# APPENDIX

## TABLE OF CONTENTS

Page

Appendix A (Court of appeals denial dated May 9, 2019) ..... 1a

Appendix B (Appellate Division Second Department Decision entered on May 23, 2018) ..... 2a

Appendix C (Supreme Court Nassau County Decision entered on July 24, 2015) ..... 6a

Appendix D (Supreme Court Nassau County Decision entered on December 10, 2012) ..... 12a

## APPENDIX A

***State of New York***
***Court of Appeals***

***Decided and Entered on the ninth day of May, 2019***

**Present,** Hon. Janet DiFiore, *Chief Judge,* ***presiding.***

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Mo. No. 2019-222
JP Morgan Chase Bank, NA,
Plaintiff,

v.

Ofra Levin,
Appellant,
Wells Fargo Bank, NA, &c.,
Respondent,
et al.,
Defendants.

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Appellant having moved for leave to appeal to the Court of Appeals in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion is denied.

/s/ John P. Asiello
John P. Asiello
Clerk of the Court

## APPENDIX B

**Supreme Court of the State of New York**
**Appellate Division: Second Judicial Department**

D55396
M/hu

___AD3d___ Submitted – January 18, 2018

REINALDO E. RIVERA, J.P.
COLLEEN D. DUFFY
BETSY BARROS
ANGELA G. IANNACCI, JJ.

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2015-07941 DECISION & ORDER

JP Morgan Chase Bank, NA,
plaintiff, v Ofra Levin, appellant,
Wells Fargo Bank, NA, etc.,
respondent, et al., defendants.

(Index No. 337/10)

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Ofra Levin, North Woodmere, NY, appellant pro se.

Donohue, McGahan, Catalano & Belitsis, Jericho, NY (Erik H. Rosanes of counsel), for respondent.

In an action to foreclose a mortgage, the defendant Ofra Levin appeals from a judgment of the Supreme Court, Nassau County (Thomas A. Adams, J.), entered July 24, 2015. The judgment, insofar as appealed from, upon an order of the same court dated March 12, 2015, as amended April 21, 2015, inter alia, granting the cross motion of the defendant Wells Fargo Bank, NA,

for summary judgment on its combined fourth affirmative defense, first counterclaim, and first cross claim, declared that the defendant Wells Fargo Bank, NA, as holder of a certain mortgage dated August 14, 2006, in the principal amount of $380,000, has a valid and subsisting first priority mortgage lien against the subject property.

ORDERED that the judgment is affirmed insofar as appealed from, with costs.

In 2010, the plaintiff, JP Morgan Chase Bank, NA (hereinafter JPMorgan), commenced this action to foreclose a mortgage given by the defendant Ofra Levin in February 2006, securing a home equity line of credit in the sum of $200,000. Levin, appearing pro se, answered the complaint. Thereafter, the defendant Wells Fargo Bank, NA (hereinafter Wells Fargo), interposed an amended answer to the complaint. Wells Fargo asserted a combined fourth affirmative defense, first counterclaim, and first cross claim (hereinafter collectively claim) pursuant to RPAPL article 15 to compel the determination of claims to real property, alleging that the mortgage it held in the sum of $380,000, given by Levin in August 2006, was a superior first mortgage lien, as evidenced by a subordination agreement it entered into with JPMorgan in August 2006, which agreement was never recorded.

After JPMorgan and Wells Fargo executed a stipulation of settlement, Levin moved pursuant to CPLR 3025(b) for leave to serve an amended answer to the complaint and Wells Fargo's claim. JPMorgan

cross-moved pursuant to CPLR 3217(b) to discontinue the action without prejudice and to cancel the notice of pendency, and Wells Fargo cross-moved for summary judgment on its claim. In an order dated March 12, 2015, as amended April 21, 2015, the Supreme Court denied Levin's motion and granted the cross motions. Thereafter, the court issued a judgment, inter alia, declaring Wells Fargo's mortgage to be a valid and subsisting first priority mortgage lien against the subject property. Levin appeals.

