To Be Argued By:
JEFFREY HERZBERG
Time Requested: 15 Minutes

APL-2019-00119
Suffolk County Clerk's Index No. 66298/14

Court of Appeals

STATE OF NEW YORK

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,

Plaintiff-Respondent,

—against—

ROSS R. CALIGURI a/k/a ROSS CALIGURI,

Defendant-Appellant,

PENTAGON FEDERAL CREDIT UNION, AMERICAN EXPRESS CENTURION BANK, BRIDGEHAMPTON NATIONAL BANK, REVCO ELECTRICAL SUPPLY, INC., EMIL NORSIC AND SON, INC., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., and JOHN DOE and JANE DOE #1 through #7, the last seven (7) names being fictitious and unknown to the plaintiff, the persons or parties intending being the tenants, occupants, persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the Complaint,

Defendants.

BRIEF FOR DEFENDANT-APPELLANT

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August 8, 2019

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The Defendant-Appellant, Ross R. Caliguri ("Caliguri"), by and through his attorney, Jeffrey Herzberg, PC, files this Brief for Defendant-Appellant.

BASIS OF APPELLATE JURISDICTION

This Honorable Court has jurisdiction to determine the issues in this appeal in accordance with the provisions set forth in CPLR §5602, namely an appeal to the court of appeals by permission. This Honorable Court granted Caliguri leave to appeal by Decision and Order dated June 11, 2019 (R-714) of the Decision and Order by the Supreme Court of the State of New York, Appellate Division, Second Judicial Department (the "Second Department") dated January 16, 2019 (the "Second Department Decision") (R-740-741). The judgment of foreclosure and sale was issued by the Supreme Court of the State of New York, County of Suffolk (the "Supreme Court"), dated February 8, 2019. The Second Department affirmed the Supreme Court order granting JPMorgan Chase Bank, National Association ("JP Morgan Chase") summary judgment in this mortgage foreclosure action and appointed a referee to compute.

STATEMENT OF THE ISSUES

This Honorable Court must determine the following issues on this appeal:

a. did the judge presiding over this second mortgage foreclosure action prematurely grant summary judgment in favor of JPMorgan Chase when there

were outstanding document demands including, but not limited to, the production of the original mortgage note for inspection and examination?; and

b. did the judge presiding over this second mortgage foreclosure action in the Supreme Court violate the doctrines of res judicata, collateral estoppel or law of the case by failing to follow the rulings made in the first mortgage foreclosure case by Justice Baisley, a coordinate judge of the Supreme Court, who presided over the first mortgage foreclosure action "between the same parties", such as the order requiring JPMorgan Chase to produce the original mortgage note for inspection and examination?

The answer to both issues is that the judge presiding over the second mortgage foreclosure case prematurely granted summary judgment and the order of reference: (a) as there were outstanding discovery demanded by Caliguri, namely the examination and inspection of the original mortgage note by Caliguri's forensic document specialist; and (b) he violated the provisions of the doctrines of res judicata, collateral estoppel and the law of the case when he refused to dismiss the Second Action and/or required the production of the purported original mortgage note for examination and inspection.

STATEMENT OF THE CASE

i. Procedural History

The following is the procedural history of this dispute:

a. JPMorgan Chase commenced a mortgage foreclosure action against Caliguri in the Supreme Court, Index No. 25638/09 (the "First Complaint") by summons and complaint dated July 2, 2009. JPMorgan Chase sought to enforce two (2) separate mortgages against the Caliguri real property (the "Property"). Caliguri duly filed and served his answer to the Mortgage Foreclosure Complaint. The second affirmative defense stated in the answer provided:

> "The complaint fails to establish that Chase has standing to commence this action by demonstrating that it has actual possession of the original mortgage note. Only the entity or party that physically possessed the original mortgage note as of the time of the commencement of the action can commence and prosecute a mortgage foreclosure action."

b. Calguri further propounded discovery demands upon JPMorgan Chase, including but not limited to a demand for the physical inspection of the original mortgage note at a mutually convenient date and time at the Long Island office of JPMorgan Chase's attorneys, provided said inspection took place within the next thirty (30) days. After JPMorgan Chase failed to duly comply with the discovery demands, including the failure: (a) to make the original mortgage note(s) available for inspection; and (b) to respond to the interrogatory requests, notwithstanding: (i) the directives of the Supreme Court at four (4) compliance conferences attended by the undersigned counsel and JPMorgan Chase's counsel; (ii) the issuance of new discovery demands by Caliguri pursuant to the directive of the Supreme Court; and (iii) the issuance of an order to compel discovery by the

Supreme Court by a date certain based on Caliguri's motion to compel discovery pursuant to CPLR §3124, Caliguri filed his motion for summary judgment dismissing the mortgage foreclosure action, with prejudice, striking the complaint and, in the alternative, other sanctions pursuant to CPLR §§3126 and 3212.

c. In response to the Caliguri motion for summary judgment, the Honorable Paul J. Baisley, Jr., one of the judges of the Supreme Court issued the order granting summary judgment dated March 7, 2012 (the "Prior Order"). The Prior Order stated in pertinent part:

> "ORDERED that the motion (motion sequence no. 004) of defendant Ross R. Caliguri for an order granting summary judgment dismissing this mortgage foreclosure action with prejudice, striking the complaint and, in the alternative, other sanctions, in accordance with CPLR §3126 and R. 3212, is granted as set forth hereinafter.
>
> The submissions reflect that plaintiff J.P. Morgan Chase Bank, N.A. commenced the instant action to foreclose a consolidated mortgage on July 2, 2009. Thereafter defendant-mortgagor Ross R. Caliguri served an answer which, *inter alia,* asserted plaintiff's lack of standing as an affirmative defense. Defendant subsequently served plaintiff with interrogatories and a demand for production of documents. In particular, defendant demanded that plaintiff produce the original note and original mortgage assignment for inspection at the Long Island office of plaintiff's attorney, Steven J. Baum, P.C 'on a mutually [convenient] date and time.' In response, plaintiff interposed various objections to defendant's interrogatories and document demands, and, citing the 'commercial sensitivity of these documents,' produced only a copy of the notes, mortgage and assignment without offering a date and time for the production of the original documents. Defendant thereafter interposed a motion (motion sequence no. 003) to compel plaintiff to 'fully and completely respond to all of the discovery requests propounded by [defendant].'

While the motion to compel, was *sub judice,* and after a compliance conference at which plaintiff's repeated failure to produce the original note and mortgage assignment was discussed, defendant served plaintiff a second request for production of documents dated September 9, 2011 which requested that the original mortgage note and the original mortgage assignment be made available for inspection at the Long Island office of plaintiff's attorney in Westbury on a date certain, to wit, October 5, 2011 at 2:00 p.m.

The submissions reflected that defendant's attorney appeared at the Westbury office of Steven J. Baum, P.C. on October 5, 2011 at 2:00 p.m., together with a forensic document examiner retained for the purpose of inspecting the original documents. Notwithstanding the duly served 'Second Request for Production of Documents,' to which plaintiff did not respond or object, no original documents were produced for defendant's inspection at that time or thereafter.

On October 7, 2011, defendant interposed the instant motion for summary judgment dismissing the action with prejudice, striking the complaint, and for other sanctions in accordance with CPLR §3126 and R. 3212. Defendant's motion is predicated in substantial part on plaintiff's failure to produce evidence of its standing to commence and prosecute this mortgage foreclosure action. It is well established that where the standing of a plaintiff in a mortgage foreclosure action is a contested issue, as here, the plaintiff must prove that it was the holder or assignee of both the subject mortgage and the underlying note at the time of commencement of the action in order to be entitled to relief (*Bank of New York v Silverberg,* 86 AD3d 274 [2^{d} Dept 2011]). In opposition to defendant's motion, plaintiff has submitted only the affirmation of its attorney, who does not have personal knowledge of the facts alleged therein and accordingly is incompetent to establish plaintiff's standing (*Zuckerman v City of New York,* 49 NY2d 557 [1980]). Moreover, the documentary evidence annexed thereto, including a purported assignment executed by a purported 'attorney in fact,' fails to establish as a matter of law that plaintiff was the owner and holder of the subject note(s) and mortgage(s) at the time of commencement of this action. Plaintiff has thus failed to establish, by proof in admissible form, its standing to commence and maintain the instant action. Accordingly, the submissions establish defendant's *prima facie* entitlement to summary judgment dismissing plaintiff's complaint.

> Additionally, the submissions establish plaintiff's willful failure to comply with the discovery orders of this Court. The October 19, 2011 order of this Court (BAISLEY, J.) granted defendant's prior motion to compel discovery, noting that plaintiff's prior responses were 'substantially deficient' and that plaintiff's interposed objections were 'improper.' The order directed plaintiff to provide full, complete and substantive responses to each of defendant's interrogatories, including identifying with specificity 'any and all persons that assisted in the preparation of the responses,' 'all persons with knowledge of the facts at issue in this case,' and 'any and all witnesses' that plaintiff intends to call at trial, and providing a basis for interpreting the computerized payment schedule annexed to plaintiff's response to defendant's interrogatories, within 20 days of the date of service of notice of entry of this order.' In addition, the order directed plaintiff to 'make available for defendant's inspection the original mortgage note and original mortgage assignment, at a mutually convenient place and time but in no event later than 20 days after the date of service of notice of entry of this order.'
>
> Notwithstanding the foregoing, the 'Amended Answers to Interrogatories' served by plaintiff on or about November 8, 2011 in response to the Court's order failed to comply with the order in several material respects. Plaintiff admittedly failed to 'identify all persons with knowledge of the facts at issue in this case,' failed to provid[e] a basis for interpreting the computerized payment scheduled annexed to plaintiff's response to defendant's interrogatories,' and interposed substantially the same objections that had previously been ruled upon by the Court and found to be 'improper.' In light of the express directives contained in the order, plaintiff's failure to provide 'full, complete and substantive responses' must be deemed to be willful (*Forbes v. New York City Tr. Auth.*, 88 AD3d 546 [1st Dept 2011]) and provides an independent basis for striking plaintiff's complaint in this action."

(Footnote Omitted). Accordingly, the Prior Order concluded by stating in pertinent part:

> "In light of all of the foregoing, and in accordance with CPLR R. 3212 and §3126, the Court grants defendant's motion for summary judgment and strikes plaintiff's complaint."

(R37-41);

d. a copy of the Prior Order was duly served on the Respondent's predecessor attorneys, Steine & Associates, PC, 187 East Main Street, Huntington, New York 11743, with a notice of entry on March 13, 2012 (R35-36). Steine & Associates, P.C. had previously filed a consent to change attorney in the mortgage foreclosure action sworn to on December 30, 2011 and filed on January 13, 2012. Notwithstanding the proper service of the notice of entry with the Prior Order, JPMorgan Chase did not file a motion for reconsideration and/or a notice of appeal. Accordingly, the terms and provisions of the Prior Order became a final, non-appealable order. And as noted in the Prior Order, the granting of the motion for summary judgment dismissing the mortgage foreclosure action was "with prejudice".

e. based on the provisions of the Prior Order, Caliguri commenced an action in the Supreme Court by summons and complaint dated April 23, 2012 seeking an order cancelling and discharging the following mortgage liens against the Property possessed by JPMorgan Chase, as successor to Washington Mutual Bank, FSB, pursuant to the provisions set forth in RPAPL §1501: (a) the mortgage dated November 2, 2005 and recorded with the Suffolk County Clerk on November 18, 2005 at Liber M00021174, Page 335 to secure a borrowing in the original sum of $945,000.00; and (b) the mortgage dated October 31, 2007 and

recorded with the Suffolk County Clerk on November 23, 2007 at Liber M00021637, Page 178 to secure a borrowing in the original sum of $7,175.28 (the "Discharge of Lien Action");

f. in lieu of answering the complaint in the Discharge of Lien Action, JPMorgan Chase filed its motion to dismiss the complaint in accordance with the provisions set forth in CPLR §3211. In response, Caliguri filed a cross-motion for summary judgment in accordance with the provisions set forth in CPLR §§3211(c) and 3212;

g. in lieu of sending the case to the Honorable Paul J. Baisley for an interpretation of his own order, the Honorable Ralph T. Gazzillo, another judge of the Supreme Court issued the Order dated May 13, 2013 (the "Gazzillo Order"). The Second Order granted the JPMorgan Chase's motion to dismiss the Second Action and denied Caliguri's cross-motion for summary judgment;

h. Caliguri took a timely appeal to the Second Department, who affirmed the Second Order by the Opinion dated October 29, 2014, 121 A.D.3d 1030, 996 N.Y.S.2d 73, 2014 N.Y. App. Div. LEXIS 7302, 2014 NY Slip Op 07319 (2nd Dept., 2014). The latter opinion stated in pertinent part at 121 A.D.3d at 1031-1032:

> "Contrary to the plaintiff's contention, a dismissal premised on lack of standing is not a dismissal on the merits for res judicata purpose. Furthermore, the alternative basis for dismissal of the prior action, the striking of the complaint for noncompliance with a discovery order, was not

> a dismissal on the merits. Accordingly, the Supreme Court properly granted JPMorgan Chase's motion to dismiss the complaint for failure to state a cause of action and denied, as academic, the plaintiff's cross motion for summary judgment on the compliant."

(Citations Omitted). (R41-43);

i. Caliguri filed a timely motion for re-argument or, in the alternative, motion for permission from the Second Department to appeal the Opinion of the Second Department Decision dated October 29, 2014. By Decision & Order dated April 6, 2015, the Second Department denied the Caliguri motion by the Decision & Order on Motion dated April 6, 2015 (R-45). Caliguri also sought permission to appeal the Second Department Decision to the Court of Appeals, however, the Court of Appeals denied said permission to appeal (R710-711);

j. JPMorgan Chase commenced a second mortgage foreclosure action against the Property in the Supreme Court by summons and complaint dated August 7, 2014, Index No. 066298/2014 (R46-55). Caliguri filed a timely answer to the second mortgage foreclosure complaint (R56-61), a motion to transfer the case to the original Supreme Court judge, namely the Honorable Paul J. Baisley, Jr. (R22-71), which motion was opposed by JPMorgan Chase (R611-620) and Caliguri filed his reply affirmation (R621-635). The specific affirmative defenses made in the Caliguri will appear below before the discussion of the law.

k. Caliguri served document demands dated April 10, 2015, which included as the first item, the production of the original note for examination and

inspection within thirty (30) days at the attorney's law office in Long Island (R69-71);

l. JPMorgan Chase filed a motion for summary judgment dated June 1, 2015 and an opposition to the motion to transfer the case to Judge Baisley (R-R72-610)), and Caliguri filed his notice of cross-motion and opposition to the motion for summary judgment dated June 18, 2015 (R636-673); JPMorgan Chase filed its reply affirmation in support of motion and in opposition to the cross-motion for summary judgment dated June 29, 2015 (R674-695) and Caliguri filed his reply affirmation to the cross-motion dated July 3, 2015 (R696-709);

m. the Supreme Court denied the Caliguri motion to transfer the case to Judge Baisley and granted JPMorgan Chase's motion for summary judgment stating, in part, that summary judgment in favor of JPMorgan Chase shall be granted and that the discovery demands by Caliguri does not have to be honored and the case need not be transferred to Judge Baisley in the Order dated May 11, 2017 (R715-739);

n. Caliguri appealed the Order dated May 11, 2017 to the Second Department by notice of appeal dated June 14, 2017 (R2-21);

o. the Second Department affirmed the Order dated May 11, 2017 by the Decision & Order dated January 16, 2019, 168 A.D.3d 819, 92 N.Y.S.3d 95, 2019 N.Y. App. Div. LEXIS 295, 2019 NY Slip Op 00262, 2019 WL 209065 (2nd Dept.,

2018). The January 16, 2019 decision acknowledged the demand for discovery of the original mortgage note, but stated in pertinent part:

> "JPMorgan Chase demonstrated its prima facie entitlement to judgment as a matter of law by producing the mortgage, the unpaid note, and evidence of default. In addition, it established its standing by attaching to the summons and complaint a copy of the consolidated note, bearing an endorsement in blank from the original lender. Contrary to the defendant's contention, 'there is no requirement that an entity in possession of a negotiable instrument that has been endorsed in blank must establish how it came into possession of the instrument in order to be able to enforce it'. In opposition, the defendant failed to raise a triable issue of fact."

(Citations Omitted) (R740-741);.

p. the Supreme Court issued the judgment of foreclosure and sale dated February 8, 2019; and.

q. the Court of Appeals granted leave to appeal to the Court of Appeal to determine the issues set forth above, but not the issue as to whether the second mortgage foreclosure action should have been transferred to Justice Baisley (R714).

ii. Statement of Facts

The following are the underlying facts of this dispute:

a. JPMorgan Chase commenced the First Action seeking to foreclose the mortgage on the Property;

b. Suffolk County Supreme Court Justice Baisley issued the Short Form Order dated March 7, 2012, which Short Form Order was never appealed by

JPMorgan Chase notwithstanding proper service of the notice of entry. The Short Form Order dated March 7, 2012 provided in pertinent part:

> "***ORDERED*** that the motion (motion sequence no. 004) of defendant Ross R. Caliguri for an order granting summary judgment dismissing this mortgage foreclosure action with prejudice, striking the complaint, and, in the alternative, other sanctions, in accordance with CPLR §3126 and R. 3212, is granted as set forth hereinafter."
>
> The submissions reflect that plaintiff J.P. Morgan Chase Bank, N.A. commenced the instant action to foreclose a consolidated mortgage on July 2, 2009. Thereafter defendant-mortgagor Ross R. Caliguri served an answer which, *inter alia,* asserted plaintiff's lack of standing as an affirmative defense. Defendant subsequently served plaintiff with interrogatories and a demand for production of documents. In particular, defendant demanded that plaintiff produce the original note and original mortgage assignment for inspection at the Long Island office of plaintiff's attorney, Steven J. Baum, P.C. 'on a mutually [convenient] date and time.' In response, plaintiff interposed various objections to defendant's interrogatories and document demands and, citing the 'commercial sensitivity of these documents,' produced only a copy of the notes, mortgage and assignment without offering a date and time for the production of the original documents. Defendant thereafter interposed a motion (motion sequence no. 003) to compel plaintiff to 'fully and completely respond to all of the discovery requests propounded by [defendant].
>
> While the motion to compel was *sub judice,* and after a compliance conference at which plaintiff's repeated failure to produce the original note and mortgage assignment was discussed, defendant served plaintiff with a second request for production of documents dated September 9, 2011 which requested that the original mortgage note and the original mortgage assignment be made available for inspection at the Long Island office of plaintiff's attorney in Westbury on a date certain, to wit, October 5, 2011 at 2:00 p.m.
>
> The submissions reflect that defendant's attorney appeared at the Westbury office of Steven J. Baum, P.C. on October 5, 2011 at 2:00 p.m., together with a forensic document examiner for the purpose of inspecting the original documents. Notwithstanding the duly served 'Second Request for

Production of Documents,' to which plaintiff did not respond or object, no original documents were produced for defendant's inspection at that time or thereafter.

On October 7, 2011, defendant interposed the instant motion for summary judgment dismissing the action with prejudice, striking the complaint, and for other sanctions in accordance with CPLR §3126 and R. 3212. Defendant's motion is predicated in substantial part on plaintiff's failure to produce evidence of its standing to commence and maintain this foreclosure action. It is well established that where the standing of a plaintiff in a mortgage foreclosure action is a contested issue, as here, the plaintiff must prove that it was the holder or assignee of both the subject mortgage and the underlying note at the time of commencement of the action in order to be entitled to relief (*Bank of New York v Silverberg*, 86 AD3d 274 [2d Dept 2011]). In opposition to defendant's motion, plaintiff has submitted only the affirmation of its attorney, who does not have personal knowledge of the facts alleged therein and accordingly is incompetent to establish plaintiff's standing (*Zuckerman v City of New York,* 49 NY2d 557 [1980]). Moreover, the documentary evidence annexed thereto, including a purported assignment executed by a purported 'attorney in fact,' fails to establish as a matter of law that plaintiff was the owner and holder of the subject note(s) and mortgage(s) at the time of the commencement of this action. Plaintiff has thus failed to establish by proof in admissible form, its standing to commence and maintain the instant action. Accordingly, the submissions establish defendant's *prima facie* entitlement to summary judgment dismissing plaintiff's complaint.

Additionally, the submissions establish plaintiff's willful failure to comply with the discovery orders of this Court. The October 19, 2011 order of this Court (BAISLEY, J.) granted defendant's prior motion to compel discovery, noting that plaintiff's prior responses were 'substantively deficient' and that plaintiff's interposed objections were 'improper.' The order directed plaintiff to provide full, complete and substantive responses to each of defendant's interrogatories, including identifying with specificity 'any and all persons that assisted in the preparation of the responses,' 'all persons with knowledge of the facts at issue in this case,' and 'any and all witnesses' that plaintiff intends to call at trial, and providing a basis for interpreting the computerized payment schedule annexed to plaintiff's response to defendant's interrogatories, within 20 days of the date of service of notice of entry of this order.' In addition, the order directed plaintiff to 'make

available for defendant's inspection the original mortgage note and original mortgage assignment, at a mutually convenient place and time but in no event later than 20 days after the date of service of notice of entry of this order.'

"Notwithstanding the foregoing, the 'Amended Answers to Interrogatories' served by plaintiff on or about November 8, 2011 in response to the Court's order failed to comply with the order in several material respects. Plaintiff admittedly failed to 'identify all persons with knowledge of the facts at issue in this case, 'failed to provid[e] a basis for interpreting the computerized payment schedule annexed to plaintiff's response to defendant's interrogatories,' and interposed substantially the same objections that had previously been ruled upon by the Court and found to be 'improper.' In light of the express directives contained in the order, plaintiff's failure to provide, 'full, complete and substantive responses' must be deemed to be willful (*Forbes v New York City Tr. Auth.,* 88 AD3d 546 [1st Dept 2011]) and provided an independent basis for striking plaintiff's complaint in this action."

In light of all of the foregoing, and in accordance with CPLR R. 3212 and §3126, the Court grants defendant's motion for summary judgment and strikes plaintiff's complaint. The compliance conference presently scheduled to be held before the undersigned on March 29, 2012 is cancelled;

c. JPMorgan Chase commenced the Second Action based on the same allegations as made in the First Action and Caliguri promptly filed his answer to the Second Action. The affirmative defenses in the Caliguri answer to the Second Action included but were not limited to: (a) the collateral estoppel effect of the Short Form Order dated March 7, 2012; (b) the lack of standing; (c) challenging the genuineness and authenticity of the copy of the mortgage note; and (d) the failure of JPMorgan Chase to provide a proper notice of default before commencing the Second Action;

d. Caliguri served discovery requests upon JPMorgan Chase dated April 10, 2015; the discovery requests included, but were not limited to: (i) the production of the original mortgage note for examination and inspection; and (ii) a copy of any and all notices of default that JPMorgan Chase sent Caliguri. To date, JPMorgan Chase has never responded to any of Caliguri's discovery demands;

e. Caliguri also filed a motion to transfer the Second Action to Justice Baisley, the presiding judge over the First Action, which transfer was opposed by JPMorgan Chase;

f. rather than responding to Caliguri's discovery demands, JPMorgan Chase filed a motion for summary judgment dated June 8, 2015 and Caliguri filed an affirmation in opposition and in support of a cross-motion for summary judgment dated June 18, 2015; JPMorgan filed the affirmation in opposition and in reply dated June 30, 2015; and Caliguri filed his reply affirmation dated July 3, 2015. The JPMorgan Chase motion for summary judgment in the Second Action was based on the same copy of the mortgage note proffered by JPMorgan Chase in the First Action. And to date, JPMorgan Chase has still not responded to any of the Caliguri discovery demands in the Second Action.

Accordingly, Caliguri raised among other issues, the collateral estoppel, the "with prejudice" determination in the Justice Baisley's prior order, the standing and the authenticity and genuineness of the note issues in his answer. Please

further note that Caliguri served JPMorgan Chase a notice of production of the notes in the Second Action dated April 10, 2015, which included:

> "To make the original mortgage note and the original mortgage assignment available for inspection on a mutually [sic] date and time at your Long Island offices in Huntington, New York provided it is within thirty (30) days of the date of this notice for production of documents."

(R69-71). It must be further noted that the purported original mortgage note was not notarized or certified (the Adjustable Rate Note dated October 31, 2007 (R99-103).

It merely stated: "WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED" with a purported signature of Caliguri (R-99-103).

Caliguri's answer dated September 15, 2014 stated in pertinent part:

Second Affirmative Defense

3. The complaint failed to state that this is the second mortgage foreclosure action commenced by JPMorgan Chase against Caliguri seeking the same relief and for the same mortgage foreclosure. The first action was assigned Index No. 25638/2009 (the "First Action").
4. Due to JPMorgan Chase's flagrant discovery violations and its failure to demonstrate its standing, the Honorable Paul J. Baisley, Jr. of this Honorable Court issued an order dated March 7, 2012 (the "March 7, 2012 Order"). The March 7, 2012 Order provided in pertinent part:

   "**ORDERED** that the motion (motion sequence no. 004) of defendant Ross R. Caliguri for an order granting summary judgment dismissing this mortgage foreclosure action **with prejudice**, striking the complaint and, in the alternative, other sanctions, in accordance with CPLR §3126 and R. 3212, is granted as set forth hereinafter."

   The March 7, 2012 Order concluded by stating in pertinent part: "In light of all of the foregoing, and in accordance with CPLR R. 3212 and §3126, the

Court grants defendant's motion for summary judgment and strikes plaintiff's complaint."

5. Based on the provisions and rulings set forth in the March 7, 2012 Order, Caliguri commenced an action against JPMorgan Chase seeking to vacate and expunge the mortgage liens purportedly possessed by JPMorgan Chase in a quiet title action pursuant to the provisions set forth in RPAPL §1501. The quiet title action was assigned Index No. 13522/12.
6. On JPMorgan Chase's motion to dismiss and Caliguri's cross-motion for summary judgment, the Honorable Ralph T. Gazzillo of this Honorable Court issued an order dated May 13, 2013 declaring that the March 7, 2012 Order was not a dismissal "on the merits" and refused to issue an order quieting title (the "May 13, 2013 Order").
7. Caliguri appealed the May 13, 2013 Order to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department (the "Second Department"). As of the drafting of this answer, the briefs to the Second Department have been fully submitted and oral argument before the Second Department is scheduled to be held on September 22, 2014, Docket No. 2013-06651.
8. If the Second Department, or the Court of Appeals if on further appeal, determines that the action by JPMorgan Chase was dismissed with prejudice, and/or that Caliguri should have been granted his relief seeking to quiet title, neither JPMorgan Chase or any of its successors in interest would have the right to seek to foreclose the lien(s), as the lien(s) would be null and void.

Third Affirmative Defense

9. JPMorgan Chase lacks standing to commence and prosecute this mortgage foreclosure action.
10. The May 13, 2013 Order determined that JPMorgan Chase was unable to demonstrate its standing to commence and prosecute a mortgage foreclosure action pertaining to the subject liens, if any, after having a full and fair opportunity to demonstrate its standing to commence and prosecute the First Action.
11. The terms and provisions of the May 13, 2013 Order must be given collateral estoppel effect.
12. Accordingly, this second action is barred by the doctrine of collateral estoppel.

Fourth Affirmative Defense

13. Assuming arguendo that this Honorable Court does not dismiss this mortgage foreclosure action based on the second and/or third defenses, the complaint fails to establish that Chase has standing to commence this action by demonstrating that it has actual possession of the original mortgage note.

14. Only the entity or party that physically possessed the original mortgage note as of the time of the commencement of the action can commence and prosecute a mortgage foreclosure action.
15. By virtue of the orders of the Honorable Paul J. Baisley, Jr. in the First Action, the physical production of the original mortgage notes is required and an affidavit from a purported authorized official of JPMorgan Chase is insufficient.

Fifth Affirmative Defense

16. Caliguri denies the authenticity and genuineness of the mortgage notes annexed to the complaint.

POINT I

IF AN EXAMINATION OF THE ORIGINAL NOTE IS DEMANDED IN DISCOVERY, THE ORIGINAL NOTE MUST BE PRODUCED PRIOR TO THE ISSUANCE OF SUMMARY JUDGMENT AND THE ORDER OF REFERENCE

In this part of the brief, Caliguri will address the discovery of the note issue and in the second point of law, the res judicata/collateral estoppel/law of the case issues. In short, if an examination of the original note is demanded in discovery for examination and inspection, the original note must be produced by the plaintiff-mortgagee in discovery prior to the issuance of summary judgment and an order of reference on its behalf.

The note, and not the mortgage, is the dispositive instrument to establish standing of the plaintiff-mortgagee to commence a mortgage foreclosure action. Aurora Loan Servs., LLC v. Taylor, 25 N.Y.3d 355, 34 N.E.3d 363, 12 N.Y.S.3d 612, 2015 N.Y. LEXIS 1393, 2015 NY Slip Op 04872 (2015) stated at 25 N.Y.3d at 360-361:

> "The physical delivery of the note to the plaintiff from its owner prior to commencement of a foreclosure action may, in certain circumstances, be sufficient to transfer the mortgage obligation and create standing to foreclose."

(Citations Omitted). Aurora Loan Servs., LLC v. Taylor further stated at 25 N.Y.3d at 361:

> "This conclusion follows from the fact that the note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law."

Please see also Wells Fargo Bank, N.A. v. Gonzalez, 2019 N.Y. App. Div. LEXIS 5404 at *2, 2019 NY Slip Op 05434, 2019 WL 2835970 (2nd Dept., 7/3/19), Carrington Mtge. Servs., LLC v. Sudano, 2019 N.Y. App. Div. LEXIS 5263 at *2, 2019 NY Slip Op 05272, 2019 WL 2707866 (4th Dept., 6/28/19). Accordingly, the possession of the original mortgage note as of the commencement of the mortgage foreclosure action is the dispositive factor to determine the standing of the plaintiff in a mortgage foreclosure action in the State of New York.

It is rudimentary that a mortgage note is a negotiable instrument subject to the provisions of the Uniform Commercial Code (the "UCC"). Bayview Loan Servicing, LLC v. Kelly, 166 A.D.3d 843, 87 N.Y.S.3d 569, 2018 N.Y. App. Div. LEXIS 7992, 2018 NY Slip Op 08006, 97 U.C.C. Rep. Serv.2d (Callaghan) 316, 2018 WL 6072176 (2nd Dept., 2018) stated at 166 A.D.3d at 845:

> "A 'promissory note [is] a negotiable instrument within the meaning of the Uniform Commercial Code' (*Mortgage Elec. Registration Sys., Inc. v*

Coakley, 41 AD3d 674, 674, 838 NYS2d 622 [2007]; *see* UCC 3-104[2][3]; *US Bank, N.A. v. Zwisler,* 147 AD3d 804, 806, 46 NYS3d 213 [2017])."

Please see also Wells Fargo Bank, N.A. v. Gonzalez at 2019 N.Y. App. Div. LEXIS 5404 at *3 which referenced that a mortgage note is a negotiable instrument.

The term "negotiable instrument" is defined at UCC §3-104(1) as:

"Any writing to be a negotiable instrument within this Article must
a. be signed by the maker or drawer; and
b. contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article; and
c. be payable on demand or at a definite time; and
d. be payable to order or to bearer."

And UCC §3-104(2) provides in pertinent part:

"A writing which complies with the requirements of this section is:
(d) a 'note' if it is a promise other than a certificate of deposit."

Accordingly, it is rudimentary that the purported original note is a negotiable instrument subject to the terms and provisions of the UCC.

UCC §3-302(1)(A) defines the term "Holder in Due Course" as a holder who takes the instrument:

"(a) for value; and
(b) in good faith; and
(c) without notice that is overdue or has been dishonored or of any defense against or claim to it on the part of any person."

Please see also Hartford Acci & Indem. Co. v. American Express Co., 74 N.Y.2d 153, 159, 542 N.E.2d 1090, 544 N.Y.S.2d 573, 1989 N.Y. LEXIS 881, 8 U.C.C. Rep. Serv.2d (Callaghan) 865 (1989).

UCC §3-307 entitled: "Burden of Establishing Signatures, Defenses and Due Course" provides:

> "(1) Unless specifically denied in the pleadings each signature on an instrument is admitted. When the effectiveness of a signature is put in issue
> (a) the burden of establishing it is on the party claiming under the signature, but
> (b) the signature is presumed to be genuine or authorized except where the action is to enforce the obligation of a purported signer who has died or become incompetent before proof is required.
> (2) When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense.
> (3) After it is shown that a defense exists a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course."

In the instant matter, Caliguri had repeatedly raised the authenticity issue of the purported signature on the note and accordingly, never admitted that the signature on the note was genuine, especially as the note was not notarized or certified (please see Paragraph No. 16 of his answer to the Second Mortgage Action). Accordingly, as Caliguri had raised the authenticity and genuineness of his purported signature on the note, the provisions set forth in UCC §3-307(1) places the burden of proof to establish the authenticity and genuineness of the signature upon JPMorgan Chase; the presumption of the signature issue will be discussed

hereafter. Please see Gonzalez v. Dumpson, 46 A.D.2d 861, 862, 361 N.Y.S.2d 666, 1974 N.Y. App. Div. LEXIS 6051, 16 U.C.C. Rep. Serv. (Callaghan) 433 (1st Dept., 1974). Freeman Check Cashing, Inc. v. State, 97 Misc.2d 819, 412 N.Y.S.2d 963, 1979 N.Y. Misc. LEXIS 2096, 26 U.C.C. Rep. Serv. (Callaghan) 1186 (Ct. Cl., 1979) (a case that concerns checks (which is also a negotiable instrument in accordance with the provisions set forth in UCC §3-104(2)(b))) stated at 97 Misc.2d at 820-821:

> "Subdivision (1) of section 3-307 of the Uniform Commercial Code provides in relevant part that the burden of establishing the effectiveness of a disputed signature is on the party seeking to enforce it. The alleged holder is aided, however, by a statutory presumption in favor of its genuineness which did not exist at common law. 'Presumption' as defined by subdivision (31) of section 1-201 of the Uniform Commercial Code means that: 'the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its non-existence.'
>
> The effect of this definition is to create a rebuttable presumption: the adversary possesses the burden of coming forward with evidence to overcome it, but once this occurs, the presumption disappears. In this respect, it is to be contrasted with those presumptions which continue to the end of trial.
>
> The critical issue is: what quantum of evidence is necessary to overcome the presumption of genuineness? 'Substantial evidence is the test frequently applied to other rebuttable presumptions. However, the framers of the Uniform Commercial Code did not use the term 'substantial' and, consequently, there is no reason to believe that such a test was intended. In this connection, the official comment to section 3-307 of the Uniform Commercial Code states in part: '[defendant's] evidence need not be sufficient to require a directed verdict in his favor, but it must be enough to support his denial by permitting a finding in his favor.'

> This language suggests that the question is less one of quantity than of 'legal sufficiency' as that term is used in connection with determining whether a prima facie case has been established. The question is not 'how much' evidence, but whether some evidence has been adduced upon each and every element of a cause of action or defense. Forgery does not function as a true affirmative defense since the holder has the ultimate burden of proof. However, it does contain several logically independent elements which are normally proven either by testimony of a qualified expert or by a witness to the execution of the indorsement. We consider that the presumption is overcome when some evidence is introduced tending to prove each and every necessary element of forgery. The proof need not, however, possess any particular degree of 'substantiality', persuasiveness or weight, since such tests are essentially subjective."

(Citations Omitted). Please see also United Bank, Ltd. V. Cambridge Sporting Goods Corp., 41 N.Y.2d 254, 261, 360 N.E.2d 943, 392 N.Y.S.2d 265, 1976 N.Y. LEXIS 3242, 20 U.C.C. Rep. Serv. (Callaghan) 980 (1976). As JPMorgan Chase has failed to produce the purported original mortgage note for examination and inspection by Caliguri's forensic document specialist, it is doubtful that any one can claim that the purported original mortgage note was, in fact, executed by Caliguri and not a forgery, especially as Caliguri raised the issue in his answer and also retained a forensic document specialist in the First Action. Additionally, as stated in Freeman Check Cashing, Inc. v. State, UCC §3-307(1) places the burden of establishing the effectiveness of a disputed signature on the party seeking to enforce it, namely JPMorgan Chase. And JPMorgan Chase has failed to proffer a report from a forensic document specialist; it merely proffered the Affidavit of

Note Possession of Sherry Stafford sworn to on May 23, 2015 (the "Stafford Affidavit") that stated in pertinent part:

> "4. According to Chase's custodial system of records, emBTrust, Chase received the original Note on 9/19/2012.
> 5. Chase maintains possession of the Note at its storage facility, located at 780 Delta Drive, Monroe, Louisiana 71201.
> 6. Attached hereto as Attachment 1 is a copy of the original Note."

(R95-96). Accordingly, there was no representation that Ms. Stafford: (a) attended the refinancing ceremony; (b) examined the purported original mortgage note; and/or (c) that she or any other staff member of JPMorgan Chase or emBTrust ever caused an independent forensic document examination of the purported original mortgage note. And if the purported original mortgage note was, in fact, located at a storage facility in Monroe, Louisiana, there was absolutely no reason why JPMorgan Chase failed to produce the original mortgage note for examination and inspection by Caliguri's forensic document specialist, especially given the terms and provisions of the Prior Order and the document demands thereof.

It should be further noted that the signature page of the purported original mortgage note lacked a notarization or certification. If the Caliguri signature on the purported original mortgage note had been notarized or certified, there may have been a presumption of due execution. Chianese v. Meier, 285 A.D.2d 315, 729 N.Y.S.2d 460, 2001 N.Y. App. Div. LEXIS 7824 (1st Dept., 2001) *aff'd* 98

N.Y.2d 270, 774 N.E.2d 722, 746 N.Y.S.2d 657, 2002 N.Y. LEXIS 1615 (2002) stated at 285 A.D.2d at 320:

> "Where a document on its face is properly subscribed and bears the acknowledgement of a notary public, there is a 'presumption of due execution, which may be rebutted only upon a clear and convincing evidence to the contrary.'"

(Citation Omitted). Please see also John Deere Ins. Co. v. GBE/Alasia Corp., 57 A.D.3d 620, 621-622, 869 N.Y.S.2d 198, 2008 N.Y. App. Div. LEXIS 9417, 2008 NY Slip Op 9757 (2nd Dept., 2008), Singh v. Kaur, 294 A.D.2d 562, 563, 743 N.Y.S.2d 284, 2002 N.Y. App. Div. LEXIS 5617 (2nd Dept., 2002), Midfirst Bank v. Rath, 270 A.D.2d 932, 932, 2000 N.Y. App. Div. LEXIS 3668, 706 N.Y.S.2d 651 (4th Dept., 2000), Demblewski v. Demblewski, 267 A.D.2d 1058, 1058, 701 N.Y.S.2d 567, 1999 N.Y. App. Div. LEXIS 13857 (2nd Dept., 1999). As the purported original adjustable rate note failed to have a notarization or certification of Caliguri's signature, JPMorgan Chase should be prohibited from asserting that there was a presumption that the note was duly executed by Caliguri.

Banco Popular N. Am. v. Victory Taxi Mgmt., 1 N.Y.3d 381, 806 N.E.2d 488, 774 N.Y.S.2d 480, 2004 N.Y. LEXIS 201 (2004) (a case that concerns personal guaranties and not negotiable instruments) stated at 1 N.Y.3d at 384:

> "Although an expert's opinion is not required to establish a triable issue of fact regarding a forgery allegation, where an expert is used to counter the moving party's prima facie proof, the expert opinion must be in admissible form and state with reasonable professional certainty that the signature at issue is not authentic."

See also 82-90 Broadway Realty Corp. v. New York Supermarket, Inc., 154 A.D.3d 797, 799-800, 62 N.Y.S.3d 186, 2017 N.Y. App. Div. LEXIS 7288, 2017 NY Slip Op 07233 (2nd Dept., 2017). In the current matter, Caliguri raised the authenticity issue in the answer, served a document demand for said production and retained a forensic document specialist in the First Action, and further raised the same in his answer and served a document demand request in the Second Action. Notwithstanding the above, JPMorgan Chase has adamantly refused to make the purported original mortgage note available for inspection and examination by Caliguri's forensic document specialist; and had, in fact, filed its motion for summary judgment prior to the thirty (30) day expiration for the production of the note for examination and inspection.

CPLR §3212(f) provides when discussing summary judgment:

> "Facts unavailable to opposing party. Should it appear that affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court must deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just."

Please see also Corvino v. Schieneller, 168 A.D.3d 812, 812-813, 90 N.Y.S.3d 294, 2019 N.Y. App. Div. LEXIS 281, 2019 NY Slip Op 00259, 2019 WL 209113 (2nd Dept., 2019), Nechamie v. County of Nassau, 147 A.D.3d 770, 773-774, 47 N.Y.S.3d 58, 2017 N.Y. App. Div. LEXIS 661, 2017 NY Slip Op 00657, 2017 WL 424496 (2nd Dept., 2017), Herrera v. Gargiso, 140 A.D.3d 1122, 1123, 34 N.Y.S.3d

498, 2016 N.Y. App. Div. LEXIS 4976, 2016 NY Slip Op 05120 (2nd Dept., 2016), Torres-Ruiz v. Luxor Transp. Corp., 136 A.D.3d 798. 798, 24 N.Y.S.3d 736, 2016 N.Y. App. Div. LEXIS 968, 2016 NY Slip Op 00963 (2nd Dept., 2016).

In fact, Aurora Loan Servs., LLC v. Taylor stated at 25 N.Y.3d at 362:

> "As to the production of the original note, there is no indication in the record that the Taylors ever requested such production in discovery or moved Supreme Court to compel such production. Although the Taylors assert that the best evidence rule should require production of the original, they fail to cite any authority holding that such is required in this context. Second, Ms. Holland asserts in her affidavit that she examined the original note herself, and the adjustable rate note attachments submitted with the moving papers clearly show the note's chain of ownership through Deutsche."

Herein, Caliguri served JPMorgan Chase with the notice of production of the original mortgage note in discovery for examination and inspection by Caliguri's forensic document specialist and in the first mortgage action, the Supreme Court had issued four (4) discovery orders for the production of the original mortgage note and Caliguri appeared at the offices of the attorneys for JPMorgan Chase at the scheduled date and time with his forensic document specialist to examine and inspect the note, however, JPMorgan Chase failed to produce the note at said date and time. Finally, the Supreme Court granted Caliguri summary judgment in the first mortgage foreclosure action; a further discussion of the granting of the summary judgment in favor of Caliguri will be addressed in Point II of this brief.

And U.S. Bank Trust, N.A. v. Moomey-Stevens, 168 A.D.3d 1169, 91 N.Y.S.3d 788, 2019 N.Y. App. Div. LEXIS 26, 2019 NY Slip Op 00016, 97

U.C.C. Rep. Serv.2d (Callaghan) 808, 2019 WL 80600 (3rd Dept., 2019) stated at 168 A.D.3d at 1173:

> "Defendants also specifically sought discovery with respect to when plaintiff took physical possession of the original note, from what entity it received it, what it paid for same, as well as 'a first generation copy of the original [n]ote and all [a]llonges to the note' and 'evidence of the physical transfer of the original [n]ote from origination to its current location.' Plaintiff, however, failed to provide any discovery prior to filing its motion for summary judgment. Accordingly, inasmuch as the proof submitted was not sufficient to establish that plaintiff had standing through assignment or actual physical possession of the note at the time it commenced the instant mortgage foreclosure action, plaintiff failed to demonstrate its entitlement to summary judgment. Rather, Supreme Court should have compelled plaintiff's disclosure of the original note pursuant to defendants' discovery request prior to granting plaintiff's motion for summary judgment."

(Citations Omitted). JPMorgan Chase Bank, N.A. v. Hill, 133 A.D.3d 1057, 21 N.Y.S.2d 363, 2015 N.Y. App. Div. LEXIS 8572, 2015 NY Slip Op 08479 (3rd Dept., 2015), citing Aurora Loan Servs., LLC v. Taylor, stated at 133 A.D.3d at 1059:

> "Here, by comparison, the original note includes only a blank endorsement, the affidavit of the assistant secretary is based on a review of system records without an examination of the original note and defendants demanded production of the original note from the outset. Defendants also represent that a prior foreclosure action was commenced by defendant Bank of New York in 2008 – a year after plaintiff ostensibly obtained possession of the original note – and discontinued in 2010, without prejudice. Given this context, and without any verification as to how plaintiff came into possession of the note, we conclude that Supreme Court should have first compelled it to produce the original note prior to resolving plaintiff's motion for summary judgment. This is particularly so given the responding affidavit of plaintiff's representative that it was 'ready, wiling (sic) and able to produce the original 'wet-ink' note for inspection' – a representation repeated in plaintiff's brief on appeal."

And the Second Department refused to grant summary judgment prior to the completion of discovery in a mortgage foreclosure action in HSBC Bank USA, N.A. v. Arias, 112 A.D.3d 785, 786, 977 N.Y.S.2d 323, 2013 N.Y. App. Div. LEXIS 8352, 2013 NY Slip Op 8409, 2013 WL 6641749 (2nd Dept., 2013).

Accordingly, it was premature for the Supreme Court in the Second Action to grant summary judgment in favor of JPMorgan Chase until and unless JPMorgan Chase made available the purported original mortgage note available for inspection and examination by Caliguri's forensic document specialist.

POINT II

THE SUPREME COURT IN THE SECOND ACTION HAD TO GIVE RES JUDICATA, COLLATERAL ESTOPPEL AND/OR LAW OF THE CASE EFFECT

Assuming arguendo that the law is that the plaintiff did not have to make available the purported original mortgage note for inspection and examination by the defendant's forensic document specialist, the doctrines of res judicata, collateral estoppel and/or law of the case doctrine mandate that the terms and provisions of the Prior Order had to be given effect, and, thus, the Second Action had to be dismissed based on res judicata or the purported original note had to be produced for examination and inspection by Caliguri's forensic document specialist.

A RES JUDICATA EFFECT OF THE PRIOR ORDER

The issuance of a judgment on Caliguri's motion for summary judgment should have been given preclusive effect as it should have been deemed to be a decision on the merits, notwithstanding the decision by the Second Department in Caliguri v. JPMorgan Chase Bank in the action to vacate and discharge the mortgage liens. Carven Associates v. American Home Assurance Corp., 84 N.Y.2d 927, 644 N.E.2d 1368, 620 N.Y.S.2d 812, 1994 N.Y. LEXIS 4104 (1994) at 84 N.Y.2d at 930:

> "A subsequent order of the Appellate Division, Second Department (175 AD2d 369), determined that a prior action by plaintiffs based upon the same events as the present action had been dismissed for their willful and repeated refusal to obey court-ordered disclosure and accordingly, plaintiffs were not entitled to reinstitute their action against defendant (*see,* CPLR 205[a])."

And citing among other authorities, Carven Associates v. American Home Assurance Corp., the Court of Appeals in Andrea v. Arnone, Hedin, Casker, Kenney & Drake, Architects & Landscape Architects, P.C. (Habiterra Assocs.), 5 N.Y.3d 514, 840 N.E.2d 565, 806 N.Y.S.2d 453, 2005 N.Y. LEXIS 2718, 2005 NY Slip Op 7862 (2005) would not permit the plaintiff to re-commence a new action based on the provisions set forth CPLR §205(a) (permits the commencement of a new action except, among other things, if the dismissal of the first action was based on a neglect to prosecute) when the first action was dismissed for the failure to comply with Court-ordered discovery demands. Please see also Maitland v.

Trojan Electric & Machine Co., Inc., 65 N.Y.2d 614, 615-616, 480 N.E.2d 736, 491 N.Y.S.2d 147, 1985 N.Y. LEXIS 14694 (1985), Strange v. Montefiore Hospital and Medical Center, 59 N.Y.2d 737, 738-739, 450 N.E.2d 235, 463 N.Y.S.2d 429, 1983 N.Y. LEXIS 3092 (1983). In contravention of the above-referenced holdings, the Second Department stated in the Opinion dated October 29, 2014 in pertinent part in Caliguri v. JPMorgan Chase:

> "Furthermore, the alternative basis for dismissal of the prior action, the striking of the complaint for noncompliance with a discovery order, was not a dismissal on the merits (*see Maitland v Trojan Elec. & Mach. Co.,* 65 NY2d 614, 615-616; *Daluise v Scottile,* 40 AD3d 801; *Aguilar v Jacoby,* 34 AD3d 706, 707; *Stray v Lutz,* 306 AD2d 836, 836-837; *Bullock v Wehner,* 263 AD2d 739, 740; *see also CPLR 5103).*"

However, most of the cited cases above by the Second Department have a summary judgment exception, namely if the discovery violation was the subject of a summary judgment determination, the summary judgment determination is deemed to be on the merits and must be given preclusive effect. For example, Maitland v. Trojan Elec. & Mach. Co., at 65 NY2d at 615-616 held that a dismissal based on a discovery preclusion order in the context of a motion for summary judgment, is deemed to be a determination on the merits and must be given res judicata effect. Similarly, the second case cited by the Second Department, Daluisse v. Scottile, 40 A.D.3d 801, 837 N.Y.S.2d 175, 2007 N.Y. App. Div. LEXIS 6218, 2007 NY Slip Op 4252 (2nd Dept., 2007) stated at 40 A.D.3d at 802-803:

> "'Where a plaintiff's noncompliance with a disclosure order does not result in a dismissal with prejudice, or an order of preclusion or summary judgment in favor of defendant so as to effectively close plaintiff's proof, dismissal resulting from the noncompliance is not a merits determination so as to bar commencement of a second action'."

(Citations Omitted). And in the third case cited, Aguilar v. Jacoby, 34 A.D.3d 706 (2nd Dept., 2006), the initial dismissal was based on a CPLR §3126 motion to dismiss based on discovery violations, and not a motion for summary judgment based on the provisions set forth in CPLR §3212. The Prior Order was based on a motion for summary judgment pursuant to the provisions set forth in CPLR §3212. Therefore, the provisions of the Prior Order should have been given preclusive effect prohibiting and enjoining JPMorgan Chase from re-commencing a second mortgage foreclosure action based on the same note and the same mortgage. Accordingly, the decisions of the Second Department are in conflict with a rudimentary rule of law namely that the granting of a motion for summary judgment is a decision on the merits which must be given preclusive effect, especially as the Prior Order stated "with prejudice". The Second Department did not provide any authority that this rudimentary issue of law pertaining to summary judgment determinations has a mortgage foreclosure law exception.

B. LAW OF THE CASE EFFECT ON THE SECOND ACTION

But, assuming arguendo that the Prior Order was not deemed to have preclusive effect, the provisions of the Prior Order had to be given effect under the

"law of the case" or collateral estoppel doctrines in the second mortgage foreclosure action especially as Justices Baisley and Rouse are judges of coordinate courts; therefore, the original mortgage note should have been provided for inspection and examination by Caliguri's forensic document specialist People v. Cummings, 31 N.Y.3d 204, 99 N.E.3d 877, 75 N.Y.S.3d 484, 2018 N.Y. LEXIS 1122, 2018 NY Slip Op 03306, 2018 WL 2105545 (2018) stated at 31 N.Y.3d at 208:

> "Law of the case is 'a judicially crafted policy that 'expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power.' As such, law of the case is necessarily 'amorphous' in that it directs a court's discretion,' but does not restrict its authority'. Law of the case does not apply to every judge or every ruling. Our cases applying law of the case have generally involved courts of *coordinate jurisdiction*. Further, absent prejudice to the defendant, a judge may revisit his or her own evidentiary rulings during trial. ['pre-trial evidentiary rulings may be reconsidered, w(h)ere no prejudice accrues to the party that had previously thought it had secured a favorable ruling from ... the court']. On retrial, evidentiary rulings may be reconsidered, but orders determining the result of a suppression hearing generally cannot.
>
> The decision to admit hearsay as an excited utterance is an evidentiary decision, 'left to the sound judgment of the trial court', and thus may be reconsidered on retrial. There is no reason to apply a different rule to a successor judge within the same trial and we, therefore, have no discretion concerning an evidentiary trial ruling. To be sure, 'the law of the case doctrine is designed to eliminate the inefficiency and disorder that would follow if courts of coordinate jurisdiction were free to overrule one another in an ongoing case'. This, however, weighs against Mr. Cummings' argument that a substitute justice's discretionary reconsideration of a prior evidentiary ruling necessitate per se reversal. Accordingly, the substitute Justice was not bound by law of the case and acted within his discretion to revisit the evidentiary ruling."

(Emphasis Added)(Citations Omitted). Matter of Lew v. Sobel, 172 A.D.3d 1208, 2019 N.Y. App. Div. LEXIS 4004, 2019 NY Slip Op 03972, 2019 WL 2202453 (2nd Dept., 2019) stated at 172 A.D.3d at 1210: "'It is fundamental that a judge may not review or overrule an order of another judge of coordinate jurisdiction in the same action or proceeding.'" (Citations Omitted). Fishon v. Richmond Univ. Med. Ctr., 171 A.D.3d 873, 98 N.Y.S.3d 143, 2019 N.Y. App. Div. LEXIS 2719, 2019 NY Slip Op 02682, 2019 WL 1549652 (2nd Dept., 2019) stated at 171 A.D.3d at 874:

> "'The doctrine of the law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned.'"

(Citations Omitted). And Stujan v. Glencord Bldg. Corp., 137 A.D.3d 1252, 29 N.Y. App. Div. LEXIS 2315, 2016 NY Slip Op 02347 (2nd Dept., 2016) stated at 137 A.D.3d at 1253:

> "'The doctrine of the 'law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned''. 'The doctrine applies only to legal determinations that were necessarily resolved on the merits in [a] prior decision''."

(Citations Omitted). Please see also Pathak v. Shukla, 164 A.D.3d 687, 689, 281 N.Y.S.3d 549, 2018 N.Y. App. Div. LEXIS 5721, 2018 NY Slip Op 05775, 2018 WL 3862996 (2nd Dept., 2018). Brown-Jodoin v. Pirrotti, 138 A.D.3d 661, 663, 9

N.Y.S.3d 426, 2016 N.Y. App. Div. LEXIS 2484, 2016 NY Slip Op 02606 (2nd Dept., 2016), Clark v. Clark, 117 A.D.3d 668, 669, 985 N.Y.S.2d 276, 2014 N.Y. App. Div. LEXIS 3159, 2014 NY Slip Op 3224, 2014 WL 1797600 (2nd Dept., 2014). Palmatier v. Mr. Heater Corp., 163 A.D.3d 1228, 81 N.Y.S.3d 610, 2018 N.Y. App. Div. LEXIS 5172, 2018 NY Slip Op 05250, 2018 WL 3383575 (3rd Dept., 2018) stated at 163 A.D.3d at 1229:

> "[w]here a court directly passes upon an issue which is necessarily involved in the final determination on the merits, [the court's determination] becomes the law of the case'."

(Citations Omitted). In the current matter, Justice Baisley's ruling as to the necessity of producing the original mortgage note was necessarily involved in the final determination on the merits of the First Action. However, People v. Evans, 94 N.Y.2d 499, 727 N.E.2d 1232, 706 N.Y.S.2d 678, 2000 N.Y. LEXIS 85 (2000) stated at 94 N.Y.2d at 502: "law of the case addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation *before* final judgment" (Citations Omitted) and stated at 94 N.Y.2d at 503: "law of the case is necessarily 'amorphous' in that it 'directs a court's discretion,' but does not restrict its authority." (Citations Omitted). While the undersigned counsel could not find a single case that defined the term "single litigation", it is arguable that a prior final decision by a court of a coordinate jurisdiction in a prior action determining the same causes of action constitutes the rule of the case doctrine in

the second action raising the same issues and facts, notwithstanding that there were two (2) separate actions, especially when JPMorgan Chase failed to appeal the Prior Order. Gadani v. DeBrino Caulking Associations, Inc., 86 A.D.3d 689, 691, 926 N.Y.S.2d 724, 2011 N.Y. App. Div. LEXIS 5686, 2011 NY Slip Op 5842 (3rd Dept., 2011).

C. COLLATERAL ESTOPPEL EFFECT MUST BE GIVEN TO THE TERMS AND PROVISIONS OF THE PRIOR ORDER

And assuming arguendo that the "law of the case doctrine" was inapplicable, the doctrine of collateral estoppel is applicable. Matter of Dunn, 24 N.Y.3d 699, 27 N.E.3d 465, 3 N.Y.S.3d 751, 2015 N.Y. LEXIS 303, 2015 NY Slip Op 01556 (2015) stated at 24 N.Y.3d at 704:

> "It is well settled that 'collateral estoppel precludes a party from relitigating 'an issue which has previously been decided against [her] in a proceeding in which [she] had a fair opportunity to fully litigate the point' (*Kaufman v Eli Lilly & Co.,* 65 NY2d 449, 455, 482 NE2d 584 [1985][citation omitted]). We have observed that 'collateral estoppel is a flexible doctrine' and that a determination of whether a party had a full and fair opportunity to litigate in the prior proceeding requires a 'practical inquiry into the realities of [the] litigation' (*Gilberg v Barbieri,* 53 NY2d 285, 292, 423 NE2d 807, 441 NY2d 49 [1981][internal quotation marks and citation omitted]; *Auqui v Seven Thirty One Ltd. Partnership,* 22 NY3d 246, 255, 980 NYS2d 345, 3 NE3d 682 [2013]). The party seeking to invoke collateral estoppel has the burden to show the identity of the issues, while the party trying to avoid application of the doctrine must establish the lack of a full and fair opportunity to litigate (*see Kaufman,* 65 NY2d at 456)."

Jacob Marion, LLC v. Jones, 168 A.D.3d 1043, 2019 N.Y. App. Div. LEXIS 632, 2019 NY Slip Op 00590 (2nd Dept., 2019) stated at 168 A.D.3d at 1044:

> "Collateral estoppel, or issue preclusion, a narrower species of res judicata, 'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same."

(Citations Omitted). Miller v. Falco, 170 A.D.3d 707, 95 N.Y.S.3d 334, 2019 N.Y. App. Div. LEXIS 1605, 2019 NY Slip Op 01589, 2019 WL 1051520 (2nd Dept., 2019) stated at 170 A.D.3d at 709:

> "'The doctrine of collateral estoppel ... precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of actions are the same' (*Ryan v New York Tel. Co.,* 62 NY2d 494, 500, 467 N.E.2d 487, 478 N.Y.S.2d 823). 'The two requirements for its application are: first, the identical issue necessarily must have been decided in the prior action and be decisive in the present action, and second, the party to be precluded must have had a full and fair opportunity to contest the prior determination' (*Matter of Abady,* 22 AD3d 71, 81, 800 N.Y.S.2d 651)."

Matter of Kleinknecht v. Siino, 165 A.D.3d 936, 86 N.Y.S.3d 577, 2018 N.Y. App. Div. LEXIS 6860, 2018 NY Slip Op 06908, 2018 WL 5020282 (2nd Dept., 2018) stated at 165 A.D.3d at 939:

> "'Collateral estoppel applies if the identical issue sought to be precluded was necessarily decided in an earlier action, at which the party opposing preclusion had a full and fair opportunity to contest the issue'."

(Citations Omitted). Please see also Dalton v. Dalton, 2019 N.Y. App. Div. LEXIS 5370 at **2-*3, 2019 NY Slip Op 05384, 2019 WL 2844553 (2nd Dept., 7/3/19), Bank of N.Y. Mellon v. Chamoula, 170 A.D.3d 788, 790, 96 N.Y.S.3d 148, 2019 N.Y. App. Div. LEXIS 1795, 2019 NY Slip Op 01731 (2nd Dept., 2019),

Karakash v. Trakas, 163 A.D.3d 788, 789-790, 82 N.Y.S.3d 435, 2018 N.Y. App. Div. LEXIS 5234, 2018 NY Slip Op 05292, 2018 WL 3450202 (2nd Dept., 2018).

And the doctrine of collateral estoppel is applicable to discovery violations in the prior proceeding, such as in the current matter where JPMorgan Chase adamantly refused to provide discovery of the note. Metro Found. Contrs., Inc. v. Marco Martelli Assoc., Inc., 145 A.D.3d 526, 43 N.Y.S.3d 44, 2016 N.Y. App. Div. LEXIS 8199, 2016 NY Slip Op 08329 (1st Dept., 2016) stated at 145 A.D.3d at 526:

> "The court correctly dismissed the breach of contract causes of action as barred by the doctrine of collateral estoppel. The judgment dismissing the action brought by plaintiff in federal court against defendant's surety (based on defendant's alleged failure to pay plaintiff in accord with the contract), although obtained on default, is a proper basis for collateral estoppel since it resulted from plaintiff's willful and repeated refusal to provide discovery in that action. Plaintiff may not re-litigate the contract issues against defendant, because those issues, which plaintiff had a full and fair opportunity to litigate in the federal action but 'affirmatively chose not to by [its] own failure to comply with court orders'."

(Citations Omitted). Kinberg v. Schwartzapfel, Novick, Truhowsky, Marcus, P.C., 136 A.D.3d 431, 24 N.Y.S.3d 614, 2016 N.Y. App. Div. LEXIS 749, 2016 NY Slip Op 00757 (1st Dept., 2016) stated at 136 A.D.3d at 431:

> "Plaintiff asserts a cause of action for legal malpractice against defendant law firm, which represented her in the course of her prior personal injury action. That action was dismissed after plaintiff failed to comply with discovery demands in a conditional order of preclusion. The order dismissing plaintiff's prior action based on her violation of the preclusion order is entitled to preclusive effect in this subsequent action."

(Citations Omitted). Please see also Windley v. City of New York, 104 A.D.3d 597, 598, 961 N.Y.S.2d 441, 2013 N.Y. App. Div. LEXIS 1966, 2013 NY Slip Op 2024, 2013 WL 1197142 (1st Dept., 2013), In re Abady, 22 A.D.3d 71, 84-85, 800 N.Y.S.2d 651, 2005 N.Y. App. Div. LEXIS 7255 (1st Dept., 2005).

Justice Baisley had ordered that the purported original mortgage note to be produced on four (4) different occasions and, thus, the issue as to whether the purported original mortgage note had to be produced had already been determined and decided against JPMorgan Chase in the First Action; in fact, the First Action was dismissed "with prejudice" due to the failure of JPMorgan Chase to produce the Court-ordered discovery. JPMorgan Chase has failed to assert or even demonstrate that it lacked a full and fair opportunity to litigate the discovery issue before Justice Baisley in the First Action.

Accordingly, the order granting the discovery of the purported original mortgage note by Justice Baisley must be given collateral estoppel effect. Please note that there was nothing stated in Matter of Dunn that the determination of the ultimate issue (whether the decision to dismiss the first mortgage foreclosure action) had to be on the merits.

CONCLUSION

For the reasons set forth above, the Decision and Order by the Second Department dated January 16, 2019 should be reversed in its entirety and Caliguri

should be entitled to the dismissal of the Second Action based on res judicata, or alternatively: discovery of the note based on the law that purported original mortgage notes must be produced in discovery when demanded by the defendant and/or the Prior Order must be given law of the case and/or collateral estoppel effect.

Dated: Hauppauge, New York
August 6, 2019

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR §500.13(c) that this brief was

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Dated: Hauppauge, New York
August 6, 2019

Jeffrey Herzberg