To Be Argued By:
JARED B. FOLEY
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APL-2019-00145
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Appellate Division–Second Department Docket No. 2016-01722

Court of Appeals

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.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

GALLET DREYER & BERKEY, LLP
Attorneys for Defendants-Appellants
845 Third Avenue, 5th Floor
New York, New York 10022
Tel.: (212) 935-3131
Fax: (212) 935-4514

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PRELIMINARY STATEMENT

U.S. Bank's Opposition Brief fails to even address or attempt to rebut the critical issue in this case, namely that, based on the incomplete documentation submitted below to support its summary judgment motion, U.S. Bank did not show it had the right to bring this lawsuit, because it did not show that it owned and held the Note. U.S. Bank does not have the legal or factual basis for bringing this lawsuit.

U.S. Bank's Opposition Brief, likewise, fails to address or rebut the indisputable fact that, in its own foreclosure claim, U.S. Bank specifically alleged that it was the "owner *and* holder of the subject mortgage and note," and that the Nelsons did in fact deny these allegations. Therefore, it could not have been any surprise to U.S. Bank that it had to address this issue to prevail on its claim.

ARGUMENT

POINT I
U.S. BANK HAS CONCEDED THAT IT FAILED TO SHOW IT WAS THE RIGHT ENTITY TO BRING THIS LAWSUIT.

U.S. Bank does not dispute the fact that U.S. Bank did not make the loan to the Nelsons. The loan was made by Knightsbridge Mortgage Brokers. (A-394).

Nevertheless, U.S. Bank brought a lawsuit against the Nelsons, claiming that it was 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.109,123,134.)

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 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.).

This incomplete documentation wholly failed to show that U.S. Bank was the owner and holder of the Note, or how ownership and possession was supposedly transferred from Knightsbridge Mortgage Brokers, through various secret entities, to U.S. Bank.

U.S. Bank's declaration, submitted to support its claim, was incomplete and inadequate. A Vice President of Loan Documentation of a different bank, Wells Fargo Bank, N.A., stated in bald conclusory fashion that U.S. Bank or "an agent of U.S. Bank" was in possession of the Note. (R.188-91.)

But the affiant did not and could 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. (*Id*.) The affiant failed to identify or attach any documents that the affiant relied upon showing U.S. Bank's possession or ownership of the Note. The affiant also did not even mention or address possession of the allonges, which it must have to show ownership.

U.S. Bank failed to submit any evidence whatsoever 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.

Of course, the affiant could not attest to any of these facts, because Wells Fargo Bank was not appointed attorney-in-fact until May 31, 2012, well after the foreclosure action was commenced.

Given U.S. Bank's utter failure to even make a prima facie showing that it was actually the right entity to bring this lawsuit, Associate Justice Duffy, writing the Minority Opinion, specifically found that "the evidence submitted by the plaintiff in support of its motion for a judgment of foreclosure and sale did not demonstrate that the note was physically delivered to it payable either to the bearer or to the plaintiff, or that the note had been assigned to it prior to the commencement of the action." *U.S. Bank Nat'l Ass'n v. Nelson*, 169 A.D.3d. 110, 134 (2d Dep't 2019) (Duffy, J., dissenting in part and concurring in part). Justice Duffy explained:

> The plaintiff did not attach a copy of the note to the complaint, and there is nothing in the record connecting the plaintiff's alleged possession of the note to its commencement of this action.
>
> The affidavit of the Vice President of Loan Documentation of Wells Fargo Bank, N.A., as servicer for the plaintiff, stated in a conclusory fashion that the plaintiff or an agent of the plaintiff was in possession of the note, without providing any factual details of a physical delivery and failing to specify when the plaintiff acquired the note or whether the plaintiff possessed the note prior to the commencement of the action. Moreover, this affidavit (1) failed to show that the servicer's records had any connection with the plaintiff'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 have the records attached. Thus, the plaintiff failed to establish that it was the holder of the note prior to commencing the action. The record only contains documents that indicate that the plaintiff acquired the subject mortgage from Mortgage Electronic Registration Systems, Inc., by assignment on August 10, 2009; the record contains no documents showing that the plaintiff possessed the note or that the note was transferred to it.

> The plaintiff therefore failed to demonstrate that it was the holder or assignee of the note at the time the action was commenced, and therefore did not establish, prima facie, that it had standing to commence this action.

Id. at 134-35 (citations omitted).