In support of its cross motion, Wells Fargo demonstrated its prima facie entitlement to judgment as a matter of law on its claim (*see* CPLR 3001, 3017[b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324) by establishing that its mortgage was valid and superior in priority to JPMorgan's mortgage (*see Lend-Mor Mtge. Bankers Corp. v Nicholas*, 69 AD3d 680, 681; *Washington Mut. Bank, FA v Peak Health Club, Inc.*, 48 AD3d 793, 797).

In opposition to Wells Fargo's prima facie showing, Levin failed to raise a triable issue of fact (*see Lend-Mar Mtge. Bankers Corp. v Nicholas*, 69 AD3d at 681; *Washington Mut. Bank, FA v Peak Health Club, Inc.*, 48 AD3d at 798). Levin does not dispute the validity of Wells Fargo's mortgage, and as a nonparty to the subordination agreement and the stipulation of settlement, she lacks standing to challenge the terms thereof (*see VAC Serv. Corp. v Technology Ins. Co., Inc.*, 49 AD3d 524, 525). Further, to the extent that Levin challenges Wells Fargo's standing to commence an action to foreclose its mortgage, that contention is misplaced, as Wells Fargo's claim is not one to foreclose

a mortgage and standing is not an issue herein (*see Zuniga v BAC Home Loans Servicing, L.P.*, 147 AD3d 882, 884; *Jahan v U.S. Bank N.A.*, 127 AD3d 926, 927).

RIVERA, J.P., DUFFY, BARROS and IANNACCI, JJ., concur.

ENTER:

/s/ Aprilanne Agostino
Aprilanne Agostino
Clerk of the Court

(Entered May 16, 2018
Supreme Court of New York
Appellate Division)

## APPENDIX C

At an Trial/IAS Part 23, Foreclosure Part, of the Supreme Court of the State of New York held in and for the County of Nassau at the Courthouse thereof in Mineola, New York, on July 10, 2015

PRESENT:

HON. THOMAS A ADAMS,

Justice.

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J.P. MORGAN CHASE BANK, N.A., Index No. 337/10

Plaintiff,

-against-

OFRA LEVIN; GENERAL MOTORS ACCEPTANCE CORPORATION; WELLS FARGO BANK, NA AS TRUSTEE; NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE; "JOHN DOES" and "JANE DOES", said names being fictitious, parties intended being possible tenants or occupants of premises, and corporation, other entities or persons who claim or may claim, alien against the premises,

Defendant(s)

**JUDGMENT**

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Defendant Ofra Levin ("Defendant Levin") having moved this Court, pursuant to CPLR §3025(b), for

leave to serve and file an amended answer with counterclaims and a reply with cross claims to the cross claims of defendant Wells Fargo Bank, N.A., as Trustee ("Wells Fargo"), and having submitted in support of that motion, and in opposition to the cross-motions recited below, a notice of motion dated October 7, 2014, the affidavit of Ofra Levin, sworn to October 7, 2014, the undated affirmation of Elliot S. Schlissel, the affidavit of Ofra Levin, sworn to December 1, 2014, the affirmation of Michael J. Ciaravino, dated December 1, 2014, and the sur-reply affirmation of Elliot S. Schlissel, dated January 19, 2015, together with the exhibits annexed to the foregoing; and plaintiff J.P. Morgan Chase Bank, N.A. ("Chase") having cross-moved for leave to discontinue this action and cancel the corresponding notice of pendency thereof, and having submitted in support of that cross-motion a notice of cross-motion, dated November 3, 2014, and the affirmation of Robert H. King, dated November 3, 2014, together with the exhibits annexed thereto; and Wells Fargo having cross-moved for summary judgment on the Fourth Affirmation Defense, First Counterclaim and First Cross-Claim alleged in its amended answer, dated January 17, 2012, and having submitted in support of that cross-motion, and in full or partial opposition to the other motions recited above, a notice of cross-motion dated November 1, 2014, the affirmation of Erik H. Rosanes, dated November 1, 2014, the affirmation in partial support and in partial opposition to plaintiff's cross-motion of Erik H. Rosanes dated November 10, 2014, the reply affirmation of Erik H. Rosanes, dated December 12, 2014, together with the

