19-531

No. _____

In The

Supreme Court of the United States

OFRA LEVIN,

Petitioner,

v.

J.P. MORGAN CHASE BANK, N.A.,
GENERAL MOTORS ACCEPTANCE CORPORATION,
WELLS FARGO BANK, NA AS TRUSTEE, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The New York Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a party who lacks standing at the commencement of the action can obtain, or be granted, standing, four and a half years *after* the action started.

2. Whether an injured party has the right to appellate review of a case on the merits.

LIST OF PARTIES

Petitioner – Ofra Levin

Respondent – J.P. Morgan Chase Bank, N.A.

Respondent – Wells Fargo Bank, N.A., as Trustee

Defendants/Respondents (Not parties to this Petition/ Parties to the Underlying Litigation) – General Motors Acceptance Corporation, New York Department of Taxation & Finance, "John Does," and "Jane Does."

STATEMENT OF RELATED CASES

J.P. Morgan Chase v. Levin, No. 10-000337, Supreme Court of Nassau County. Judgment entered July 24, 2015.

J.P. Morgan Chase v. Levin, No. 2015-07941, Supreme Court of the State of New York, Appellate Division: Second Judicial Department. Judgment entered May 16, 2018.

J.P. Morgan Chase v. Levin, No. 2015-07941, Motion to renew and Reargue, Supreme Court of the State of New York, Appellate Division: Second Judicial Department. Denied October 4, 2018.

J.P. Morgan Chase v. Levin, APL 2018-00195 Preliminary Appeal statement filed November 1, 2018 with the Court of Appeals for an 'as of right' appeal. Denied. Decided and Entered on January 10, 2019.

STATEMENT OF RELATED CASES – Continued

J.P. Morgan Chase v. Levin, MOT 2019-222. Motion for Leave to Appeal to the Court of Appeals filed February 19, 2019. Denied. Decided and Entered on May 9, 2019.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the order below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is found at *JP Morgan Chase Bank, NA, v. Ofra Levin, Wells Fargo Bank, NA, et al.*, State of New York Court of Appeals, Mo. No. 2019-222.

JURISDICTION

The date on which the highest state court reviewed the case was May 9, 2019. A copy of that decision appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

RELEVANT PROVISIONS

There are no relevant provisions involved.

STATEMENT OF THE CASE

On or about January 10, 2010, Respondent J.P. Morgan Chase Bank, N.A. ("Chase") filed an action to foreclose a mortgage securing the property located at 960 Cliffside Avenue, North Woodmere, NY 11581. The mortgage being foreclosed was a second mortgage home equity line of credit encumbrance on the subject property, which is owned in fee simple by Petitioner.

Upon receipt and notice of the pending action, Petitioner filed her Answer and Affirmative Defenses. Nearly two years after the initial filing by Respondent, Wells Fargo Bank, N.A. ("Wells Fargo") also filed its Answer and Affirmative Defenses as a responsive pleading to the foreclosure complaint. In its response, Wells Fargo claimed that it held a mortgage interest in the subject property superior to that interest of Respondent Chase. On January 17, 2012, Wells Fargo filed an amended answer with Counterclaims and Crossclaims alleging this same interest and seeking a final summary judgment and declaratory judgment related to the issue of standing and its lien interest in the subject property.

On January 31, 2012, Petitioner filed a motion with Order to Show Cause, in which Petitioner sought a Court order striking Wells Fargo's Answer, Affirmative Defenses, and Counterclaims and to impose sanctions for frivolous litigation practices. Petitioner filed a detailed Affidavit in Support of the Order to Show Cause. Significant questions arose as a result, particularly as to whether Wells Fargo was a proper "party in

interest" to the pending litigation, as Petitioner submits that at the time it interposed its Answer, Affirmative Defenses, and Counterclaims, it did not have the proper legal standing to interpose such a pleading. In support of Petitioner's contentions, Petitioner submitted documentary evidence showing "that the assignment of the subject mortgage to plaintiff was infirm, and further that the ownership rights to the subject mortgage could not have been assigned to Wells Fargo because the rights to assign were never held by the previous servicer." Petitioner further submitted evidence that showed that the 2nd assignment of the mortgage (purportedly made by American Home Mortgage Servicing, Inc., as the successor of Option One Mortgage Corporation) was signed by employees of DocX, a known robo-signing and fraudulent entity.

In response to Petitioner's motion with Order to Show Cause, on February 27, 2012, Wells Fargo filed an opposition to the motion.

In its opposition, Wells Fargo argued that "facts have changed," and that as a result, "the circumstances as they exist today are not the same as they were when the prior action was brought."

On or about March 29, 2012, Petitioner filed a reply Affidavit in Support of her motion with Order to Show Cause. The Court records show that on April 4, 2012, Wells Fargo filed with the Court an unauthorized Sur-Reply Affidavit purportedly made and executed by David J. Merrill on April 13, 2012, as Assistant Secretary for American Home Mortgage Servicing, Inc.

Attached to this Affidavit was a note endorsed to Option One Mortgage Corporation and a single allonge signed by an unidentified person. On April 19, 2012, Wells Fargo filed a 2nd unauthorized Sur-Reply Affidavit and asserted that a response was required due to Petitioner including substantial new material in her Affidavit that was not made part of the original motion. Upon information and belief, the 1st Sur-Reply Affidavit was filed in furtherance of Wells Fargo's claim that it is in fact the holder of the mortgage and the note at the time it interposed its Answer, Affirmative Defenses, and Counterclaims. Contrary to Wells Fargo claims in its Sur-Reply and second Sur-Reply Affidavit, Petitioner did not raise new issues in her Affidavit in further support of her motion with Order to Show Cause. Petitioner's Affidavit was filed "in further support." Thus, it was filed to provide further support to her original motion, which is allowed under New York law.

Subsequent to Petitioner's and Wells Fargo's filings, the Honorable Supreme Court Justice Thomas A. Adams issued his order on June 1, 2012 denying in its entirety Petitioner's motion to strike the Answer, Affirmative Defenses, and Counterclaims interposed by Wells Fargo. In its order, the Court stated that the motion was "without merit and procedurally defective." The Court concluded (respectfully submitted in error) that "Wells Fargo has sufficiently alleged that it was the holder of a Note and Mortgage at the time it interposed its answer, affirmative defenses and counterclaims." This was in error, as at the time of the filing of

the amended complaint, Wells Fargo lacked any adequate legal standing as it was not the holder of both the Note and Mortgage. The June 1, 2012 order goes on to state that Wells Fargo presented "proof of the written assignment of the mortgage" at the time it interposed its answer. Petitioner respectfully submits that this was an incorrect determination by the Court, as Wells Fargo failed through its filings to establish that it properly held the Note and Mortgage on the subject property while neither the answer nor the amended answer included any proof of the assignment of the mortgage.

The Supreme Court had already ruled in a prior decision that "physical possession of the promissory Note is insufficient to provide a party with standing." See *Deutsche Bank v. Vasquez*, Index No. 4924/11 (Sup. Ct. Nassau Cty, May 8, 2012). Relying on UCC §§ 3-202, and 204, the Court noted that "the negotiation of a Promissory Note required a specific endorsement in favor of the party seeking to enforce the Note, or an endorsement in blank." *Id.* at pg. 3. In this case, Wells Fargo had neither. Wells Fargo deliberately avoided the issues presented in Petitioner's moving papers in order to gloss over the fraudulent documents which they provided to the Court. Upon review of Petitioner's motion and Wells Fargo's opposition, the Court issued a ruling on or about December 6, 2012. The Court agreed with Petitioner by further declaring in the December 6, 2012 order that "as the movant has properly raised the issue of standing, Wells Fargo must prove its standing to be entitled to relief." *See Appendix "D,"*

Page 19a. To date, Wells Fargo has failed to prove that it has the proper legal standing. Petitioner submitted to the Second Department Appellate Division that due to Wells Fargo's lack of standing, the entry of Summary Judgment in its favor should not have been entered, and the Supreme Court erred in entering judgment in its favor, when the Court had already entered an order stating that Wells Fargo must prove its standing to be entitled to relief.

On or about September 29, 2014, Chase and Wells Fargo reached an agreement whereby Chase consented to some of Wells Fargo's affirmative defenses, counterclaims, and crossclaims. This was done without notice to the other interested parties, namely Petitioner.

The order of summary judgment was timely appealed to the Second Judicial Department Appellate Division. After full briefing on the merits, the Appellate Division issued its Decision & Order on May 16, 2018 affirming the Supreme Court's ruling. Petitioner immediately sought further appellate review, first via briefing, which was dismissed by the State of New York Court of Appeals on January 10, 2019 for what the Court described as lack of a "substantive constitutional question," and then via Petitioner's timely motion for leave to appeal to the Court of Appeals, which was denied on May 9, 2019. This petition follows.

ARGUMENT IN SUPPORT OF PETITION

I. Standing is a legal requirement for a Party to Intercede in a Legal Action. Respondent Wells Fargo failed to Demonstrate Standing, thus leading to an Erroneous Order of Summary Judgment against Petitioner.

The cornerstone of the American judicial system is due process. Due process considerations include, as a threshold matter, that the parties litigating have the requisite standing, or interest in the matter sufficient to warrant Court intervention and/or only awarding relief in favor of those parties who have sufficiently demonstrated their legal standing to seek relief. In the case herein, summary judgment was awarded to a party who failed to demonstrate the requisite level of standing necessary to be granted relief. In fact, the Supreme Court found, and the Appellate Division subsequently affirmed, that Wells Fargo established standing due to a subordination agreement Wells Fargo allegedly entered into with Chase in August 2006. *See Appendix "B", Page 3a.* However, contrary to the appellate panel's decision, the facts clearly demonstrate otherwise. When the action commenced on January 7, 2010, Chase and Wells Fargo lacked a duly filed, recorded and enforceable subordination agreement. The only subordination agreement ever proffered to Levin, or the Court for that matter, was a 2006 subordination agreement between Chase and Superior Home Mortgage, the originating lender of Petitioner's loan. Wells Fargo was never a party in interest to the subordination agreement. As such, and as demonstrated to no avail to the

lower tribunals, no subordination agreement ever existed between Chase and Wells Fargo. Wells Fargo has never been a party to a subordination agreement which confers any standing to it in this matter.

"Standing . . . is critical to the proper functioning of the judicial system. It is a threshold issue. If standing is denied, the pathway to the courthouse is blocked. The plaintiff who has standing, however, may cross the threshold and seek judicial redress. It is difficult to draw an exquisitely sharp line separating the worthy litigant from one who would generate a lawsuit to advance someone else's cause. The rules governing standing help courts separate the tangible from the abstract or speculative injury, and the genuinely aggrieved from the judicial dilettante or amorphous claimant." See *Saratoga County Chamber of Commerce v. Pataki*, 100 NY2d 801, 812 [2003]. "In New York, 'a plaintiff may not proceed with an action in the absence of standing.'" *Raske v. Next Mgt., LLC*, 40 Misc 3d 1240[A], 2013 NY Slip Op 51514[U], *7 [Sup Ct. NY County 2013], quoting *Ryan, Inc. v. New York State Dept. of Taxation & Fin.*, 26 Misc 3d 563, 567 [Sup Ct. NY County 2009]). "The plaintiff must have an injury in fact in order to bring a cause of action against a particular defendant." (id., citing *Silver v. Pataki*, 96 NY2d 532, 539 [2001]). Wells Fargo has never demonstrated its right to bring forth its claims against Petitioner in this action. Wells Fargo has never proffered any evidence that it has suffered an injury in fact. Neither the trial court nor the appellate division found that Wells Fargo had suffered

any injury in fact which would confer standing upon Wells Fargo.

Additionally, it is undisputed that Petitioner is an aggrieved party, a necessary element in this Court's review. An "aggrieved party may seek permission to appeal." See CPLR 5701(c). A party is aggrieved when he or she "has a direct interest in the controversy which is affected by the result and [when] the adjudication has a binding force against the rights, person or property of the party.'" *Matter of DeLong*, 89 AD2d 368, 370. Here, Petitioner's possessory interest in the subject property at the heart of the underlying action has been affected by the lower court's ruling. Based on an alleged enforceable subordination agreement, the lower court deemed Wells Fargo's mortgage interest to be superior to any and all other encumbrances. In essence, the lower tribunal declared that Wells Fargo has a legal and equitable interest in the property and can therefore proffer evidence in support of its standing to foreclose. Petitioner contends that Wells Fargo's efforts in asserting an interest in the subject property is wrongful, unlawful, and based on fraudulently created and manufactured documents.

This Court, in its Decision and Order stated that Petitioner "failed to raise a triable issue of fact," and that Petitioner "does not dispute the validity of Wells Fargo's mortgage." *See Appendix "B," Page 4a*. These statements could not be further from the truth and provided the basis for an appeal to the Court of Appeals. Unfortunately, the Court of Appeals dismissed

and denied Petitioner the right to appellate review on the merits.

It is undisputed that Petitioner has, throughout the course of this 9-year litigation, challenged the validity of mortgage assignments and allonges relied upon by Wells Fargo in asserting an interest in the subject property. It is Petitioner's position that Wells Fargo lacked standing to bring forth its counterclaims and cross claims, and as such, the lower tribunals erred as a matter of law in declaring that standing "is not an issue" herein and granting Wells Fargo its requested relief.

The Fourteenth Amendment to the United States Constitution explicitly provides that no State shall "deprive any person of life, liberty, or property, without due process of law." Due process has many meanings and many variations depending on its context. At a minimum, in the civil law arena, it requires that the Court accept competent evidence, provide all parties with a fair and reasonable opportunity to be heard, and to enter findings based on truthful competent evidence. Petitioner submits that the lower tribunals here violated her constitutional right to due process by accepting false or fabricated evidence and preventing Petitioner from a fair and equitable opportunity to refute the fabricated evidence put forth by the other parties. Petitioner's due process rights were further violated when the appellate division found, without competent evidence, that Wells Fargo had standing to bring its claims based, in large part, on the subordination agreement it purportedly entered into with Chase.

This was never an argument made to the Supreme Court; thus, Petitioner had no reason to attack it in the appellate briefs. The appellate division reached its conclusion without providing Petitioner an opportunity to be heard on the merits of this finding. Thus, Petitioner was deprived of due process in relation to her right to attack Wells Fargo's standing on this ground.

II. In violation of Due Process, the Court of Appeals Denied Petitioner Leave to Appeal.

CPLR 5602(a)(1)(i) allows a litigant to seek leave to appeal from a final Appellate Division order entered in an action originating in the Supreme Court, a County Court, a Surrogate's Court, the Family Court, the Court of Claims, an administrative agency, or an arbitration. The judgment sought to be appealed from must be a final judgment. The parties cannot simply enter a "nonfinal" judgment on the Appellate Division order (*Burnside Coal & Oil v City of New York*, lv dismissed 73 NY2d 852 [1988]). Here, the judgment sought to be appealed was a final order, entered by the Supreme Court, which granted relief to Wells Fargo on its motion for summary judgment. Thus, it was appropriate for Petitioner to seek leave to appeal from the Court of Appeals.

"The existence of an injury in fact – an actual legal stake in the matter being adjudicated – ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute in a form traditionally capable of judicial resolution.

Under the injury in fact analysis standing exists when the plaintiff has sustained actual injury, meaning that he/she has an actual legal stake in the in the [sic] matter being litigated." *Collateral Loanbrokers Assn. of N.Y., Inc. v City of New York*, 47 Misc 3d 1225[A], 2015 NY Slip Op 50847[U], *5 [Sup Ct. Bronx County 2015] [internal quotation marks and parenthetical omitted], quoting *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773 [1991].

It is undisputed that Petitioner is an aggrieved party, a necessary element in this Court's review. An "aggrieved party may seek permission to appeal." See CPLR 5701(c). A party is aggrieved when he or she "has a direct interest in the controversy which is affected by the result and [when] the adjudication has a binding force against the rights, person or property of the party.'" *Matter of DeLong*, 89 AD2d 368, 370. Here, Petitioner's possessory interest in the subject property at the heart of the underlying action has been affected by the lower court's ruling. Based on an alleged subordination agreement, the lower court deemed Wells Fargo's mortgage interest to be superior to any and all other encumbrances. In essence, the lower tribunal declared that Wells Fargo has a legal and equitable interest in the property and can therefore proffer evidence in support of its standing to foreclose. Petitioner contends that Wells Fargo's efforts in asserting an interest in the subject property is wrongful, unlawful, and based on fraudulently created and manufactured documents. Accordingly, Petitioner is an injured party who is entitled to appellate review on the merits.

Petitioner was never given a fair and equitable opportunity to pursue key material issues on appeal, thus justifying her right to appeal on the merits.

REASONS FOR GRANTING THE PETITION

For the reasons herein, the petition for writ of certiorari should be granted.

Standing

Every day American citizens enter into the court system around the country and seek standing to litigate their claims. Many are pro se, a breed not favored by the courts. In many instances, they fail to understand that absent standing, they will be out of the court within a couple of months. Here, Petitioner presents to this Court the case of a litigant obtaining standing four and a half years after the action was commenced, despite that fact that the trial court found that the litigant lacks standing.

Due Process

Furthermore, the constitution infers that an appeal will be granted to every citizen. The right to appeal a case may be inferred from Article I, Section 8 of the Constitution. One clause of that section states that Congress has the right to set up courts that will be inferior to the Supreme Court. This implies that there will be appellate courts, which also implies that

appeals will happen. The right to appeal can also be inferred from Article III, Section 2. That section says (among other things) that the Supreme Court will have appellate jurisdiction in certain types of cases. This, too, implies that appeals are permitted. A Petitioner should expect that the appeal will be on the merits. He does not expect that the appeal process will be a second trial by the appellate courts on documents not argued in the trial court, a process he did not participate in the appeal papers. Therefore, the appellate court here destroyed the appeal and rendered the appeal moot. In doing so, Petitioner was denied the rights afforded her under the due process clause for appellate review.

CONCLUSION

For the reasons herein, the petition for writ of certiorari should be granted.

Originally filed: August 7, 2019
Re-filed: October 17, 2019

Respectfully submitted,

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