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.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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November 27, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

The Defendant-Appellant Ross R. Caliguri ("Caliguri") filed the record on appeal and the Brief for Defendant-Appellant dated August 6, 2019 and the Plaintiff-Respondent JPMorgan Chase Bank, National Association ("JPMorgan") filed the Brief of Plaintiff -Respondent JPMorgan Chase Bank, N.A. dated October 28, 2019. Caliguri is now filing his reply brief.

PRELIMINARY STATEMENT

JPMorgan is incorrect as to the notarization of the Adjustable Rate Note in the principal amount of One Million and xx/100 Dollars ($1,000,000.00) dated October 31, 2007 (the "Note") (R-230-234). The Note was never notarized; rather, the Consolidation, Extension, and Modification Agreement dated October 31, 2007 was notarized by Alison Cavill (R-239-270). The Consolidation, Extension and Modification Agreement and/or mortgage had to be notarized in order to record the document with the Suffolk County Clerk in accordance with the provisions set forth in RPL §§291, 316-a. Please see also Merscorp, Inc. v. Romaine, 8 N.Y.3d 90, 97, 861 N.E.2d 81, 828 N.Y.S.2d 266, 2006 N.Y. LEXIS 3699 (2006). However, as made crystal clear in Aurora Loan Servs., LLC v. Taylor, 25 N.Y.3d 355, 34 N.E.3d 363, 12 N.Y.S.3d 612 (2015), the note and mortgage are two (2) separate, distinct documents. In fact, Aurora Loan Servs., LLC v. Taylor 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 page 19 of the Brief for Defendant-Appellant. Accordingly, the mortgage is essentially an irrelevant document pertaining to the issue of standing.

The first paragraph of Judge Baisley's Order dismissing the first mortgage foreclosure action dated March 7, 2012 provided as follows:

> "**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."

(R-39-41). Notwithstanding the service of a notice of entry upon the Plaintiff-Respondent JPMorgan, JPMorgan failed to file a motion for reconsideration and/or a notice of appeal. Accordingly, the March 7, 2012 Order must be given res judicata effect, especially as the March 7, 2012 Order was issued based on: (a) the filing of a motion for summary judgment in accordance with the provisions set forth in CPLR §3212; and (b) the failure of JPMorgan to provide both Court-ordered discovery (i.e., the production of the original mortgage note for inspection and examination by Caliguri's forensic document specialist, Jeffrey Luber, on a date and time set by Judge Baisley) and its failure to demonstrate its standing to prosecute this mortgage foreclosure action by admissible evidence. This issue was

addressed in the Brief for Defendant-Appellant and will be further addressed in Point I of this reply brief.

It should also be noted that during the first mortgage foreclosure action, JPMorgan had represented that its attorney, Steven J. Baum, Esq. in Amherst, New York had physical possession of the original mortgage note and the first mortgage foreclosure action was commenced on July 2, 2009; based on the latter representation, Justice Baisley ordered that the original mortgage note be produced in discovery at Mr. Baum's office in Westbury, New York on a date and time certain. And when Caliguri appeared at Baum's office in Westbury, New York on the scheduled date and time, with the undersigned counsel and Mr. Luber, Mr. Baum's office had failed to produce the original mortgage note for inspection and examination by Mr. Luber. Accordingly, the first mortgage foreclosure action was dismissed with prejudice in accordance with the provisions set forth in CPLR §§3212 and 3126. (R39-41).

The second mortgage foreclosure action was commenced by Stiene & Associates, P.C. on behalf of JPMorgan by summons dated August 7, 2014 (R-46-47). It should be further noted that the undersigned counsel on behalf of Caliguri had filed a motion to transfer the second action to Justice Baisley, but the motion was denied on the opposition of JPMorgan.

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

> "4. According to Chase's custodial system of record, 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 Deive, Monroe, Louisiana 71203."

(R-95-97). However, there were no facts proffered as to the physical location of the original mortgage note from July 2, 2009 (the date of the commencement of the first mortgage action) to September 12, 2012, a date that was greater than three (3) years after the commencement of the first mortgage action. And further, an official at emBTrust never proffered an affidavit of possession.

As stated numerous times, each and every time that the undersigned counsel had sought the production of the original mortgage note for examination by Caliguri's forensic document specialist, Mr. Luber, JPMorgan, as successor in interest to Washington Mutual, FSB ("WaMu"), had adamantly refused to provide the original mortgage note for inspection and discovery. Accordingly, with each and every rebuff, Caliguri and the undersigned counsel have become more convinced that neither WaMu nor JPChase ever possessed the original mortgage note, especially as the original mortgage note was unaccounted for throughout the first mortgage foreclosure action and purportedly made an appearance as of September 12, 2012, a date that was subsequent to the March 7, 2012 Order issued by Justice Baisley dismissing the first mortgage foreclosure action with prejudice.

It is also rudimentary that an assignee of a note acquires the exact same rights in said note as the assignor previously possessed. Mason v. Caruna 2019 N.Y. App. Div. LEXIS 8052, 2019 NY Slip Op 08039 (4th Dept., 11/8/19) stated at 2019 N.Y. App. Div. LEXIS 8052 at *1:

> "We agree with defendant that plaintiff, as the assignee of a mortgagee, stands in the shoes of decedent, and took the mortgage' subject to the equities attending the original transaction'.' Plaintiff, as assignee, cannot stand in any better position than decedent, as assignor."

(Citations Omitted). Please see also American States Ins. Co. v. Huff, 119 A.D.3d 478, 479, 990 N.Y.S.2d 489 (1st Dept., 2014). In fact, this concept of the law in the State of New York can be traced to Trustees of Union College v. Wheeler, 61 N.Y. 88, 1874 N.Y. LEXIS 622 (1874) which stated at 61 N.Y. at 104-105:

> "It is well settled that an assignee of a mortgage must take it subject to the equities attending the original transaction. If the mortgagee cannot himself enforce it, the assignee has no greater rights. The true test is to inquire what can the mortgagee do by way of enforcement of it against the property mortgaged; what he can do the assignee can do, and no more."

There is one limited exception to this rule of law which was set forth by the United States Supreme Court in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 460, 62 S.Ct. 676, 86 L.Ed. 956 (1942) and was thereafter codified in 12 U.S.C. §1283(e), to protect the Federal Deposit Insurance Corporation from secret side agreements between the failed bank and the borrower pertaining to payment terms. 12 U.S.C. §1823(e) provides:

"No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it … as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement –

(A) is in writing,

(B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution;

(C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board of committee, and

(D) has been continuously, from the time of its execution, an official record of the depository institution."

Herein, there were no side or secretive agreements between Caliguri and WaMu and accordingly, the provisions set forth in 12 U.S.C. §1823(e) are inapplicable. In fact, the Second Circuit in FDIC v. Great Am. Ins. Co., 607 F.3d 288, 2010 U.S. App. Div. LEXIS 11471 (2nd Cir. 2010) held that the provisions set forth in 12 U.S.C. §1823(e) were inapplicable in an attempt by the Federal Deposit Insurance Corporation to enforce fidelity bonds and its related rescission clause. FDIC sought to hold an insurer liable notwithstanding misrepresentations by the failed banking institution on its insurance application. FDIC v. Great Am. Ins. Co stated at 607 F.3d at 293-294:

"Even though we consider the fidelity bond to be an asset under 12 U.S.C. §1823, this provision exists to bar 'secret' defenses which would diminish the FDIC's interest in a failed bank's assets. Defenses raised by the fidelity bond was in accord with its terms allowing such action on the basis of a 'misrepresentation, omission, concealment or any incorrect statement of a material fact, in the application or otherwise. ' As the grounds for rescission were plainly stated on the face of the bond, there is nothing secret about GAIC's misrepresentation defense, and no cause to apply Section 1823(e).

> To honor the FDIC's position and allow it to recover despite misrepresentations in CBC's insurance applicable would be to strike the rescission clause from the bond."