U.S. Bank's Opposition Brief does not even attempt to address or rebut these facts. U.S. Bank's Opposition does not dispute that U.S. Bank failed to show that it was even the right entity to bring this lawsuit. U.S. Bank has conceded this point for this appeal.

As a result, all of U.S. Bank's legal arguments in this appeal must be considered against the backdrop of the undisputed fact that it failed to show that it was the right entity to bring this lawsuit.

POINT II
RPAPL §1302-A PERMITS THE NELSONS TO RAISE A STANDING DEFENSE.

Newly enacted RPAPL §1302-a expressly permits the Nelsons to raise the defense that U.S. Bank lacks "standing" to bring this foreclosure action.

> §1302-a. Defense of lack of standing; not waived.
>
> Notwithstanding the provisions of subdivision (e) of rule three-two hundred eleven of the civil practice law and rules, any objection or defense based on the plaintiff's lack of standing in a foreclosure proceeding related to a home loan, . . . shall not be waived if a defendant fails to raise the objection or defense in a responsive pleading or pre-answer motion to dismiss. A defendant may not raise an objection or defense of lack of standing following a foreclosure sale . . .

§2. This act shall take effect immediately.

(2019 Laws of New York, Chapter 739).

While, as a general matter, statutes are applied prospectively, an exception is made for "remedial legislation or statutes governing procedural matters" which are applied retroactively. *Majewski v. Broadalbin–Perth Central School District*, 91 N.Y.2d 577, 584, (1998). If a statute is remedial in nature, it "should be liberally construed to carry out the reform intended and spread its beneficial effects as widely as possible, and therefore should be accorded retroactive effect". *Jaquan L. v. Pearl L.*, 179 A.D.3d 457, 459 (1st Dep't 2020); *Lesser v. Park 65 Realty Corp.*, 140 A.D.2d 169, 173 (1st Dep't 1988).

Because Chapter 739 is silent as to its retroactive application, the Court must review the legislative history to discern the legislative intent and purpose. *Matter of Duell v. Condon*, 84 N.Y.2d 773, 783 (1995). The Court must consider (1) whether the statute was designed to rewrite an unintended judicial interpretation, and (2) whether the legislative history establishes that the purpose of the amendment was to *clarify* what the law was always meant to do and say, and (3) whether the legislature conveyed a sense of urgency. *In re Gleason (Michael Vee, Ltd.)*, 96 N.Y.2d 117, 122–23 (2001).

The statutory language, as well as the legislative history, demonstrate that §1302-a was remedial in nature. "[R]emedial statutes are those designed to correct

imperfections in the prior law, or which provide a remedy for a wrong where none previously existed." N.Y. Stat. Law §54, Comment; *see also* N.Y. Stat. Law §55, Comment ("Procedural statutes are usually remedial in their nature and therefore receive ordinarily the same construction accorded remedial legislation.").

Section 1302-a was enacted to remediate the harm caused to borrowers by the overzealous lending industry, whose predatory and toxic loans, made to satiate a crazed mortgage securitization market, helped cause the financial crises of 2007-2008. After the crises, banks brought foreclosure actions against borrowers such as the Nelsons. The vast majority of these actions were default proceedings with no involvement by defendant homeowners whatsoever. This prompted the New York State Courts, followed by the state legislature, to implement a series of policies to ensure that foreclosing plaintiffs were actually entitled to foreclose, and that judgments of foreclosure and sale were not premised on fabricated evidence. (Brief of Legal Services NYC et al., as Amicus Curiae, at 1, *Freedom Mortg. Corp. v. Engel*, Index No. 1139/15, APL-2019-00114.) Chapter 739 is the latest effort to address this crisis.

The legislative history shows that the purpose of the law is to protect homeowners, many of whom appear *pro se*, and especially communities of color and the elderly who have been disproportionately affected, from inadvertently waiving the standing defense and allowing banks to foreclose on debt they do not own.

Because of lenders' greed in making loans to be bundled for the securities market, lenders became careless and sloppy, transferring loans from the original lender, to MERS, and then to other parties, without proper documentation. This reckless behavior often resulted in the wrong party bringing a foreclosure action against a homeowner. Section 1302 was enacted to address this reckless behavior. As stated in the legislative history, the statute was necessitated by the fact that "many lenders and trusts alike continue to move forward with a legal action against borrowers when they don't even own the debt. . . . In this situation, an entity can foreclose on a home they lack any legal right to foreclose on." (Bill Jacket, 2019 Laws of New York, Chapter 739 ("Bill Jacket"), attached as Exhibit A to the Jan. 14 Ltr. of Supplemental Authority, S003).[1]

Given that it was clearly designed to address the reckless actions of the lending industry years ago following the 2007-2008 crises, and the foreclosure actions brought years ago in the wake of that crises, the remedial purpose of Chapter

[1] During debate on Chapter 739, Assemblyman Thomas Abinanti expanded upon its purpose:

> Because of electronic systems these days, the banks pass around all of the paperwork that's supposed to go with them. . . . . So this is just an additional protection to make sure that the–if there's going to be a mortgage foreclosure that the—the foreclosure is granted to the bank or the lender that has the right to do so. This will not tie up a proceeding, this is just making sure the system works in today's electronic world.

(Statement of Rep. Abinanti, New York State Assembly Minutes, June 20, 2019 ("Assembly Minutes"), at 34).

739 would be substantially undermined if §1302-a were only applied prospectively. *See Gleason*, 96 N.Y.2d at 122–23 (finding the remedial purpose of the new statute would be undermined if only applied prospectively); *see also Brothers v. Florence*, 95 N.Y.2d 290, 299-300 (2000) (same); *Matter of OnBank & Trust Co.*, 90 N.Y.2d 725, 731 (1997) (same); *Nelson v. HSBC Bank USA*, 87 A.D.3d 995, 998 (same).

Moreover, the legislative history shows that §1302-a was merely designed to clarify what the law was always meant to do. *See Gleason*, 96 N.Y.2d at 122–23. Specifically, §1302-a was necessary to clarify §1302(1)(a), which requires a plaintiff in a foreclosure action to plead that it "is the owner and holder of the subject mortgage and note," and resolve "conflicting case law" over the circumstances under which the standing defense is waived. (*See* Bill Jacket, at S003, S007, S00l0, and S0013). "Absent the clarification provided under this proposal, mortgagees will continue to be able to foreclose solely because an otherwise viable standing defense was not timely raised."(*Id*. at S003; *See also Id*. at S007 (Division of the Budget Bill Memo states "This bill would clarify the existing statute to maintain that the defense of standing is not waivable and can be raised throughout the foreclosure process."))[2]

[2]*OnBank*, 90 N.Y.2d 725, 731 (1997) (finding it relevant to the retroactivity analysis that " . . . the amendment's sponsor . . . in his memorandum in support of the bill and in his letter to the Governor's Counsel [stated] that the amendment was intended to *clarify* the law that trustees could pass along the costs of mutual fund management to the common trust funds") (emphasis added); *Gleason*, 96 N.Y.2d at 122–23 (finding it relevant that "the legislative history establishes that the purpose of the amendment was to clarify what the law was always meant to do and say: that all arbitration-related applications should be concentrated in a single proceeding or action, to promote

Finally, the Legislature evinced a sense of urgency when it determined that Chapter 739, was to "take effect immediately". *See Gleason*, 96 N.Y.2d 117, 122 (legislature "evinc[ed] a sense of urgency" by directing that the amendment "was to take effect immediately"); *Florence*, 95 N.Y.2d at 299 (same); *Becker v. Huss Co.*, 43 N.Y.2d 527, 542 (1978) (same).

Each of the *Gleason* factors, weigh in favor of applying Chapter 739 retroactively to this pending litigation.

The primary case relied upon by U.S. Bank, *Simonson v. Int'l Bank*, 14 N.Y.2d 281, 289 (1964), is distinguishable because the court in that case found that the statute (CPLR §1003) did not apply retroactively because the statute specifically said so.[3]

judicial economy and prevent forum shopping."); *Nelson v. HSBC Bank USA*, 87 A.D.3d 995, 996 ("The express purpose of the law was 'to clarify the scope' of the City's Human Rights Law because it was 'the sense of the Council that New York City's Human Rights Law has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law.'"); *Cf. Majewski*, 91 N.Y.2d at (1998) ("In an analysis of retroactive application, we have found it relevant when the legislative history reveals that the purpose of new legislation is to clarify what the law was always meant to say and do".)

