To Be Argued By:
Anne Fleming, Esq.
Time Requested: 10 Minutes

NEW YORK SUPREME COURT
APPELLATE DIVISION, SECOND DEPARTMENT

HSBC BANK, USA,

Plaintiff-Appellant,

App. Div. No.
2008-01498

-against-

HOWARD DAMMOND,

Defendant-Respondent,

-and-

RHANNA LESHARON and DARIA LESHARON,

Defendants.

BRIEF of Defendant-Respondent HOWARD DAMMOND

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3. Did the Supreme Court abuse its discretion in vacating its judgment of foreclosure and sale? No.

STATEMENT OF FACTS

Plaintiff-Appellant HSBC appeals an order of the Supreme Court, Westchester County entered on January 11, 2008 granting Defendant-Respondent Howard Dammond's request to dismiss the Complaint and vacate the judgment of foreclosure and sale. The Supreme Court vacated the judgment of foreclosure and dismissed the Complaint on the ground that HSBC did not own the subject mortgage at the time the foreclosure action was filed. (R. 2).

HSBC filed the action on July 27, 2006 to foreclose a mortgage given by Mr. Dammond to First Continental Mortgage and Investment Corporation. That mortgage secured a $440,000 indebtedness pursuant to a promissory note signed by Mr. Dammond on September 28, 2005. (R. 82). In its Complaint, HSBC alleged that at the time the Complaint was filed, the subject mortgage had already been assigned to HSBC "by assignment to be recorded." (R. 83). However, as Mr.

Dammond later discovered, the purported assignment was executed on September 7, 2006, *after* the foreclosure action was commenced. (R. 80).

Before the action was filed and during the pendency of the litigation, Mr. Dammond and a foreclosure prevention counselor attempted in good faith to resolve the matter through a loan modification agreement with the loan servicer, Chase Home Finance. (R. 10). These negotiations resulted in Mr. Dammond accepting a modification offer in November 2006. (R. 11). Chase later withdrew the offer and proposed an unaffordable modification requiring payments of more than $5,000 a month and a balloon payment of $25,744 after seven months. (R. 11). Following the breakdown of negotiations, Mr. Dammond then pursued other avenues of relief, including consultation with a bankruptcy attorney. (R. 11). The bankruptcy counsel did not undertake to represent Mr. Dammond in the foreclosure action. (R. 11-12). She entered a Notice of Appearance in the case on January 5, 2007 so as to be notified of any developments concerning the foreclosure that would be relevant to a bankruptcy filing. (R. 11-12, 39). Mr. Dammond also filed complaints with the New York State Banking Department and the New York State Attorney General's Criminal Fraud Division concerning fraud in the origination of the loan. (R. 12).

After Mr. Dammond learned that HSBC did not own the mortgage at the time the action was filed, he filed an order to show cause seeking vacatur of the

judgment of foreclosure and sale and dismissal of the Complaint on several grounds, including that HSBC did not own the mortgage when the action was filed. (R. 8-27). In response, HSBC argued that the assignment was legally effective as of a stated "effective" date of June 16, 2006, but proffered no evidence to support this factual assertion. (R. 92-96). The Supreme Court therefore concluded that the "[l]anguage in the assignment purporting to make it retroactive is insufficient to establish [HSBC's] ownership interest at the time the action was commenced" and accordingly dismissed the Complaint and vacated the judgment of foreclosure and sale. (R. 3).

ARGUMENT

The Supreme Court did not abuse its discretion in vacating the judgment of foreclosure and dismissing the Complaint after Mr. Dammond brought to the court's attention that HSBC did not own the mortgage loan at the time it filed the Complaint. In response to the Order to Show Cause, HSBC failed to establish that it had received assignment of the mortgage before it filed the foreclosure action. Moreover, HSBC did not allege, much less prove, that it ever owned the promissory note secured by the mortgage. These deficiencies in HSBC's allegations and proof created a meritorious defense to foreclosure that required dismissal of the action. Furthermore, the Supreme Court did not abuse its discretion in vacating the judgment of foreclosure in the interests of fairness and

substantial justice because Mr. Dammond presented a meritorious defense to the foreclosure action, provided a reasonable excuse for failing to raise HSBC's ownership of the mortgage at the outset of litigation, and showed that HSBC misrepresented in the Complaint that it received assignment of the mortgage prior to filing the action. Accordingly, this Court should hold that the Supreme Court was well within its discretion to vacate the foreclosure judgment and dismiss the action.

Nevertheless, HSBC seeks this Court's blessing for its loose and fast legal procedures. Under HSBC's breathtakingly expansive legal theories, once a foreclosing party obtains a judgment of foreclosure, it has no obligation to respond to evidence disputing its ownership of a mortgage loan and it can rely on conclusory legal assertions to resolve the factual issue of when it obtained ownership of the mortgage loan. Invoking judicial assistance, particularly assistance to strip a family of its home, should require more. As one federal court recently observed in rejecting a foreclosing party's similar justifications for its sloppy practices: "the jurisdictional integrity" of the courts is "[p]riceless" and cannot be shoved aside by the "condescending mindset and quasi-monopolistic system where financial institutions have traditionally controlled, and still control, the foreclosure process." *In re Foreclosure Cases*, No. 07-cv-2282 et al., 2007 WL 3232430, at *3 n.3 (N.D. Ohio Oct. 31, 2007).

In particular, when a foreclosure complaint contains misrepresentations concerning assignment of the mortgage and note or fails to allege ownership, it is exceedingly difficult for homeowners, especially those proceeding *pro se*, to discover these defects and raise them as defenses to the foreclosure. At the outset, *pro se* homeowners have an inherent informational disadvantage regarding the transfer of the complicated financial instruments on which foreclosing financial institutions rely. When these instruments are transferred between institutions without written, recorded assignments, it is virtually impossible for homeowners to determine ownership at any given time. *See, e.g.*, *Aurora Loan Services, LLC v. Sattar,* 17 Misc. 3d 1109(A) (Sup. Ct. Kings County 2007). Moreover, the rise of the secondary market and the securitization of mortgage debt have created significant uncertainty about the ownership of mortgage loans. Foreclosing parties, like HSBC, cannot be allowed to disguise defects in their standing to bring an action by misrepresenting, or failing to allege, if and when they acquired ownership of the mortgage and note, and then attempt to bar homeowners from raising these defects once they are discovered.

I. The Supreme Court Did Not Err in Dismissing the Complaint on the Ground that HSBC Filed the Foreclosure Action Before It Obtained an Assignment of the Mortgage.

The Supreme Court did not err in dismissing the Complaint on the ground that HSBC lacked standing to proceed with the foreclosure action because it did

not establish ownership of the mortgage at the time the action was filed. Standing to bring a foreclosure action requires having an ownership interest in the mortgage and note *at the time the complaint is served*. *See RCR Servs. Inc. v. Herbil Holdings Co.*, 229 A.D.2d 379, 380-81 (2d Dep't 1996) ("[B]ecause the plaintiff, at the time it served the complaint on Herbil in 1994, was the assignee of the subject mortgage, the plaintiff had standing and was entitled to commence this proceeding in its own name." (citations omitted)); *see also Bankers Trust Co. v. Hoovis*, 263 A.D.2d 937, 938 (3d Dep't 1999) ("Where plaintiff is the assignee of a mortgage at the time of service of the complaint, plaintiff has standing and is entitled to commence a proceeding in its own name."). The Supreme Court properly dismissed the Complaint in light of HSBC's lack of standing.

A. The Supreme Court Did Not Err in Finding that HSBC Did Not Obtain Ownership of the Mortgage Prior to September 7, 2006.

HSBC does not dispute that it lacked standing to proceed with this foreclosure action if it did not own the mortgage on or before September 7, 2006. Rather, HSBC argues that the Supreme Court erred in finding that HSBC failed to prove that it owned the mortgage at the time the action was filed. However, the September 7, 2006 execution date listed on a written mortgage assignment is the only record evidence of the date when HSBC obtained a legal interest in Mr. Dammond's mortgage. (R. 80-81). Because that date is later than July 27, 2006—when HSBC filed the Complaint—the Supreme Court correctly concluded that

HSBC failed to establish that it had standing to proceed with this foreclosure action.

1. The Effort To Backdate the Assignment Has No Legal Effect.

HSBC argues that the assignment was effective prior to its execution date of September 7, 2006 because the assignment contains a provision stating it is "effective on or before June 16, 2006." (R. 80-81). HSBC latches onto this provision to claim it "demonstrated its standing as a matter of law." HSBC Br. 14, 17.

However, the mere fact that a written assignment states that it is effective as of a date prior to the date of execution has no legal significance. Under New York law, a party cannot change the date of the assignment solely based on the stated, retroactive "effective" date in the assignment document. *See Mackay v. Treat*, 213 A.D. 725, 728 (1st Dep't 1925) (citing prior holding that "an assignment made after the commencement of an action did not have a retroactive effect, carrying the right to enforce a cause of action which did not exist in favor of the assignees at the time the suit was commenced by them"); *Shepard & Morse Lumber Co. v. Franklin Trust Co.*, 55 A.D. 627, 628 (3d Dep't 1900) ("Until it established its debt it had no standing to assert foreclosure. If, by virtue of the recent transfer to it . . . it became vested with a better right, a cause of action it did not have before, such right or cause of action cannot . . . be tacked on to the original, and thus by

transfers subsequent to the commencement of the action, the cause of action be changed.").[1]

Consistent with this longstanding law, the Supreme Court of Suffolk County recently refused to give effect to a provision in a written mortgage assignment identical to the one in this case attempting to backdate the effective date. *Countrywide Home Loans, Inc. v. Taylor*, 17 Misc. 3d 595, 597 (Sup. Ct. Suffolk County 2007) ("Such attempt to retroactivity . . . is insufficient to establish [the mortgage assignee's] ownership interest at the time the action was commenced."); *see also Deutsche Bank Trust Co. Ams. v. Peabody*, 20 Misc. 3d 1108(A) (Sup. Ct. Saratoga County 2008) ("The assignment's language purporting to give it retroactive effect, absent a prior or contemporary delivery of the note and mortgage, is insufficient to grant it standing.").

Bankers Trust Co. v. Hoovis, relied on by HSBC, HSBC Br. 18-19, is entirely consistent with the court's refusal to give legal effect to a provision backdating a mortgage assignment. The assignment in that case stated that it was effective as of May 1, 1997, and the record contained no contradictory evidence. *Hoovis*, 263 A.D.2d 937, 938 (3d Dep't 1999). In other words, unlike in the case at hand, *Hoovis* contains no suggestion that the assignment's stated effective date

[1] In contrast, HSBC cites cases that do not pertain to assignments and do not discuss, let alone permit, the enforcement of a backdated contract through a lawsuit commenced prior to contract's execution. HSBC Br. 17-18.

differed from its execution date. Based on these facts, the *Hoovis* court made the entirely unremarkable holding that the assignee had standing when it commenced a foreclosure action on June 19, 1997. *Id.* The record here, however, reflects that the execution date of the written assignment was not the same as the stated "effective" date. Accordingly, *Hoovis* provides absolutely no support for HSBC's argument that a backdated assignment is sufficient to establish standing.

2. No Record Evidence Shows an Assignment Effective Prior to September 7, 2008.

HSBC argues, for the first time on appeal, that it received physical possession of Mr. Dammond's promissory note and mortgage on June 16, 2006, and that the mortgage's assignment was therefore effective on that date.[2] HSBC Br. 15-16. This allegation appears only in the appellate brief, authored by HSBC's counsel, and is unsupported by any record evidence. The record contains absolutely no evidence of this date of physical transfer. In fact, the record is entirely devoid of any allegations or evidence, such as affidavits from parties with actual knowledge, concerning the physical transfer of the note and mortgage.

[2] HSBC does not argue, and New York law does not provide, that an assignment of the mortgage and note can be effected through the physical transfer of the mortgage alone. Rather, physical transfer is significant only to the extent that ownership of the *note* may be transferred by a change in its physical possession. As incident to the change in the note's ownership, the new note owner also becomes the *mortgage* owner. *See Mortgage Electronic Registration Sys. v. Coakley*, 41 A.D.3d 674, 674 (2d Dep't 2007) (holding that physical transfer of a note transferred ownership of the note and mortgage, "which passed as an incident to the promissory note").

Instead, the record's only reference to June 16, 2006 is the conclusory sentence in the written mortgage assignment attempting to backdate the effective date. (R. 80). But neither the written mortgage assignment nor anything else in the record indicates what allegedly occurred on that date. There is no suggestion that the date is related to the physical transfer of the note and mortgage to HSBC. In sum, the assignment's language purporting to give it retroactive effect, absent any evidence of a prior or contemporary delivery of the note and mortgage as of the "effective" date, is insufficient to establish that the assignment of the mortgage occurred prior to the date of execution. *See Peabody*, 20 Misc. 3d at 1108(A).[3]

B. The Supreme Court Did Not Err in Allowing Mr. Dammond To Question HSBC's Ownership of the Mortgage After His Time To Answer Had Expired.

HSBC argues that the Supreme Court erred in allowing Mr. Dammond to raise the defense, after his time to answer had expired, that HSBC did not own the mortgage at the time the Complaint was filed. HSBC argues that Mr. Dammond waived this defense under C.P.L.R. 3211(e) because Mr. Dammond did not raise the defense in his Notice of Appearance. HSBC Br. 10-14. However, HSBC cites

[3] Furthermore, even if the note and mortgage were physically delivered to HSBC on June 16, 2008, physical delivery alone is not enough to transfer ownership of the note and accompanying mortgage to the recipient. The note must also be properly endorsed for the assignment to be effective. *See* N.Y. U.C.C. § 3-202(1) (requiring "delivery with any necessary indorsement" to effectively negotiate an instrument payable to a definite entity, such as the originating lender of a home loan); *id.* § 3-201(3) ("Negotiation takes effect only when the indorsement is made and until that time there is no presumption that the transferee is the owner."); *id.* § 3-204(2) (providing that physical delivery can effectively negotiate a note that is indorsed in blank).

no authority for the proposition that a defense is waived if not asserted in a Notice of Appearance.

Under C.P.L.R. 3211(e), "[w]hen a defendant answers a complaint and fails to assert lack of standing as a defense, such defense is waived." However, here, "no such answer or waiver exists." *Countrywide Home Loans, Inc. v. Taylor*, 17 Misc. 3d 595, 597 (Sup. Ct. Suffolk County 2007) (finding no waiver of standing defense where defendant had not yet filed an answer). Mr. Dammond did not waive the defense under the terms of C.P.L.R. 3211(e), because he raised the defense in his first, pre-answer motion to dismiss the Complaint. *See* C.P.L.R. 3211(e) (providing that "[a]t any time before service of the responsive pleading is required, a party may move" to dismiss the complaint for lack of capacity to sue and that any objection or defense based lack of capacity is "waived unless raised either by such motion or in the responsive pleading").

Although Mr. Dammond's time to answer the Complaint had expired at the time that he raised the issue of HSBC's ownership of the mortgage, he nonetheless still had the ability to file an answer at that time with leave of the court. The Supreme Court has the inherent power to extend a party's time to respond under C.P.L.R. 2004. *See* C.P.L.R. 2004 ("Except where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the

application for extension is made before or after the expiration of the time fixed."). C.P.L.R. 3012(d) explicitly provides that, "[u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." Here, the Supreme Court had the discretion to extend Mr. Dammond's time to respond to the Complaint at the time he raised the issue of HSBC's standing.

A court must consider several factors in determining whether to extend a party's time to respond to a complaint including: the existence of a potentially meritorious defense to the action, the prejudice to plaintiff, and "the public policy favoring the resolution of cases on the merits." *Schmidt v. City of N.Y.*, 50 A.D.3d 664, 664 (2d Dep't 2008). Although HSBC had already obtained a judgment at the time he made the request, Mr. Dammond presented a meritorious defense to the foreclosure action based upon which the court ultimately dismissed the Complaint.

Furthermore, Mr. Dammond's delay in discovering and raising the defense that HSBC did not own the mortgage at the time the action was filed was due in part to HSBC's misrepresentations in the Verified Complaint that it had obtained a written assignment of the mortgage prior to the commencement of the foreclosure action. The Verified Complaint alleges that, at the time the Complaint was filed, the subject mortgage had already been assigned to HSBC "by assignment to be

recorded." (R. 83). However, as Mr. Dammond later discovered, the assignment was executed *after* the date that the foreclosure action was commenced. Such a misrepresentation is a proper ground for allowing a late answer. *See Barranco v. Cabrini Med. Ctr.*, 50 A.D.3d 281, 281-82 (1st Dep't 2008) (affirming order of trial court allowing defendant to amend its answer to assert lack of standing where factual basis for defense—that plaintiff's claim had been discharged in prior bankruptcy filing—had not been previously disclosed to defendant); *cf. Rich v. Rich*, 103 Misc. 2d 723, 726-27 (Sup. Ct. N.Y. County 1980) (finding that failure to include a defense in answer, where facts upon which defense was based did not arise until after service of answer, did not constitute waiver of defense and allowing amendment of answer to assert defense).

Accordingly, because Mr. Dammond had not yet filed an answer at the time that he raised the defense of HSBC's ownership of the mortgage loan, and the Supreme Court had discretion to permit Mr. Dammond's filing of a late answer at that time, C.P.L.R. 3211(e) does not deem him to have waived the standing defense.

C. Under New York Constitution, the Supreme Court Did Not Have Authority To Hear HSBC's Suit.

Even if the Notice of Appearance operated pursuant to C.P.L.R. 3211(e) to waive certain defenses, it could not waive an objection that the Supreme Court lacked constitutional power to hear HSBC's suit. *See Wells Fargo Bank Minn.,*

N.A. v. Mastropaolo, 42 A.D.3d 239, 243-44 (2d Dep't 2007).[4] Such power was lacking to hear this lawsuit because of HSBC's lack of standing when it filed the Complaint.

The Court of Appeals has held the separation-of-powers doctrine present in the New York Constitution requires that "the power of a court to declare the law . . . is limited to[] determining the rights of persons which are actually controverted in a particular case pending before the tribunal." *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 713 (1980). But the rights of HSBC were not "actually controverted" in the suit it filed suit on July 27, 2006. Instead, according to the record evidence, the mortgage was still owned by Mortgage Electronic Registration Systems, Inc. as nominee for First Continental Mortgage and Investment Corporation on July 27, 2006. Accordingly, it was First Continental's rights that were "actually controverted" in the suit, and the Supreme Court had no constitutional power over HSBC's lawsuit.

The constitutional limitations on a New York court hearing a suit prosecuted by a party without standing were recently highlighted by the First Department.

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[4] *Mastropaolo* did not consider whether New York courts lack constitutional power to hear a case brought by a mortgage assignee without standing. Moreover, *Mastropaolo*'s holding that standing should be considered the same as capacity for purposes of C.P.L.R. 3211(e) entirely overlooks, and is completely inconsistent with, the statement of the Court of Appeals in *City of New York v. State of New York* that "[t]he issue of lack of capacity to sue does not go to the jurisdiction of the court, as is the case when the plaintiffs lack standing. *Rather*, lack of capacity to sue is a ground for dismissal which must be raised by motion and is otherwise waived." 86 N.Y.2d 286, 292 (1995) (emphasis added).

People ex rel. Spitzer v. Grasso, 54 A.D.3d 180, 197, 206 (1st Dep't 2008). That court specifically noted that justiciability requirements, such as a party's standing, "are unquestionably of constitutional dimension . . . in New York's constitution." *Id*. at 206 n.19. And *Grasso* looked to cases addressing standing under the United States Constitution to guide its understanding of the limits of the New York constitution.[5] *Id*. at 641-42, 648.

Such logic applies equally to this case. Federal courts have held they lack power under the United States Constitution to hear mortgage foreclosure actions brought by parties who had not received mortgage assignments until after filing suit. *See, e.g.*, *In re Foreclosure Cases*, 521 F. Supp. 2d 650, 653-54 (N.D. Ohio 2007) (holding the court lacked constitutional power to hear twenty-six foreclosure suits brought by parties that "submitted evidence that indicates that they may not have had standing at the time the foreclosure complaint was filed"). Accordingly, the New York courts lack power to hear foreclosure cases brought by such parties

[5] Of course, there are textual differences between the power the United States Constitution grants to the federal judiciary and the power the New York Constitution grants to its courts. These differences, however, do not diminish that separation-of-powers principles in both constitutions deny the power of courts to entertain suits brought by parties without standing. *See Grasso*, 54 A.D.3d at 206.

under the New York Constitution. The Supreme Court's dismissal of HSBC's lawsuit therefore should be affirmed.[6]

II. The Supreme Court Also Had Grounds to Dismiss the Complaint Because HSBC Failed to Allege or Prove Ownership of the Mortgage Debt.

In addition to HSBC's failure to establish standing at the time it brought the action, the Supreme Court also properly dismissed the Complaint because HSBC failed to state a cause of action. HSBC neither alleged nor provided any evidence of its ownership of the promissory note signed by Mr. Dammond. This omission resulted in HSBC failing to state a cause of action to foreclose the subject mortgage. Under C.P.L.R. 3211(a)(7), Defendant had the right to raise this meritorious defense even after his time to answer had expired.

A. Ownership of the Debt Sued Upon Is an Element of a Cause of Action To Foreclose a Mortgage Securing Payment of a Debt.

It is axiomatic that "foreclosure of a mortgage may not be brought by one who has no title to it." *Kluge v. Fugazy*, 145 A.D.2d 537, 538 (2d Dep't 1988); *see also Campaign v. Barba*, 23 A.D.3d 327, 327 (2d Dep't 2005) ("To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish

[6] *Mastropaolo* did not consider whether New York courts lack constitutional power to hear a case brought by a mortgage assignee without standing. Moreover, *Mastropaolo*'s holding that standing should be considered the same as capacity for purposes of CPLR 3211(e) entirely overlooks, and is completely inconsistent with, the statement of the Court of Appeals in *City of New York v. State of New York* that "[t]he issue of lack of capacity to sue does not go to the jurisdiction of the court, as is the case when the plaintiffs lack standing. *Rather*, lack of capacity to sue is a ground for dismissal which must be raised by motion and is otherwise waived." 86 N.Y.2d 286, 292 (1995) (emphasis added).

the existence of the mortgage and the mortgage note, ownership of the mortgage, and the defendant's default in payment."). The owner of the mortgage could be the original mortgagee named on the mortgage itself or a party to whom the mortgage has been subsequently and properly assigned.

In order for a party to obtain ownership of a mortgage through assignment, the debt secured by the mortgage also must be transferred to the assignee. A party cannot acquire a mortgage if it does not also acquire ownership of the underlying debt. In other words, "absent transfer of the debt, the assignment of the mortgage is a nullity." *Kluge*, 145 A.D.2d at 538; *see also Merritt v. Bartholick*, 36 N.Y. 44, 45 (1867) ("[A] transfer of the mortgage without the debt is a nullity, and no interest is acquired by it."); *5-Star Mgmt. v. Rogers*, 940 F. Supp. 512, 521 (E.D.N.Y. 1996) ("New York law [is] consistent with the majority default rule that an assignment of a mortgage unaccompanied by the note that it secures is a nullity, absent a contrary intent of the original contracting parties). This rule exists to prevent the mortgagor from facing double liability. *5-Star Mgmt.*, 940 F. Supp. at 520. Accordingly, in cases without the transfer of the debt, the assignee of the mortgage has no right to foreclose. *See Kluge*, 145 A.D.2d at 538 (holding a foreclosure cause of action fails when the mortgage assignee was not transferred the debt); *5-Star Mgmt.*, 940 F. Supp. at 522 (dismissing a plaintiff's foreclosure complaint when the complaint did not allege transfer of the debt to the assignee of

the mortgage); *see also First Trust Nat'l Assoc. v. Meisels*, 234 A.D.2d 414, 414 (2d Dep't 1996) (holding a plaintiff could maintain a foreclosure action when the record demonstrated it was "*both* the assignee of the mortgage *and*, by indorsement, *the holder of the underlying note* at the time the foreclosure action was commenced" (emphases added)).

Here, HSBC commenced an action to foreclose a mortgage given by Mr. Dammond to First Continental Mortgage and Investment Corporation to secure his $440,000 indebtedness pursuant to a promissory note dated September 28, 2005. However, HSBC failed to state a claim to foreclose the subject mortgage because it did not allege in the Complaint, much less prove, that it owns the subject debt. Mr. Dammond moved to dismiss on the ground that HSBC lacked an ownership interest in his mortgage loan, attaching supporting documents to his affidavit. (R. 17-18, 80-81). HSBC, in response, presented no evidence that it owned the debt at the time the action was commenced, or thereafter. (R. 92-96).

The Complaint alleges, in paragraphs 8 and 9, that the *mortgage* given by Mr. Dammond to the First Continental Mortgage and Investment Corporation as security for repayment of the debt was assigned to HSBC and that the assignment

was later delivered for recording.[7] (R. 83). The Complaint does not, however, allege that the *note* was ever transferred to Plaintiff.

Accordingly, the Supreme Court had grounds to dismiss the Complaint for failure to state a cause of action to foreclose the subject mortgage, since Plaintiff did not allege that it owned the underlying debt at the time that action was commenced. *See Kluge*, 145 A.D.2d at 538 (reversing the denial of a motion to dismiss when the mortgage assignee seeking foreclosure had not established ownership of the underlying debt); *Manne v. Carlson*, 49 A.D. 276, 278 (1st Dep't 1900) (reversing denial of a demurrer upon the grounds that the complaint failed to state a cause of action when the foreclosure complaint lacked an allegation that the underlying debt had been transferred to the mortgage assignee); *5-Star Mgmt.*, 940 F. Supp. at 522 (dismissing a foreclosure complaint as failing to state a cause of action when the complaint by a mortgage assignee did not allege transfer of the underlying debt).

B. The Defense of "Failure To State a Cause of Action" Is Not Waivable.

The defense that HSBC did not own the debt sued upon at the time the Complaint was filed was not waived by Mr. Dammond's failure to assert the defense before his time to answer had expired. The defense that a "pleading fails

[7] The Complaint goes on to allege, in paragraph 10, that "Plaintiff is still the holder of the aforementioned instrument(s)." (R. 83).

to state a cause of action," under C.P.L.R. 3211(a)(7), is not waivable. *See* C.P.L.R. 3211(e) (providing that, unlike many of the grounds for dismissal listed in C.P.L.R. 3211(a), the defense that a complaint fails to state a cause of action is not waived if not asserted in the defendant's answer or pre-answer motion to dismiss). The Supreme Court therefore had sufficient grounds to dismiss the Complaint, even after Mr. Dammond's time to answer had expired, based on HSBC's failure to allege or provide any evidence of its ownership interest in the subject debt.

III. The Supreme Court Did Not Abuse Its Discretion In Vacating the Judgment of Foreclosure and Sale

In light of Mr. Dammond's meritorious defenses to the foreclosure Complaint, the decision whether to grant the motion to vacate was "left to the sound discretion" of the Supreme Court. *Savino v. "ABC Corp."*, 44 A.D.3d 1026, 1026 (2d Dep't 2007). HSBC must demonstrate that the Supreme Court abused its discretion in order to prevail on appeal. *See Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 68 (2003) ("[A] court's decision to vacate a default judgment will be reviewed on appeal for an abuse of discretion."); *see also ALBANK, FSB v. Dashnaw*, 37 A.D.3d 932, 934 (3d Dep't 2007) (requiring "a *clear* abuse of that discretion" to disturb the Supreme Court's decision on whether to vacate a foreclosure judgment (emphasis added)).

A. The Supreme Court Did Not Abuse Its Discretion in Vacating the Judgment for a "Sufficient Reason and in the Interests of Substantial Justice."

A court may vacate its own judgment for a "sufficient reason and in the interests of substantial justice." *Woodson*, 100 N.Y.2d at 68. As the Court of Appeals has observed, the power of the Supreme Court to vacate its judgments "in furtherance of the ends of justice" is "unquestionable." *Vanderbilt v. Schreyer*, 81 N.Y. 646, 648 (1880); *see also Wade v. Village of Whitehall*, 46 A.D.3d 1302, 1303 (3d Dep't 2007) (observing the Supreme Court's inherent power to vacate an order in the interest of justice "recognizes our strong preference for deciding cases on their merits"). Furthermore, "[w]hether the power shall be exercised in any case rests in [the Supreme Court's] discretion, with the exercise of which [the appellate courts] will not ordinarily interfere." *Vanderbilt*, 81 N.Y. at 648.