exhibits annexed to the foregoing including the stipulation dated September 29, 2014 between the attorneys of record for Wells Fargo and Chase, and the February 10, 2015 letter of Erik H. Rosanes to the Court objecting to the untimely and unauthorized submission of the sur-reply affirmation of Elliot S. Schlissel, dated January 19, 2015; and that motion and those cross-motions having duly come on to be heard by the Court on December 15, 2014, and having them been duly submitted, and, after due deliberation thereon, the Court having made a short form order, dated March 12, 2015 and entered in the office of the Nassau County Clerk on March 31, 2015, as amended by the Court, sua sponte, by short-form order dated April 21, 2015: granting Chase's motion to discontinue its action and cancel the corresponding notice of pendency thereof; granting Defendant Wells Fargo's motion for summary judgment and directing Wells Fargo to settle a judgment on notice thereon pursuant RPAPL §1521; and denying Defendant Levin's motion as untimely and devoid of merit;

NOW, upon the foregoing papers and upon the motion of Wells Fargo's attorneys, Donohue, McGahan, Catalano & Belitsis, 380 North Broadway, PO Box 350, Jericho, New York 11753-0350, it is

ADJUDGED AND DECLARED, that Wells Fargo, as the holder of that certain mortgage dated August 14, 2006 made by Ofra Levin in favor of Mortgage Electronic Registration Systems, Inc., ("MERS") as nominee for Superior Home Mortgage, in the principal amount of $380,000.00 against the residential real

property known as 960 Cliffside Avenue, Valley Stream, Town of Hempstead, County of Nassau and State of New York, designated on the Land and Tax Map of Nassau County as Section 39, Block 601, Lot 16, and more particularly described on Schedule A hereto (hereinafter referred to as "960 Cliffside Avenue"), which mortgage was recorded in the Office of the Nassau County Clerk, on September 26, 2006 in Liber 31024, Page 465, has a valid and subsisting first priority mortgage lien against 960 Cliffside Avenue, in the principal amount of $380,000.00, together with such interest and other charges as may be secured thereby, by virtue of such mortgage; and it is further

ADJUDGED AND DECLARED, that any rights of Chase under the mortgage pleaded by it in this action against defendants and 960 Cliffside Avenue, that is, that certain home equity line mortgage dated February 20, 2006 made by Ofra Levin in favor of Chase and recorded in the office of the Nassau County Clerk on March 22, 2006 in Liber 30247, Page 522, are inferior, subject and subordinate to the rights of Wells Fargo under the mortgage held by Wells Fargo as set forth above, pursuant to that certain Subordination of Mortgage, dated August 9, 2006, executed by Chase and the stipulation in this action, dated September 29, 2014, by and between the attorneys of record for Chase and Wells Fargo; and it is further

ADJUDGED AND DECLARED, that any rights or claims of Chase and the defendants, or anyone claiming through or under them, in or to 960 Cliffside Avenue are inferior and subject and subordinate to the

rights of Wells Fargo under the mortgage held by Wells Fargo as set forth above; and it is further

ADJUDGED AND DECLARED, that the parties hereto, and any person claiming under or through them or any of them, be barred to any claim to an estate or interest in or to 960 Cliffside Avenue inconsistent with or prior in right to the interest claimed by Wells Fargo under the mortgage held by Wells Fargo as set forth above; and it is further

ADJUDGED AND DECLARED that, upon presentation to her of a certified copy of this judgment, and upon payment of the appropriate fees therefor, if any, the Clerk of the County of Nassau shall record this judgment in the real property records maintained by her and index same against the real property known as 960 Cliffside Avenue, Valley Stream, Town of Hempstead, County of Nassau and State of New York, designated on the Land and Tax Map of Nassau County as Section 39, Block 601, Lot 16, and more particularly described on Schedule A hereto, in lieu of that certain Subordination of Mortgage dated August 9, 2006, to record and reflect Wells Fargo's rights and claims under the mortgage held by Wells Fargo set forth above, nunc pro tunc to August 14, 2006; and it is further

ORDERED, ADJUDGED AND DECLARED that the Fifth Affirmative Defense and Second Counterclaim pleaded by Wells Fargo in its amended answer herein dated January 17, 2012 is deemed withdrawn and discontinued without prejudice; and it is further

ORDERED, ADJUDGED AND DECLARED that the motion of Defendant Levin for leave to amend her answer and to interpose an answer to Wells Fargo's cross claims is denied in all respects; and it is further

ORDERED, ADJUDGED AND DECLARED that this action is hereby otherwise discontinued and the corresponding notice of pendency thereof filed by Chase on or about January 7, 2010 is hereby cancelled; and it is further

ADJUDGED, that defendant Wells Fargo Bank, N.A., residing at 9062 Old Annapolis Road, Columbia, Maryland 21045-1951, recover of Defendant Ofra Levin, residing at 960 Cliffside Avenue, North Woodmere, New York 11581, costs and disbursements in the amount of $245.00, as taxed, and that Wells Fargo have execution therefor.

ENTER.

/s/ Thomas A. Adams
Thomas A. Adams, J.S.C.

(Entered July 24, 2015
Supreme Court of New York
Nassau County)

## APPENDIX D

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**PRESENT: HON. THOMAS A. ADAMS**
**Supreme Court Justice**

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|---|---|
| JP MORGAN CHASE BANK, NA, | FORECLOSURE PART NASSAU COUNTY |
| Plaintiff, | Index No.: 000337/10 |
| -against- | Motion Date: 09/10/12 |
| | Motion Seq.: 02 |
| OFRA LEVIN; GENERAL MOTORS ACCEPTANCE CORPORATION; WELLS FARGO BANK, NA AS TRUSTEE, et al., | |
| Defendants. | |

---------- X

**The following papers were read on this application:**

**Notice of Motion. Affidavit and Exhibits..... 1**
**Affidavit in Opposition and Exhibits..... 2**
**Affidavit in Reply..... 3**

Upon the foregoing papers the motion by defendant, Ofra Levin (movant), for an order, pursuant to CPLR § 2221, for leave, to renew and / or reargue, the movant's prior motion brought by Order to Show Cause, which was denied by Order of this Court dated June 1, 2012, and upon granting renewal or reargument, striking defendant/counter-plaintiff, Wells Fargo Bank NA as Trustee's (Wells Fargo), answer, affirmative

defenses, counterclaims and to impose sanctions for frivolous practice, is determined as set forth herein.

Pursuant to CPLR § 2221(d)(2) and (3), a motion to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and shall be made within thirty days after service a copy of the order determining the prior motion and written notice of its entry".

"A motion for reargument is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law (see, Pahl Equip. Corp., v. Kassis, 182 AD2d 22; Foley v. Roche, 68 AD2d 558)." McGill v. Goldman, 261 AD2d 593, 594).

A motion to renew, shall be based upon new facts not presented to the court in connection with the prior motion that would change the court's prior determination or shall demonstrate that there has been a change in the law which would change the prior decision and shall provide a reasonable justification for the failure to present the new facts on the prior motion. CPLR §2221(e).

To grant renewal the court must find that the party presenting the new facts has a reasonable excuse for failing to present those facts on the prior motion (see Kaufman v. Kunis, 14 AD3d 542; Yarde v New York City Transit Auth., 4 AD3d 352. A party establishes a

reasonable excuse when the facts existed but were not known to the movant when the prior motion was made (see *Johnson v. Marquez*, 2 AD3d 786; *Riccio v. Deperalta*, 274 AD2d 384, app dism, 95 NY2d 957).

A motion to renew is not a second chance given to a party who failed to exercise due diligence when making the initial application (see Renna v. Gullo, 19 AD3d 472; O'Dell v Caswell, 12 AD3d 492).

Despite the movant's assertions to the contrary no new facts or change in law have been presented that would change this Courts prior determination, as such the branch of the motion to renew is denied.

Based upon the movant's assertions that the Court overlooked or misapprehended facts and or law in making its determination, the branch of the motion to reargue, is granted, and upon reargument, defendant, Levin's motion is denied.

As this Court has previously held, on a CPLR § 3211 motion to dismiss for "failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (quotations omitted)." East Hampton Union Free School Dist., v. Sandpebble Builders, Inc., 66 AD3d 122, 125, *aff'd* 16 NY3d 775 (2011), *quoting* Breytman v. Olinville Realty, LLC., 54 AD3d 703, 303-304, *lv dism.*, 12 NY3d 378, *citing* Leon v. Martinez, 84 NY2d 83, 87

(1994); Smith v. Meridian Technologies, Inc., 52 AD3d 685, 686.

A complaint may be dismissed based upon documentary evidence, pursuant to CPLR 3211(a)(1), if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby (see Yew Prospect, LLC v. Szulman, 305 AD2d 588; Sta-Bright Services, Inc. v. Sutton, 17 AD3d 570). "On a motion to dismiss based on documentary evidence, dismissal is only warranted if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" Moore v. Liberty Power Corp., LLC, 72 AD3d 660, 661) quoting Klein v. Gutman, 12 AD3d 417, 418. To obtain dismissal "the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" Teitler v. Max J. Pollack & Sons, 288 AD2d 302; see Leon v. Martinez, 84 NY2d 83; Sheridan v. Town of Orangetown, 21 AD3d 365.

In New York to assert a cause of action for foreclosure, the plaintiff must allege in the pleading: the existence of a promissory note; the existence of a related mortgage referable to the subject property; plaintiff's ownership of the mortgage and the borrowers default under the terms of the note. (see Wells Fargo Bank v. Cohen, 80 AD3d 753,755 [2nd Dept. 2011]).

Insofar as a motion pursuant to CPLR § 3211 requires this Court to accept as true the allegations in

the complaint (see Guggenheimer v. Ginsberg, 43 NY2d 268, 275 [1977]), the Here when affording the pleading the benefit of every possible inference and accepting the allegations as true, the motion must be denied as Wells Fargo sufficiently alleges a cause of action in this residential mortgage foreclosure action.

Contrary to the movant's contention, a plaintiff is not required to plead its standing to commence an action, nor is it always required to prove its standing to be entitled to relief.

Only where standing has been put in issue by a defendant's pre-answer motion or by an affirmative defense set forth in an answer must the plaintiff prove its standing to be entitled to relief from the court (see Wells Fargo Bank Minn, NA v Mastropaolo, 42 AD3d 239 [2nd Dept. 2007], *citing* TPZ Corp. v Dabbs, 25 AD3d 25 AD3d 787 [2nd Dept. 2006]).

Only after that issue has been properly raised, a plaintiff establishes its standing by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note "either by physical delivery or execution of a written assignment prior to the commencement of the action" (Citimortage Inc. v Stosel, 89 AD3d 887 [2nd Dept. 2011], *quoting* Aurora Loan Servs., LLC v Weisblum, 85 AD3d 95, 108 [2nd Dept 2011]; *see* US Bank of NY v Silverberg, 86 AD3d 274 [2nd Dept. 2011]; Citibank, N.A., v Swiatkowski, 98 AD3d 555 [2d Dept 2012]; U.S.Bank, NA v Collymore,68 AD3d 752 [2nd Dept. 2009] Wells Fargo Bank, NA v Marchione,

69 AD3d 204 [2nd Dept. 2009]) "Where a mortgage is represented by a bond or other instrument, an assignment of the mortgage without assignment of the underlying note or bond is a nullity" U.S.Bank, NA v Collymore, *supra* at 754).

However, a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation and vest standing in the plaintiff, since the mortgage passes with the debt that is evidenced by the note as an inseparable incident thereto (see US Bank Natl. Assn. v Cange, 96 AD3d 825 [2nd Dept. 2012]; GRP Loan, LLC v Taylor, 95 AD3d 1172 [2nd Dept. 2012]; Deutsche Bank Natl. Trust Co. v Rivas, 95 AD3d 1061 [2nd Dept. 2012]; US Bank, Natl. Assn. v Sharif, 89 AD3d 723 [2nd Dept. 2011]; U.S. Bank, NA v Collymore, 68 AD3d at 754, *supra*). A plaintiff's standing in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action US Bank of NY v Silverberg, 86 AD3d 274 [2nd Dept. 2011] U.S.Bank, NA v Collymore, supra; Wells Fargo Bank, NA v Marchione, 69 AD3d 204 [2nd Dept. 2009]). Mortgage loan servicers and other agents of the owner, holder or possessor of the note and mortgage at the time of commencement also possess standing to prosecute claims for foreclosure and sale (*see* RPAPL §1304[1] [*authorizing lenders, assignees or mortgage loan servicers to commence mortgage foreclosure actions*]; RPAPL §1302[1] [requiring plaintiffs in some foreclosure actions to allege that it is the owner and holder of the note and mortgage or has

been delegated the authority to prosecute action by such]; *see also* Wells Fargo Bank, NA v Edwards, 95 AD3d 692 [1st Dept. 2012] [*action properly maintained in plaintiff's capacity as trustee under a pooling and servicing agreement that predated the commencement of the action*]; CWCapital Asset Mgt. v Charney—FPG 114 41st St., LLC., 84 AD3d 506 [1st Dept. 2011] [*action properly maintained in plaintiff's capacity as servicing agent*]; Fairbanks Capital Corp. v Nagel, 289 AD2d 99 [1st Dept. 2001] [*delegation of mortgage to service agent by mortgagee was sufficient to give service agent standing to sue*]; Deutsche Bank Natl. Trust Co. v Pietranico, 33 Misc 3d 528 [Sup.Ct., Suffolk County, 2011] [*agent and nominee of original lender had standing to prosecute action*]; *see also* US Bank, NA v Flynn, 27 Misc 3d 802, 806 [Sup. Ct., Suffolk County 2010]).

However, as the ownership, holder status or possessory interest of the plaintiff or its duly delegated agent bears solely upon the issue of standing, and not upon the sufficiency of the claim, the pleading and proving of such interest is not an element of the plaintiff's claim for foreclosure and sale (see Wells Fargo Bank Minn, NA v Mastropaolo, 42 AD3d 239 [2nd Dept. 2008]; cf., U.S. Bank Nat. Assn. v Dellarmo, 94 AD3d 746 [2nd Dept. 2012]).

The foregoing rule is the result of the nature of the issue of standing under principles of New York jurisprudence, in which it has recently been established that the issue of a plaintiff's standing is not an issue concerning subject matter jurisdiction, but instead, is an affirmative defense in bar which may be waived by a defendant possessed of such defense (*see* Wells Fargo

Bank Minn, NA v Mastropaolo, *supra*; *see also* HSBC Bank USA, NA v Schwartz, 88 AD3d 961 [2nd Dept. 2011]; Citi Mtge., Inc. v Rosenthal, 88 AD3d 759, 931 NYS2d 638 [2nd Dept. 2011]. A plaintiff is thus under no obligation to plead and prove its standing in the first instance.

Accordingly, as the movant has properly raised the issue of standing, Wells Fargo must prove its standing to be entitled to relief (see US Bank N.A., v. