such arguments *have been preserved* for appellate review.

For example, in the foreclosure action *Wells Fargo Bank, N.A. v. Merino*, 173 A.D.3d 491, at *1 (1st Dep't June 11 2019), the Appellate Division reviewed the

Supreme Court's decision to grant a motion for judgment of foreclosure and sale, and deny the defendant's cross motion to dismiss. As in the case at bar, the defendant initially proceeded *pro se*, and raised the defense of plaintiff's non-compliance with the foreclosure notice requirements in her answer which is "a condition precedent to the commencement of its foreclosure action." *Id*. However, the defendant did not raise this issue in her opposition to plaintiff's motion for summary judgment, which was subsequently granted. *Id.* Later, the bank filed a motion for judgment of foreclosure sale. *Id.* In response, the defendant filed a cross-motion to dismiss, raising her notice defense. *Id.* Citing the "law of the case" doctrine, the court declined to consider Merino's notice defense. *Id.* The Appellate Division reversed. *Id.*

The Appellate Division explained that, even though the defendant did not raise the noncompliance defense on summary judgment, that "does not preclude her, however, from raising plaintiff's noncompliance *prior to entry of judgment of foreclosure and sale*." *Id*. at *1 (emphasis added). The Appellate Division held it "was an improvident exercise of discretion to apply the law of the case doctrine and decline to reconsider" the defendant's defense. *Id*.

Similarly, in the foreclosure action *Emigrant Mortg. Co., Inc. v. Lifshitz*, 143 A.D.3d 755, 755-56 (2d Dep't 2016), the Appellate Division held that the trial court did not err in addressing a RPAPL 1304 notice defense, that was not argued on

summary judgment, nor did it err in considering newly submitted evidence in opposition to a motion for judgment of foreclosure and sale. In finding that the trial court "did not improvidently exercise its jurisdiction in declining to apply the doctrine of law of the case" the Appellate Division stressed that, like here, the court "gave the plaintiff a full opportunity to respond to and submit further evidence addressing that evidence." *Id*.

It is hornbook procedural law that, on motion, New York trial courts may, and frequently do, revisit decisions made on summary judgment, prior to entry of the final judgment, and the arguments made on these subsequent motions are preserved for appeal.

In *Nat'l Mortg. Consultants v. Elizaitis*, 23 A.D.3d 630, 630 (2d Dep't 2005), the appellate court found that the trial court providently exercised its discretion in entertaining the plaintiff's *second* summary judgment motion and reviewing a prior order of the same court which incorrectly determined that the plaintiff NMC did not own the mortgage and lacked standing. On the second motion, *7 years later*, the court was made aware that it erred. While the mortgage was delivered to NMC, the written assignment was erroneously placed in the name of an entity that did business with the plaintiff and was owned by the same principals. *Nat'l Morg. Consultants v. Elizaitis*, 787 N.Y.S.2d 679, 2004 WL 1326619, at *2-3 (N.Y. Sup. Ct. Mar. 17, 2004). Confronted with these facts, the trial court deemed NMC the owner and

proper plaintiff. *Id.* at *4. On appeal, the Second Department explicitly rejected the defendant's "law of the case" argument and upheld the trial court's right to correct clear error. *Elizaitis*, 23 A.D.3d at 630. "Indeed, a court may review a previously-decided matter where there is a need to correct clear error." *Id.* As stated in *Mortgage Electronic Registration Systems, Inc. v. Lopez*, "[T]he court retains continuing jurisdiction to reconsider any prior intermediate determination it has made during the pendency of the action." 38 Misc.3d 1219[A], at *4 (N.Y. Sup. Ct. Jan. 31, 2013). *See also Madison Acquisition Grp., LLC v. 7614 Fourth Real Estate Dev. LLC*, 47 Misc. 3d 1207(A), at *2 (N.Y. Sup. Ct. Apr. 7, 2015) (following grant of summary judgment and Order of Reference and Judgment of Foreclosure and Sale, the Court vacated the Judgment because plaintiff did not establish proper standing for failure to furnish an original copy of the note at issue in the matter.)

A. The Nelson Defendants Have Preserved the Issue of Whether U.S. Bank Owns the Note and Mortgage.

The Second Department correctly determined that the issue of U.S. Bank's ownership of the Note and Mortgage was preserved for appellate review. The Second Department implicitly rejected U.S. Bank's prior argument that the "law of the case" somehow prevented the Appellate Division from addressing the issue on appeal. And the Appellate Division rejected U.S. Bank's argument that the Nelson Defendants' arguments on its Motion for Leave had never been raised before when it granted leave to appeal to this Court. (A-1234.)

As the Nelson Defendants have argued repeatedly, U.S. Bank's Complaint, together with the Nelson Defendants' Answer, squarely placed the question of U.S. Bank's ownership of the Note and Mortgage at issue and, thus, preserved the issue for adjudication. On September 15, 2009, U.S. Bank, purportedly acting as a "Trustee" for some unknown trust, purportedly known as the "Deutsche ALT-A Securities Mortgage Loan Trust, Series 2007-2", which had purportedly received an "assignment" of the note and mortgage from an entity known as "MERS", which was purportedly acting as a "nominee" for the mortgage broker, initiated a court action in the New York courts requesting a judgment of foreclosure upon filing the Summons and Complaint. In the FIRST paragraph of the Complaint, U.S. Bank alleged that "Plaintiff . . . [is] the owner and holder of a note and mortgage being foreclosed." The THIRD paragraph of Complaint further alleges that "[t]he mortgage was subsequently assigned to U.S. BANK . . . by assignment dated August 10, 2009 and sent for recording in the Office of the Kings County Clerk." (R. at 37-38.) The Complaint did not attach the aforementioned Note or any documentation reflecting the purported alleged "assignment" of the Mortgage to U.S. Bank.

On October 13, 2009, the Nelson Defendants filed their Answer *pro se* on a form provided by the court. In their Answer, the Nelson Defendants denied the allegations. (R. at 72, 74, 181, 183, 225, and 227.)

Thereafter, the Nelson Defendants have repeatedly argued that U.S. Bank was required to prove that it owns and holds the Note and Mortgage as part of its prima facie case; but U.S. Bank failed to do so. For example, in the Attorney Affirmation submitted in support of cross-motion and opposition to plaintiff's Motion for Judgment of Foreclosure and Sale, before the trial court, the Nelson Defendants wrote:

> It is well-settled that in order to commence a foreclosure action, a plaintiff must have a legal or equitable interest in the mortgage . . . In a judicial foreclosure case, the plaintiff must plead and prove as part of its prima facie case that it owns the note and mortgage and has the right to foreclose.

(R. at 165.) The Nelson Defendants moved to dismiss the foreclosure claim for failure to prove "ownership" prior to the judgment of foreclosure and sale—when the *nisi prius* court still had an opportunity to act. Accordingly, the issue was well-preserved for appeal. *See* Arthur Karger, *The Powers of the NY Court of Appeals* § 21:11.

Later, in the Nelson Defendants' Opening Brief before the Appellate Division, the Nelson Defendants renewed this argument:

> In a judicial foreclosure case, a plaintiff must plead and prove as part of its prima facie case that it owns the note and mortgage and has the right to foreclose.

(A-766.) And, again, later in the Opening Brief:

> As stated previously, in a judicial foreclosure case, a plaintiff must plead and prove as part of its prima facie case that it owns the note and mortgage and has the right to foreclose . . . .

(A-768-69.) Finally, in the Nelson Defendants' Reply Brief, they wrote:

> It is clear that in order to commence a foreclosure action, a plaintiff must have a legal or equitable interest in the mortgage and that the plaintiff must plead and prove as part of its prima facie case that it owns the note and mortgage and has the right to foreclose.

(A-812.)

Subsequently, in the Appellate Division's Opinion on January 23, 2019, the majority addressed this very question of whether ownership of a note and mortgage is an "essential element" of a foreclosure cause of action. *Nelson*, 169 A.D.3d at 113. While the Court demurred, nurturing the split within the Appellate Division, Associate Justice Duffy, in her minority opinion, went on to address whether U.S. Bank had proved that it owned the Note and Mortgage. In Associate Justice Duffy's well-reasoned minority opinion, she writes:

> In this case, as the record amply demonstrates and as will be discussed below, the plaintiff failed to establish, *prima facie*, its status as the holder of the note at the time the action was commenced and, thus, the Supreme Court should have denied its motion for a judgment of foreclosure and sale.

See Nelson, 169 A.D.3d at 126 (Duffy, J., dissenting in part and concurring in part). That the Appellate Division then granted the Nelson Defendants leave to appeal to

the Court of Appeals acknowledges and shows that this issue was raised and is ripe for determination by this Court.

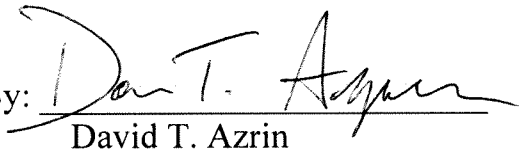
Thus, all the issues raised by the opinion of the Appellate Division, for which it granted leave to review, have been preserved for review by this Court.

CONCLUSION

Accordingly, for all the reasons set forth above, this Court should find that there is an issue of fact as to whether U.S. Bank was in fact actually the owner and holder of the Note and Mortgage when it filed this foreclosure action. Further, this Court should find that the Nelson Defendants properly preserved the question of U.S. Bank's ownership of the Note, and that U.S. Bank's motion for summary judgment and its motion for judgment of foreclosure and sale should have been denied. This case should be remanded for trial on the question of ownership of the Note and Mortgage.

Dated: New York, New York
December 23, 2019

GALLET DREYER & BERKEY, LLP

By: 
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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: New York, New York
December 23, 2019

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