(Citations Omitted). In Federal Deposit Ins. Corp. v. RepublicBank, Lubbock, N.A.,883 F.2d 427, 1989 U.S. App. LEXIS 14119 (5th Cir. 1989), the Fifth Circuit refused to permit the Federal Deposit Insurance Corporation to acquire superior rights to a more senior lien based on the provisions set forth in 12 U.S.C. §1823(e).

Similarly, there was no "secret" agreement between Caliguri and WaMu; and to allow the enforcement of the provisions set forth in 12 U.S.C. §1283(e) herein would usurp the laws of the State of New York pertaining to the enforceability of mortgage notes and other forms of negotiable instruments. In fact, the provisions set forth in 12 U.S.C. §1283(e) never even referenced the provisions of the Uniform Commercial Code.

Lastly, pages 47 and 48 of the Brief of Plaintiff-Respondent JPMorgan Chase Bank, N.A. correctly stated that the undersigned counsel was the attorney for Monique and Leonard Taylor in Aurora Loan Servs., LLC v. Taylor, 25 N.Y.3d 355, 34 N.E.3d 363, 12 N.Y.S.3d 612 (2015). The oral argument was held on April 30, 2015 at 12:00 noon at the Judiciary Institute in White Plains. This representation in the Brief of Plaintiff-Respondent JPMorgan Chase Bank, N.A. was the first reference as to the undersigned counsel's representation of the Taylors

as it was never referenced in any of the briefing before the trial court or the Second Department.

POINT I

THE ORDER DATED MARCH 7, 2012 ISSUED BY JUSTICE BAISLEY MUST BE GIVEN RES JUDICATA EFFECT

In our system of justice, parties do not have the right to have a dry-run litigation or "a second bite at the apple" and thus, if one of the parties dislikes the ultimate result, they are not entitled to a do-over, with limited exceptions not relevant herein. The only right that the losing party in a litigation has is to file: (a) a motion for leave to renew or to reargue a prior motion in accordance with the provisions set forth in CPLR §2221; and/or (b) a notice of appeal in accordance with the provisions set forth in CPLR §5513. In the current matter, JPMorgan failed to file a motion for leave to renew or to reargue and/or a notice of appeal of the Justice Baisley Order dated March 7, 2012. Finality of court decisions is an important element in our system of jurisprudence as it brings an end to the litigation and also serves to limit the unnecessary burden on our court system.

In the current matter, the Order dated March 7, 2012 issued by Justice Baisley must be given res judicata effect as it was based on both a failure to produce discovery and the inability of JPMorgan to demonstrate its standing to sue by admissible evidence. The underlying motion by Caliguri was based on both CPLR §§3126 and 3212. Admittedly, if the underlying motion by Caliguri was

based solely on the provisions set forth in CPLR §3126, it may be problematic whether the Order dated March 7, 2012 should be given res judicata effect, but it should be given preclusive effect as explained in the brief for defendant-appellant and will be further addressed below. Most importantly, the underlying motion and the Order dated March 7, 2012 sought summary judgment based on the provisions set forth in CPLR §3212. It must be emphasized that the first decretal paragraph of the Order dated March 7, 2012 stated:

> "***ORDERED*** that the motion (motion sequence no. 004) of defendant Ross R. Caliguri for 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."

Accordingly, Justice Baisley's Order dated March 7, 2012 was a valid and enforceable final judgment.

Owens v. Tompkins Bank of Castile, 170 A.D.3d 1683, 96 N.Y.S.3d 788, 2019 N.Y. App. Div. LEXIS 2244, 2019 NY Slip Op 02253 (4th Dept., 2019) stated at 170 A.D.3d at 1684:

> "Plaintiffs contend that defendants' claim for attorneys' fees is barred by res judicata because the stipulated orders denying the motions to intervene did not award such fees. We reject that contention. ''[U]nder res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action '' (*Landau, P.C. v LaRossa, Mitchell & Ross,* 11 NY3d 8, 12, 892 NE2d 380, 862 NYS2d 316 [2008], quoting *Parker v Blauvelt Volunteer Fire Co.,* 93 NY2d 343, 347, 712 NE2d 647, 690 NYS2d 478 [1998]. 'A voluntary discontinuance ordinarily is not a decision on the merits, and res judicata does not bar a [party] from maintaining another proceeding for the same claim unless the order of

> discontinuance recites that the claim was discontinued or settled on the merits' (*Matter of AutoOne Ins. Co. v Valentine,* 72 AD3d 953, 955, 899 NYS2d 354 [2d Dept 2010])."

As set forth above, the March 7, 2012 Order granted the motion for an order granting summary judgment "with prejudice". The term "with prejudice" means that the action was a final judgment on the merits. Laudau, P.C. v. LaRossa, Mitchell & Ross, 11 N.Y.3d 8, 892 N.E.2d 380, 862 N.Y.S.2d 316, 2008 N.Y. LEXIS 1819, 2008 NY Slip Op 5772 (2008) stated at 11 N.Y.S.3d at 13:

> "Defendants assert that res judicata should be applied. However, a dismissal 'without prejudice' lacks a necessary element of res judicata – by its terms such a judgment is not a final determination on the merits (*see e.g. Miller Mfg. Co. v Zeiler,* 45 NY2d 956, 958, 383 NE2d 1152, 411 NYS2d 558 [1978]). When defendants moved to amend Supreme Court's judgment dated June 25, 2001 to provide that the dismissal of Eisen and Eisen, P.C.'s complaint be changed from 'with prejudice' to 'without prejudice,' this was a clear acknowledgement by the parties and the motion court that the merits of this case have yet to be decided."

Yonkers Contr. Co. v. Port Auth. Trans-Hudson Corp., 93 N.Y.2d 375, 712 N.E.2d 678, 690 N.Y.S.2d 512 (1999) stated at 93 N.Y.2d at 380:

> "Our conclusion that the Appellate Division's dismissal of plaintiff's first action 'with prejudice' was intended to be 'upon the merits,' as a final disposition of plaintiff's claim, is entirely consistent with the Appellate Division's rationale for dismissing the case."

State of New York Mtge. Agency v. Massarelli, 167 A.D.3d 1296, 89 N.Y.S.3d 768, 2018 N.Y. App. Div. LEXIS 8653, 2018 NY Slip Op 08732 (3rd Dept., 2018) stated at 167 A.D.3d at 1296:

> "The only one of those elements in dispute here is whether the dismissal of the 2012 action was on the merits, which the use of the term 'with prejudice' in the dismissal order would ordinarily indicate."

(Citations Omitted). Please see also DeSouza v. LSREF2 Apex 2, LLC, 171 A.D.3d 702, 703, 98 N.Y.S.3d 99, 2019 N.Y. App. Div. LEXIS 2570, 2019 NY Slip Op 02499 (2nd Dept., 2019).

Justice Baisley's Order dated March 7, 2012 specifically stated that the dismissal was "with prejudice". Therefore, the Order dated March 7, 2012 must be given res judicata effect, as JPMorgan failed to file a motion for leave of the Court to reargue or renew and/or a notice of appeal.

Strange v. Montefiore Hospital & Medical Center, 59 N.Y.2d 737, 450 N.E.2d 235, 463 N.Y.S.2d 429 (1983) stated at 59 N.Y.2d at 738:

> "As we wrote in *Barrett v Kasco Constr. Co.* (56 NY2d 830, 831), procedurally indistinguishable from the case now before us, 'although the prior judgment of Supreme Court does not specifically recite that it is 'on the merits', that judgment should be given *res judicata* effect in order to prevent the plaintiff from circumventing the preclusion decree (cf. *Palmer v Fox,* 28 AD2d 968 affd 22 NY2d 667).' CPLR 5013 does not require that the prior judgment contain the precise words 'on the merits' in order to be given *res judicata* effect; it suffices that it appears from the judgment that the dismissal was on the merits. Indeed, one would not expect to find any such explicit recital in a judgment of dismissal based on a grant of summary judgment for insufficiency of proof, as occurred here."

Further, the issuance of an order granting summary judgment is on the merits and has preclusive effect. Methal v. City of New York, 50 A.D.3d 654, 855

N.Y.S.3d 588, 2008 N.Y. App. Div. LEXIS 2973, 2008 NY Slip Op 2978 (2nd Dept., 2008) stated at 50 A.D.3d at 656:

> "In action No. 2, the Supreme Court erred in denying the NYCTA's motion to dismiss the complaint. That action was barred by the doctrine of res judicata, since the dismissal of the prior action was a determination on the merits (*see Daluise v Sottile,* 40 AD3d 801, 802-803, 837 NYS2d 175 [2007]; *83-17 Broadway Corp. v Debcon Fin. Servs., Inc.,* 39 AD3d 583, 584, 835 NYS2d 602 [2007]; *see generally Luscher v Arrua,* 21 AD3d 1005, 1007, 801 NYS2d 379 [2005]). An order granting a summary judgment motion is on the merits and has preclusive effect (*see Eidelberg v Zellermayer,* 5 AD2d 658, 662, 174 NYS2d 300 [1958], *affd* 6 NY2d 815, 159 NE2d 691, 188 NYS2d 204 [1959]). In the motion practice which resulted in dismissal of the first complaint against the NYCTA, the parties clearly charted a summary judgment course and the Supreme Court was entitled to treat the NYCTA's dismissal motion as one for summary judgment (*see* CPLR 3211[c], *cf. Bowes v Healy,* 40 AD3d 566, 833 N.Y.S.2d 400 [2007])."

Please see also Cox v. Hubbard, 118 A.D.3d 783, 982 N.Y.S.2d 370, 2014 N.Y. App. Div. LEXIS 1674, 2014 NY Slip Op 1705 (2nd Dept., 2014), Bayer v. City of New York, 115 A.D.3d 897, 899, 983 N.Y.S.2d 61, 2014 N.Y. App. Div. LEXIS 1967, 2014 NY Slip Op 2005 (2nd Dept., 2014). Given that the Order dated March 7, 2012 was determined on a motion for summary judgment based on the provisions set forth in CPLR §3212, the provisions of the Order dated March 7, 2012 must be given preclusive effect.

In opposition thereto, JPMorgan cited Schulz v. State, 81 N.Y.2d 336, 615 N.E.2d 953, 1993 N.Y. LEXIS 1172 (1993). Schulz v. State stated that if the dismissal was based on the standing issue of the plaintiffs to assert the claims

based on the Constitution of the State of New York, the order cannot be given preclusive effect. In fact, Landau, P.C. v. LaRossa, Mitchell & Ross, when referring to Schulz v. State, stated at 11 N.Y.3d at 14:

> "Further, in *Matter of Schulz v State of New York* (81 NY2d 336, 615 NE2d 953, 599 NYS2d 469 [1993]) and in *Town of Hardenburgh Ulster County, N.Y. v State of New York* (52 NY2d 536, 540, 421 NE2d 795, 439 NYS2d 303 [1981]), we recognize that when the disposition of a case is based upon *a lack of standing only*, the lower courts have not yet considered the merits of the claim (*Matter of Schulz v State of New York* (81 NY2d at 347). We agree that '[i]t would be inequitable to preclude a party from asserting a claim under the principle of res judicata, where, as in this case, '[t]he court in the first action has expressly reserved the plaintiff's right to maintain the second action'' (*Parker v Blauvelt Volunteer Fire Co.* (93 NY2d at 349, quoting Restatement (Second) of Judgments §26[1][b])."

(Emphasis Added). The holding of Schulz v. State is inapplicable in the current matter for the following reasons:

1 Justice Baisley's Order dated March 7, 2012 granting summary judgment was based on both the standing issue and the failure to comply with Justice Baisley's prior discovery orders; accordingly, it was not based solely on the standing issue;

2 Justice Baisley's Order dated March 7, 2012 did not expressly reserve the right of JPMorgan or its privities to commence and maintain a second mortgage foreclosure action; and,

3 JPMorgan was the same plaintiff in the second action that Justice Baisley has already determined lacked the standing to commence the

first mortgage foreclosure action; accordingly, the lack of standing of JPMorgan had already been conclusively determined.

Thus, JPMorgan was precluded from commencing the second mortgage foreclosure action based on the res judicata doctrine or claim preclusion. As was stated in Paramount Pictures Corp. v. Allianz Risk Transfer AG, 31 N.Y.3d 64, 96 N.E.3d 737, 73 N.Y.S.3d 472 (2018), the issue of a claim preclusion is governed by a transactional analysis; in the current matter, both actions concern the same parties, the same note, the same mortgage and the same real property. Accordingly, under any transactional analysis utilized, claim preclusion should be granted especially as Paramount Pictures Corp. v. Allianz Risk Transfer AG stated at 31 N.Y.3d at 76-77:

> "Or, viewed another way, as modern procedural devices broadened the scope of claims that *may* (and in some cases, *must)* be litigated, the scope of claims covered by res judicata – those claims that *should* been litigated -has symmetrically widened."

(Citations Omitted).

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And assuming arguendo that the dismissal was based solely on the provisions set forth in CPLR §3126 (not considering that it was also based on a motion for summary judgment), JP Morgan would still be precluded from proffering evidence as to its standing in the second action as it never sought to vacate the preclusion order set forth in Justice Baisley's Order dated March 7,

2012. CPLR §3126 entitled: "Penalties for refusal to comply with order or to disclose" provides in pertinent part:

> "If any party, or …, or an inspection is made is … or otherwise under a party's control, refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:
>
> 1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
> 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or …"

It is undisputable that Justice Baisley was within his jurisdiction and authority to disallow JPMorgan's subsequent production of the original mortgage note to demonstrate its standing. CDR Creances S.A.S. v. Cohen, 23 N.Y.3d 307, 15 N.E.3d 274, 991 N.Y.S.2d 519 (2014) stated at 23 N.Y.3d at 318:

> "As we stated in *Kihl v Pfeffer,* '[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. (94 NY2d 118, 123, 722 NE2d 55, 700 NYS2d 87 [1999]). Compliance requires 'a timely response and one that evinces a good-faith effort to address the requests meaningfully' (*id.).* A trial court has discretion to strike pleadings under CPLR 3126 when a party's repeated noncompliance is 'dilatory, evasive, obstructive and ultimately contumacious' (*see Arts4All, Ltd. V Hancock,* 54 AD3d 286, 286, 863 NYS2d 193 [1st Dept 2008] *affd* 12 MU3d 846, 909 NE2d 83, 881 NYS2d 390 [2009]*and affd* 13 NY3d 812, 918 NE2d 945, 890 NYS2d 432 [2009]).
>
> Apart from CPLR 3126, a court has inherent power to address actions which are meant to undermine the truth-seeking function of the judicial system and place in question the integrity of the courts and our system of justice.

> 'Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution' (*Anderson v Dunn,* 19 US 204, 227, 5 L Ed 242 [1821]."

Gibbs v. St. Barnabas Hosp., 16 N.Y.3d 74, 942 N.E.2d 277, 917 N.Y.S.2d 68 (2010) further emphasized the importance of complying with Court orders, by stating at 16 N.Y.3d at 81:

> "As this Court has repeatedly emphasized, our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent…. For these reasons, it is important to adhere to the position we declared a decade ago that '[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity'."

(Citations Omitted). Gibbs v. St. Barnabas Hosp. further stated at 16 N.Y.3d at 83:

> "In reaching this conclusion, we reiterate that '[l]itigation cannot be conducted efficiently if deadlines are not taken seriously, and we make clear again, as we have several times before, that disregard of deadlines should not and will not be tolerated'."

(Citations Omitted). Herein, the Order dated March 7, 2012 was never appealed or modified, and, thus, must be given res collateral/preclusive effect on the lack of standing of JPMorgan given its willful and intentional lack of production of the original mortgage note; in other words, JPMorgan was precluded from establishing its standing to commence the second action even if the Order dated March 7, 2012

was solely based on the provisions set forth in CPLR §3126. 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])."

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.

Accordingly, JPMorgan was barred by res judicata and claims preclusion effect to establish its standing in the second action.

POINT II

THE DOCTRINE OF COLLATERAL ESTOPPEL PROHIBITS JPMORGAN FROM CHALLENGING JUSTICE BAISLEY'S ORDERS THAT THE ORIGINAL MORTGAGE NOTE HAD TO BE PRODUCED IN DISCOVERY

As set forth in great detail in Justice Baisley's Order dated March 7, 2012, Justice Baisley had issued several prior orders compelling the production of the original mortgage note by JPMorgan for inspection and examination by Caliguri's expert, which orders were completely ignored and rebuffed by JPMorgan. As stated numerous times previously, the issue as to the requirement of JPMorgan to produce the original mortgage note for inspection and examination had already been determined by Justice Baisley. The second action commenced by JPMorgan, pertained to the same mortgage note, the same mortgage acting as security, the same real property and the same parties as were the subjects of the first mortgage foreclosure action. In fact, we do not even have to consider the privity issue. Matter of Dunn, 24 N.Y.3d 699, 27 N.E.3d 465, 3 N.Y.S.3d 751 (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 63, 492 NYS2d 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 NYS2d 49 [1981] [internal quotation marks and citation

> omitted]; *Auqui v Seven Thirty One Ltd. Partnership,* 22 NY3d 246, 255, 980 NY2d 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)."

Please see also Matter of Terry v. County of Schoharie, 162 A.D.3d 1344, 1346, 80 N.Y.S.3d 483 (3rd Dept., 2018); JPMorgan may cite HSBC Bank USA, N.A. v. Carchi, 2019 N.Y. App. Div. LEXIS 8208, 2019 NY Slip Op 08177, 2019 WL 5950815 (2nd Dept., 11/13/19) and Deutsche Bank Natl. Trust Co. v. Murray, 2019 N.Y. App. Div. LEXIS 7767, 2019 NY Slip Op 07768, 2019 WL 5582008 (2nd Dept., 10/30/19) to the contrary. However, the issue in the latter two (2) cases was whether a dismissal of a prior mortgage foreclosure action pursuant to the provisions set forth in CPLR §3211 based on a lack of standing is entitled to collateral estoppel effect. The latter issue is quite different than in the current matter, where the dismissal by Justice Baisley was based on both a motion for summary judgment pursuant to CPLR §3212 and the failure to produce Court-ordered discovery pursuant to CPLR §3126; in fact, in the two (2) above-cited cases, there is no indication that the judge presiding over the first actions specifically ordered the production of the original note for examination and inspection or that the original note was demanded in discovery. Collateral estoppel is available when there were discovery violations by the plaintiff in a prior action. 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 526-527:

> "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 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). And Kinberg v. Schwartzapfel, Novick, Truhowsky, Marcus, PC, 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 Kanat v. Ochsner, 301 A.D.2d 456, 458, 755 N.Y.S.2d 371, 2003 N.Y. App. Div. LEXIS 648 (1st Dept., 2003).

The issue of the necessity as to the production of the original mortgage note for examination by Caliguri's expert is also subject to the equitable doctrine of the law of the case. People v. Cummings, 31 N.Y.3d 204, 99 N.E.3d 877, 75 N.Y.S.3d 484 (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 ruling may be revisited 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.*"

(Emphasis Added). Admittedly, suppression motions and hearings relate to criminal matters, and the current matter is not a criminal matter. However, the Justice Baisley orders compelling the production of the original mortgage note is akin to an hearing on a suppression motion, as it was done in a pre-trial setting (as part of discovery). Therefore, Justice Rouse, as a coordinate justice to Justice Baisley (both are members of the Supreme Court, Suffolk County) had no right to modify or ignore Justice Baisley's orders mandating and compelling the production of the original mortgage note for examination.