[3] Likewise, other cases cited by U.S. Bank are distinguishable and not relevant, because in those cases, the Legislature or the statute expressly stated that the statute was to be applied prospectively. *See Wade v. Byung Yang Kim*, 250 A.D.2d 323 (2d Dep't 1998); *Lipkis v. Gilmour*, 160 Misc.2d 50 (1st Dep't 1994) ("[t]he words 'hereafter deemed in compliance' used in the statute imply prospective, not retroactive, operation"); *Majewski*, 91 N.Y.2d 577 (1998) (during floor debates the legislature stated it was to be prospective).

Moreover, *Simonson* and the cases cited by U.S. Bank are irrelevant because in those cases, the courts were chiefly concerned that a new statute might "destroy rights already accrued"—such as nullifying the right to bring a summary judgment motion, a cause of action, or a defense. But this has not happened here. Applying the statute will not destroy any rights already accrued. Accordingly, the cases cited by U.S. Bank are inapposite. [4]

Instead, this case is most akin to *Matter of Jessica R. by Feder*, 78 N.Y.2d 1031, 1033 (1991). In that case, this Court held that a discovery statute enacted during the appeal of a family court proceeding should apply retroactively to enable parents accused of abuse to examine the accusing child in an adversarial setting. This Court remitted the case to the trial court "for reconsideration [of its prior denial of an examination] in light of the change in the law." *Feder*, 78 N.Y.2d at 1033. Like here, "[t]he statute is designed to enhance procedural fairness and the fact-finding

[4] *Augur v. State of New York*, 236 A.D.2d 177, 180 (3rd Dep't 1997) (applying new statute would deprive parties of the ability to bring a motion for summary judgment); *Phoenix Garden Rest. v. Chu*, 245 A.D.2d 164, 165 (1st Dep't 1997) (same); *Krug v. Jones*, 252 A.D.2d 572 (2d Dep't 1998) (same); *Chapman v. State of New York*, 261 A.D.2d 814, 815 (3rd Dep't 1999) (applying the new statute would result in *waiver* of a defense, "procedural statutes (although generally given retroactive effect) will be applied in pending actions so as to affect only procedural steps taken after their enactment *and not so as to destroy rights already accrued*") (emphasis added); *Pelnick v. State of New York*, 171 A.D.2d 734, 735 (2d Dep't 1991) (effect of applying new law would be to waive a defense); *Charbonneau v. State*, 148 Misc.2d 891, 895 (Ct. Cl. 1990) (same); *Wade v. Byung Yang Kim*, 250 A.D.2d 323, 32 (2d Dep't 1998) (same).

process". *Id*. The provision at issue was remedial, and the subject matter of child abuse evinced a sense of urgency. *Id*. *See also Gleason,* 96 N.Y.2d at 122–23.

Similarly, Chapter 739 does not "destroy rights already accrued". *Chapman,* 261 A.D.2d at 815. Instead, Chapter 739 allows the Nelsons to raise the defense of standing *now* and at any point prior to the foreclosure sale. The Legislature acknowledged that simply demanding proof that a lender owns the note and mortgage "will not tie up a proceeding, this is just making sure the system works in today's electronic world." (Assembly Minutes, at 34).[5] Accordingly, this Court should find that the Nelsons may raise the defense that U.S. Bank does not have "standing" to commence this foreclosure action.

POINT III
THE NELSONS 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

Even if this Court determines that §1302-a does not apply to this proceeding, the Nelsons did not waive their defense that U.S. Bank did not own and hold the Note and Mortgage—or of standing. Given that U.S. Bank alleged in its Complaint that it owns and holds the Nelsons' Note and Mortgage, and the Nelsons denied those assertions, those issues were preserved for adjudication.

[5] Other cases cited by U.S. Bank are similarly inapplicable here, because the statutes at issue were neither procedural nor remedial. *See Morales v. Gross*, 230 A.D.2d 7 (2d Dep't 1997) (the statute at issue was not procedural and the sponsor expressly stated that the act was prospective); *Clean Earth of N. Jersey, Inc. v. Northcoast Maint. Corp.*, 142 A.D.3d 1032, 1037 (2d Dep't 2016) (the statute was not a procedural statute or remedial.).

A. Whether Conceived of as an Essential Element or a Pleading Requirement, the Nelsons Placed "Ownership" of the Note and Mortgage at Issue.

As demonstrated in the Nelsons Opening Brief, RPAPL §1302(1)(a) requires a plaintiff to affirmatively allege that it "is the owner and holder of the subject mortgage and note" at the time the action commences. Therefore, under §1302(1)(a) U.S. Bank had the initial burden to prove ownership. *See Tuthill Fin. v. Candlin*, 54 Misc. 3d 1204(A), 2014 WL 12638454, at *1 n.1 (N.Y. Sup. Ct. Jan. 9, 2014).