Historically, New York courts have vacated judgments of foreclosure where, as in the case here, there was a misapprehension of the "true facts" of the claim. *Archer v. Archer*, 171 A.D. 549, 550-51 (2d Dep't 1916); *Siegel v. State,* 138 Misc. 474, 482-83 (N.Y. Ct. Cl. 1930); *see also In re City of Buffalo*, 78 N.Y. 362, 370 (1879); *Alling v. Fahy*, 70 N.Y. 571, 572 (1877).

The Supreme Court did not abuse its discretion in vacating the judgment of foreclosure against Mr. Dammond because its decision is supported by the interests of fairness and substantial justice. Here, Mr. Dammond presented evidence that

HSBC did not own the mortgage at the time the Complaint was filed and argued that HSBC accordingly had no right to a judgment of foreclosure and sale. (R. 24-25, 80-81). In response to this meritorious defense, HSBC presented no evidence to establish that it owned the mortgage at the time that it filed the Complaint. (R. 92-96).

In addition, granting *pro se* litigants additional leeway in defending foreclosure actions is consistent with notions of fairness and substantial justice. Foreclosure defendants have an inherent informational disadvantage regarding the complicated financial instruments foreclosing financial institutions rely on for their cause of action. The rise of the secondary market and the securitization of mortgage debt have created significant uncertainty about the validity of ownership, even among the nation's largest financial institutions. Accordingly, the Supreme Court properly "exercise[d] [its] inherent discretionary power in [a] situation[] that warranted vacatur but which the drafters [of C.P.L.R. 5015] could not easily foresee." *Woodson*, 100 N.Y.2d at 68.

While the legitimate motives of foreclosing financial institutions should be respected, the repercussions of judgments of foreclosure for homeowners (and their families) can be as harsh as homelessness. Balancing the harm from the eviction of a foreclosed upon homeowner with meritorious defenses to foreclosure, against

the prejudice of putting foreclosing plaintiffs to their proofs, tips the scales of "substantial justice" towards the homeowner.[8]

B. The Record Also Supports Vacatur of the Judgment for Either "Excusable Default" or "Material Misrepresentation" under C.P.L.R. 5015(a).

Although the Supreme Court need not have based its vacatur of the judgment of foreclosure and sale on any of the five grounds specifically enumerated in C.P.L.R. 5015, the Court could have vacated the judgment based on either "excusable default" or "material misrepresentation," pursuant to C.P.L.R. 5015(a).

1. Excusable Default.

The Supreme Court has discretion to vacate a judgment for "excusable default" when a party asserts a "reasonable excuse" for its prior failure to assert a meritorious defense.[9] *Savino*, 44 A.D.3d at 1026. "The determination as to what constitutes a reasonable excuse lies within the sound discretion of the trial court, and will not be disturbed if the record supports such determination." *Green Apple*

[8] Here, Mr. Dammond moved to vacate before execution of the foreclosure sale. The balancing of the harms may differ where a foreclosure sale has already occurred.

[9] The rule for "excusable default" vacatur applies to instances, like in this case, when a party appears in the action but defaults in opposing the motion for judgment against it. *See Simpson v. Tommy Hilfiger U.S.A., Inc.*, 48 A.D.3d 389, 392 (2d Dep't 2008) ("[T]he Supreme Court should have granted the plaintiff's motion to vacate . . . [the judgment granting] the defendant's unopposed motion for summary judgment . . . ."); *Montefiore Med. Ctr. v. Hartford Acc. & Indem. Co.*, 37 A.D.3d 673, 673 (2d Dep't 2007) ("Pursuant to CPLR 5015(a)(1), a court may vacate a default in opposing a motion . . . .").

Mgmt. Corp. v. Aronis, __ A.D. ___, 2008 WL 4595179, at *1 (2d Dep't Oct. 14, 2008).

The record contains ample support for a finding that Mr. Dammond had a "reasonable excuse" for his default in opposing the motion for judgment of foreclosure. Mr. Dammond filed an affidavit explaining that, although a bankruptcy attorney had appeared in the action on his behalf, the appearance was entered solely for the purpose of receiving court documents that would be relevant to a bankruptcy filing. (R. 11-12). Mr. Dammond in fact remained unrepresented throughout the course of the litigation and proceeded *pro se*. Mr. Dammond also explained that he did not become aware that HSBC did not own the mortgage at the time the action was commenced—contrary to the allegations in the Verified Complaint—until he examined the purported assignment, which was not filed with the Complaint, with greater scrutiny.

HSBC asserts that Mr. Dammond did not have a "reasonable excuse" because he did not act to save his house until the eve of foreclosure sale. HSBC Br. 7-10. Mr. Dammond, however, explained in his affidavit that he had been trying to resolve the matter ex-judicially. He averred—and HSBC did not dispute—that he and a foreclosure prevention counselor had been attempting in good faith to resolve the matter through a loan modification agreement with the loan servicer, Chase Home Finance, beginning a month before the Complaint was

filed and during the pendency of the action. (R. 10). These negotiations resulted in Mr. Dammond accepting a modification offer in November 2006. Chase later withdrew the offer and proposed an unaffordable modification requiring payments of more than $5,000 a month and a balloon payment of $25,744 after seven months. (R. 11). Not only do these negotiation efforts refute HSBC's claim that Mr. Dammond was not diligent in trying to save his house, but they also provide further record evidence of Mr. Dammond's reasonable excuse for his delay in raising a defense. *See Deutsche Bank Nat'l Trust Co. v. Miele*, 20 Misc. 3d 1146(A) (Sup. Ct. Richmond County 2008) (relying on "the belief of the Appellate Division, Second Department that controversies are best decided on their merits, rather than by procedural technicalities" to hold a defendant's reliance on negotiations was a reasonable excuse).

Following the breakdown of negotiations, HSBC's misleading Verified Complaint caused Mr. Dammond to believe he had no recourse except bankruptcy. (But for the material misrepresentations in the Verified Complaint, Mr. Dammond would have more expeditiously investigated, identified, and asserted his meritorious legal defense that HSBC did not own the mortgage when it filed the action.) Consequently, Mr. Dammond's attention was diverted away from answering or dismissing the Verified Complaint, and directed towards the discharge potentially available to him in bankruptcy.

Furthermore, Mr. Dammond also filed complaints with the New York State Banking Department ("NYSBD") and the New York State Attorney General's Criminal Fraud Division ("CFD"). (R. 12). (Indeed, the initial sale date for the property was pushed back from August to December after Mr. Dammond began the formal complaint process with the NYSBD and the CFD in July 2007. (R. 9).) In light of the change of sale date, Mr. Dammond pressed forward with the administrative complaint process in hopes of resolving the matter outside of court. However, when it became clear these extra-judicial processes would not conclude until after the rescheduled foreclosure sale date of December 20, 2007, Mr. Dammond proceeded *pro se* to vacate the judgment of foreclosure and sale. (R. 12-13).

Under these circumstances and "in view of the strong public policy that actions be resolved on their merits," vacatur was well within the Supreme Court's discretion when Mr. Dammond was not willful in his default, did not unduly delay, and there is little prejudice to the adverse party. *N.Y. Univ. Hosp. Rusk Inst. v. Ill. Nat'l Ins. Co.,* 31 A.D.3d 511, 512 (2d Dep't 2006); *see also N.Y. & Presbyterian Hosp. v Am. Home Assur. Co.*, 28 A.D.3d 442, 442 (2d Dep't 2006) (highlighting public policy favoring resolution of cases on their merits, limited delay, lack of willfulness, and absence of prejudice in affirming vacatur); *Hosp. for Joint Diseases v. Dollar Rent A Car*, 25 A.D.3d 534, 534 (2d Dep't 2006) (highlighting

absence of willfulness and lack of prejudice in affirming vacatur); *I.J. Handa, P.C. v. Imperato*, 159 A.D.2d 484, 485 (2d Dep't 1990) ("In exercising such discretion [under C.P.L.R. 5015(a)(1)] courts should undertake a balanced consideration of all relevant factors . . . .").

2. Material Misrepresentation.

Under C.P.L.R. 5015(a)(3), a court may also vacate a judgment on account of "fraud, misrepresentation, or other misconduct of an adverse party." Material misrepresentations in court filings made as part of the process of obtaining the judgment is an appropriate ground for vacating the judgment. *See 142 Fulton LLC v. Hegarty,* 41 A.D.3d 286, 287 (1st Dep't 2007) (concluding that the "parties procured the judgment by means of a misrepresentation to the court of a material fact" by stating a unit was not covered by rent stabilization laws); *Haber v. Nasser*, 289 A.D.2d 200, 200 (2d Dep't 2001) (noting misrepresentations in "the means by which the prior order was procured" are grounds for vacatur under C.P.L.R. 5015(a)(3)).

The record amply supports a finding that the judgment was procured through "material misrepresentation" so as to support vacatur of the judgment under C.P.L.R. 5015(a)(3). Here, HSBC obtained the judgment of foreclosure and sale by means of a misrepresentation in its Verified Complaint that it had obtained a written assignment of the mortgage prior to the commencement of the foreclosure

action. *See* Section I.B, *supra* (highlighting this misrepresentation in explaining why the Supreme Court correctly allowed Mr. Dammond to file a late answer).

As has been thoroughly addressed above, this misrepresentation is material because a party cannot bring an action to foreclose a mortgage that it does not own. Accordingly, C.P.L.R 5015(a)(3) supports the Supreme Court's decision to vacate the judgment.

CONCLUSION

For the foregoing reasons, Defendant-Respondent Howard Dammond respectfully requests that this Court affirm the judgment of the Supreme Court in all respects.

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Brooklyn, NY

Respectfully Submitted,

_____

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CERTIFICATE OF COMPLIANCE

I hereby certify that the above brief was prepared on a computer using Microsoft Word, and using Point 14 Times New Roman typeface, in double space. The total word count, exclusive of the cover, table of contents, table of citations, proof of service, and certificate of compliance, is 7,874.