Accordingly, even if the standing issue was not entitled to res judicata/collateral estoppel effect, the issue as to the Court-ordered production of the original mortgage note for examination and inspection must be enforced based on the doctrines of collateral estoppel and/or the law of the case. In short, as demonstrated above, there is certainly an identity of the issues, and JPMorgan has

failed to demonstrate that it lacked a fair opportunity to litigate the necessity of the production of the note before Justice Baisley.

POINT III

CALIGURI HAD THE LAWFUL RIGHT TO INSPECT AND EXAMINE THE ORIGINAL MORTGAGE NOTE AS PART OF DISCOVERY

Assuming arguendo that the provisions of Justice Baisley's Order dated March 7, 2012 should not be given res judicata and/or collateral estoppel effect, Caliguri's discovery demands in the second mortgage foreclosure action had to be honored and complied with, including but not limited to the production of the original mortgage note for examination and inspection by Caliguri's expert.

JPMorgan failed to address: (a) the holding in 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 (3rd Dept., 2019) and the related cases which were discussed on pages 27-28 of the brief for defendant-appellant; or (b) that a note that lacks a notarization or a certification can not be presumed to be duly executed, without discovery. Please see 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.2d 657 (2002) and the other cases addressed on pages 24 through 26 of the brief for defendant-appellant. In fact, U.S. Bank Trust, N.A. v. Moomey-Stevens 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 defendant's discovery request prior to granting plaintiff's motion for summary judgment."

(Citations Omitted). Further, as demonstrated above, the original mortgage note was never notarized or certified (only the mortgage was notarized), and, therefore, the note was not permitted to be given a presumption of due execution. In fact, Chianese v. Meier, 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 the execution, which may be rebutted only upon a clear and convincing evidence to the contrary."

(Citations Omitted). In short, UCC §3-307(1) provides in pertinent part:

> "When the effectiveness of a signature is put in issue
> (a) the burden of establishing it is on the party claiming under the signature."

Accordingly, JPMorgan had and continues to have the burden of demonstrating by admissible evidence that the signature on the purported original mortgage note was, in fact, the signature of Caliguri, as no presumption of due execution can be given.

As acknowledged by JPMorgan, the undersigned counsel was the attorney for the Taylors in Aurora Loan Servs., LLC v. Taylor. The undersigned counsel can affirmatively state that the Taylors had never demanded the production of the original mortgage note or to compel the production thereof; in lieu thereof, the undersigned counsel based the demand on the best evidence rule. At the oral argument on April 30, 2015, Justices Lippman (now retired), Pigott (now retired) and Fahey questioned the undersigned counsel how and why the best evidence rule should suffice when a demand for the production of the original mortgage note was never made. It should also be mentioned that there was discussion whether the non-originating mortgagee had to proffer delivery receipts (i.e., federal express tracking receipts, United Parcel Service receipts, United States Postal Service receipts and/or messenger receipts) to reflect the assignee's actual receipt of the original mortgage note to prevent robo-signing in affidavits of possession, but apparently, it was thought to be unnecessary as Diane Holland, the affiant, had represented that she had examined the original mortgage note only four (4) days prior to the commencement of the mortgage foreclosure action. Accordingly, the genesis of the following quotation from Aurora Loan Servs., LLC v. Taylor at 25 N.Y.3d at 362 related to the failure of the Taylors to demand the production of the note in discovery:

> "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 attachments submitted with the moving papers clearly show the note's chain of ownership through Deutsche."

Accordingly, JPMorgan is totally incorrect as to the meaning of the above-stated quotation.

CONCLUSION

For the reasons set forth in the Brief for Defendant-Appellant and in this reply brief, 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 mortgage foreclosure action based on res judicata, or alternatively, discovery of the purported original mortgage note must be produced as it was demanded by Caliguri and/or Justice Baisley's Order dated March 7, 2012 must be given law of the case and/or collateral estoppel effect.

Dated: Hauppauge, New York
November 25, 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
November 25, 2019

Jeffrey Herzberg