This is consistent with New York courts that have held that ownership is an essential element that a plaintiff must prove to foreclose. [6]

In its Opposition Brief, U.S. Bank relies upon cases providing that, to foreclose, a plaintiff must produce the mortgage, unpaid note, and evidence of default. (Opp. at 18-19). But this is consistent with the plaintiff's obligation, in a

[6] *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) ("Ownership 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."); *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); *Bank of New York v. Silverberg*, 86 A.D.3d 274, 280 (2d Dep't 2011) ("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 at *1 (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.").

foreclosure action, to prove that it owns or holds the note and mortgage. As explained in the Opening Brief, producing the note—together with its named payees, endorsement, and allonge—is critical to establish ownership of the debt.

U.S. Bank also objects that ownership cannot be an element by incorrectly relying on *Wells Fargo Bank, NA v. Ostiguy*, 127 A.D.3d 1375, 1377 (3d Dep'. 2015), where a loan servicer, who held the note, but transferred its interest in the debt, was permitted to maintain the action—likely acting on behalf of the owner of the debt, Freddie Mac. This holding is irrelevant. It is at odds with the express language of RPAPL §1302(1)(a) which requires the plaintiff in a subprime foreclosure action, like this one, to plead that it "is the owner *and* holder of the subject mortgage and note" at the commencement of the action. (emphasis added). Moreover, unlike in *Ostiguy*, U.S. Bank pled in its Complaint that it is "the ***owner and holder*** of a note and mortgage being foreclosed" and was, therefore, bound to prove this allegation. (R.37) (emphasis added).

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 (*quoting* 5-3018 Weinstein-Korn-Miller, *N.Y. Civ. Prac.* CPLR ¶ 3018.00) (emphasis added).

Similarly, the denial of a pleading requirement which describes a condition

precedent to commencing a foreclosure action has been held sufficient to shift the initial burden on summary judgment to the plaintiff. *U.S. Bank Nat'l Ass'n v. Goldberg*, 171 A.D.3d 981, 982, (2d Dep't 2019) (where defendant denied that plaintiff complied with RPAPL §§1302 and 1304 notice requirements, the court held "[t]he plaintiff failed to meet its initial burden on its [summary judgment motion]"); *U.S. Bank Nat'l Ass'n. v. Guercia*, 61 Misc. 3d 1220(A), 2018 WL 6072586, at *4 (N.Y. Sup. Ct. Nov. 20, 2018) ("Once plaintiff has pled RPAPL §1304 compliance in its complaint and ***it is either denied by defendant in his answer*** or raised as an affirmative defense, it is plaintiff's responsibility to establish compliance as part of its prima facie case") (emphasis added).

Thereafter, U.S. Bank as the proponent of the summary judgment motion had the initial burden to prove that, at the commencement of the action, it was either the holder or assignee of the underlying note. *See Roumiantseva*, 2013 WL 2500829, at *5, 7 (held once the debtor denied the element of ownership in a foreclosure action and placed ownership at issue, the plaintiff bank failed to prove ownership of the mortgage and note). As outlined above, U.S. Bank failed to provide sufficient evidence that it owned the Note and Mortgage at the commencement of the proceeding. When U.S. Bank failed to meet its burden on its motion for summary judgment, the motion should have been denied, and the court did not need to consider the sufficiency of the Nelsons' papers in opposition. *JPMorgan Chase Bank, Nat'l*

Ass'n v. Kutch, 142 A.D.3d 536, 538 (2d Dep't 2016).

B. Viewed in Terms of "Standing," the Nelsons' Answer Placed U.S. Bank's Ownership of the Note and Mortgage at Issue.

Even if the Nelsons' objection is phrased or conceived as an issue of "standing", the analysis remains the same. 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." Accordingly, as stated in the authoritative text *New York Practice*, ***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)[7]; *see also Nelson*, 169 A.D. 3d at 130.

Where, as here, the issue of "ownership" already appeared on the face of U.S. Bank's Complaint, *see* RPAPL §1302(1)(a), the Nelsons need not plead a separate affirmative defense. One need only deny the allegation. As outlined in Associate Justice Duffy's minority opinion, U.S. Bank's allegation that it is the "owner and holder of [the] note and mortgage being foreclosed" by assignment, is tantamount to an allegation that U.S. Bank has "standing." *Nelson*, 169 A.D. 3d at 126-28; *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

[7] Misleadingly, U.S. Bank alleges that this quote is not the treatise's representation of the state of the law. This is plainly wrong.

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 its Complaint (R.37-38), the Nelsons' specific denial (or denial of knowledge or information of the allegations) was legally sufficient to place the contention at issue.

Prior to the Second Department's ruling below, the weight of opinion followed the foregoing analysis. *See Nationstar Mortg., LLC v. Wong*, 132 A.D.3d 825, 826 (2d Dep't 2015) ("Contrary to the plaintiff's contention, Wong raised the issue of the plaintiff's standing by interposing an answer which, in effect, denied the plaintiff's allegation that it was the holder of the note."); *see also Bank of Am., N.A. v Paulsen*, 125 AD3d 909, 910 (2d Dep't2015); *US Bank N.A. v Faruque*, 120 A.D.3d 575, 576 (2d Dep't 2014).

This analysis was consistent with cases outside of the foreclosure context, holding that where facts relevant to a defense appear on the face of a complaint, a denial puts the defense at issue. For example, in *Gibson v. Air & Liquid Sys. Corp.*, relied upon by U.S. Bank, the First Department acknowledged that "Where the plaintiff elects to allege facts specifically addressing the issue of personal jurisdiction in its complaint, the defendant's denial of those allegations may be sufficient to preserve defendant's jurisdictional defense." 173 A.D.3d 519 (1st Dep't

2019).[8] In reaching this decision, the First Department relied upon the Second Department decision in *Green Bus Lines v. Consolidated Mut. Ins. Co.* 74 A.D.2d 136, 142-43 (2d Dep't 1980), which held 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 also Stevens v. N. Lights Assocs.*, 229 A.D.2d 1001, 1002 (4th Dep't 1996)[9] (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) (defendant not required to plead a separate affirmative defense challenging the choice of law, where Plaintiff was presumably aware of the potential applicability of Connecticut law, because its complaint asserted the accident occurred in Connecticut); *Red Hook Marble, Inc. v. Herskowitz & Rosenberg*, 15 A.D.3d 560,

[8] U.S. Bank's counsel misrepresented the remainder of the holding. The "lack of general jurisdiction" defense was not preserved because the defendant *admitted*, and did not deny, the relevant factual allegation.

[9] U.S. Bank attempts to distinguish *Green Bus Lines* and *Stevens* by arguing that they "involved 'highly unusual circumstances,' where the 'complaints actually set forth the facts supporting the defenses subsequently relied upon.'" (Opp. at 53). As explained above, that is exactly what happened here.

561 (2d Dep't 2005) (failure to plead statute of frauds did not preclude the Court from addressing the issue where the complaint specifically alleged the relevant factual allegations).[10]

The cases cited by U.S. Bank do not change this analysis.[11]

In an effort to avoid the effect of this case law, U.S. Bank argues that the Nelsons' "general denial" of its allegations did not provide them with sufficient notice that the Nelsons put ownership of the Note and Mortgage at issue. But this is disingenuous at best. In order to initiate a foreclosure cause of action, U.S. Bank was *required* to plead that it owned the note and mortgage. RPAPL §1302(1)(a). The thrust of the FIRST and THIRD paragraphs of U.S. Bank's Complaint related specifically to whether U.S. Bank owned the Note and Mortgage and obtained it by

[10] U.S. Bank makes no effort to distinguish other cases cited by the Nelsons, including *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.").

[11] U.S. Bank presents a strawman argument, citing the decisions in *Bank of N.Y. Mellon v. Gordon*, 7 A.D.3d 197 (2d Dep't 2019), and *Garcia v. Utica First Ins. Co.*, 7 A.D.3d 665 (2d Dep't 2004), before distinguishing the cases. Neither case was ever relied upon by the Nelsons.

assignment; these paragraphs were designed to comply with §1302(1)(a).[12] The Nelsons specifically denied those allegations.[13] As Justice Duffy's minority opinion explains, "here, the factual allegations made by the plaintiff in the complaint relate to the issue of its standing and, thus, the plaintiff should not be able to contend surprise. Given the allegations in the complaint and the factual assertions in a later affirmation by the plaintiff's counsel,"—which stated that plaintiff "is the holder of the note and the proper entity to have commenced this proceeding"—the magic words "lack of standing" or "affirmative defense" are unnecessary to put the issue in controversy." *See Nelson*, 169 A.D.3d at 129.

The decisions cited by U.S. Bank also do not support its misplaced waiver argument. While they stand for the uncontroversial point that an affirmative defense is waived if not stated in a responsive pleading or pre-answer motion to dismiss, *none* of these cases address the circumstances *here,* where the factual allegations relevant to a defense appear on the face of a complaint, and are denied. *See Matter of Fossella v. Dinkins*, 66 N.Y.2d 162 (1985); *Micallef v. Miehle Co., Div. of Miehle-*

[12] Justice Duffy made this very point: "In the case before us, and in the cases discussed, supra, where this Court found that the issue of standing was not waived, the paragraphs at issue did not lump together a set of allegations pertaining to a variety of matters. Rather, the first paragraph of the complaint in each respective case set forth that the plaintiff 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 defendants specifically denied that allegation or DKI'd as to the truth of that allegation". *Nelson*, 169 A.D.3d at 133.

[13] Moreover, "[i]t is elementary that under a general denial a defendant may disprove any fact which the plaintiff is required to prove to establish a prima facie cause of action." *Hoffstaedter v. Lichtenstein*, 203 A.D. 494, 496 (1st Dep't 1922).

Goss Dexter, 39 N.Y.2d 376 (1976); *Scholastic Inc. v. Pace Plumbing Corp.*, 129 A.D. 3d 75 (1st Dep't 2015); S*aks v. Franklin Covey Co.*, 316 F.3d 337 (2d Cir. 2003).

Having placed standing at issue, U.S. Bank was obligated to demonstrate on summary judgment that it owned the Nelsons' Note and Mortgage at the beginning of this action, and, therefore, had standing to commence this foreclosure action. *Confidential Lending LLC v. Nurse*, 33 Misc. 3d 1210(A), 2011 WL 4907796, at *2 (N.Y. Sup. Ct. Oct. 17, 2011), aff'd 120 A.D.3d 739, 740 (2d Dep't 2014) ("It is well established that in a foreclosure action it is plaintiff's burden to provide admissible evidence of its standing as the lawful holder of the subject note and mortgage at the time the action was commenced. . . . Standing is a threshold issue, which if not established obliterates the plaintiff's ability to seek redress for its claim, including the foreclosure of a mortgage.").

As demonstrated above, U.S. Bank makes no effort to dispute that U.S. Bank failed to make out its *prima facie* case. As Justice Duffy found, "the record amply demonstrates . . . [U.S. Bank] failed to establish, *prima facie*, its status as the holder of the note at the time the action was commenced." *See Nelson*, 169 A.D.3d at 126. Thus U.S. Bank never should have succeeded on summary judgment.

POINT IV

THE QUESTION OF OWNERSHIP HAS BEEN PRESERVED FOR REVIEW.

Contrary to U.S. Bank's suggestion, the Nelsons clearly preserved the question of ownership for appellate review.

As noted in the Opening Brief, the Nelsons repeatedly questioned U.S. Bank's ownership of the Note and Mortgage in their Answers (R.37-38,72,74, 181,183,225, and 227), in the Nelsons' Cross-Motion to Dismiss and Opposition to U.S. Bank's Motion for Judgment of Foreclosure and Sale (R.165), the Second Department appeal brief (A-766, 768-69), and the Nelsons' Reply (A-812).

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. The purpose of the preservation rule is to alert the trial court to any errors and to afford it an opportunity to correct those errors. In explaining the purpose behind the preservation requirement, this Court explained that "in making and shaping the common law . . . this Court best serves the litigants and the law by limiting its review to issues that have first been presented to and carefully considered by the trial and intermediate appellate courts." *Bingham v. New York City Transit Auth.*, 99 N.Y.2d 355, 359 (2003). *See also Barry v. Manglass*, 55 N.Y.2d 803, 805 (1981)("The requirement of a timely exception is not merely a technicality. Its function 'is to give the court and the opposing party the opportunity to correct an error in the conduct of

the trial.") (quoting *Delaney v. Philhern Realty Holding Corp.*, 280 N.Y. 461, 467 (1939)); *Williams v. City of New York*, 101 A.D.2d 835, 836 (2d Dep't 1984) (same).

U.S. Bank's Opposition Brief fails to dispute, and therefore concedes, the Nelsons did in fact argue in the trial court that U.S. Bank did not own the Note and Mortgage, and again in the Appellate Division. Indeed, it is a function of the unique procedure in New York foreclosure actions that arguments need not be raised on a motion for summary judgment to be preserved for appeal. Foreclosure actions will frequently include 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.

Because of the unique procedure for foreclosure actions in New York, unlike in other proceedings where summary judgment may bring about the end of the case, in foreclosure actions, defendants are again able to appear before the court to address the evidence. Accordingly, New York courts have addressed issues going to their notice and pleading requirements, set forth in RPAPL §§1302 and 1304 as late as an opposition to a motion for judgment of foreclosure and sale, and such issues have been preserved for appeal. *See Wells Fargo Bank, N.A. v. Merino*, 173 A.D.3d 491, at *1 (1st Dep't June 11, 2019); *Emigrant Mortg. Co., Inc. v. Lifshitz*, 143 A.D.3d 755, 755-56 (2d Dep't 2016).

Likewise, U.S. Bank cannot rebut the fact that New York trial courts have inherent authority to revisit decisions made on summary judgment, prior to entry of the final judgment, and such arguments have been preserved for appeal. *See Nat'l Mortg. Consultants v. Elizaitis*, 23 A.D.3d 630, 630 (2d Dep't 2005) (on appeal, the Second Department explicitly rejected the defendant's "law of the case" argument and upheld the trial court's right, 7 years after the initial decision, to "review a previously-decided matter where there is a need to correct clear error."). 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], 2013 WL 440508, 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).[14]

[14] U.S. Bank's contention that a trial court's inherent authority to revisit its own decisions is "constricted" by CPLR 5015 is inconsistent with New York law. It is well-established that "[CPLR 5015] should not be deemed to exclude grounds for relief, or eccentric default situations, not listed in subdivision (a). It was intended that the court's inherent discretionary power remain a source for vacating a judgment if an appropriate case should arise but none of the codified grounds should prove applicable." CPLR § 5015, C5015:11; *see also Gurin v. Pogge*, 112 A.D.3d 1028, 1030 (2013) ("However, the grounds set forth in CPLR 5015 are not exclusive, and courts retain "inherent discretionary power" to vacate their own judgments "for sufficient reason and in the interests of substantial justice"); *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 68 (2003)

The decisions cited by U.S. Bank are distinguishable. In those cases, the issues were *never* raised with the trial court.[15] In contract, here, the issue of ownership of the note and mortgage was presented to the trial court for review and decision numerous times. Therefore, the question whether U.S. Bank owned the Nelsons' Note and Mortgage, or had standing to commence the foreclosure action, was properly preserved for review.

("In addition to the grounds set forth in section 5015(a), a court may vacate its own judgment for sufficient reason and in the interests of substantial justice")

[15] *See Sager Spuck Statewide Supply Co. v. Meyer*, 273 A.D. 2d 745, 746 (3d Dep't 2000)(Defendant's challenge to the Plaintiff was not addressed in the trial court below); *County of Orange v. Greier*, 30 A.D.3d 556, 556 (2d Dep't 2006) (same); *N.Y. Commercial Bank v. J. Realty*, 108 A.D.3d 756 (2d Dep't 2013)(the appealed issue was never raised with the trial court by defendants); *Bank of N.Y. Mellon Trust Co. v. Balash*, 156 A.D.3d 1203 (3d Dep't 2017) (The defendant never answered or moved to dismiss and so lack of standing was waived).

CONCLUSION

Accordingly, for all the reasons set forth above, and in the Nelsons' Appeal Brief, this Court should find in the Nelsons' favor.

Dated: New York, New York
March 25, 2020

GALLET DREYER & BERKEY, LLP

By: _____
David T. Azrin
Jared B. Foley

845 Third Avenue, 5th Floor
New York, New York 10022
(212) 935-3131

Attorneys for Defendants-Appellants

CERTIFICATION

I certify pursuant to 500.13(c)(1) that the total word count for all printed text in the body of the brief, exclusive of the statement of the status of related litigation; the corporate disclosure statement; the table of contents, the table of cases and authorities and the statement of questions presented required by subsection (a) of this section; and any addendum containing material required by subsection 500.1(h) of this Part is 6,969 words.

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March 25, 2020

GALLET DREYER & BERKEY, LLP

By: _____
David T. Azrin
Jared B. Foley

845 Third Avenue, 5th Floor
New York, New York 10022
(212) 935-3131

Attorneys for Defendants-Appellants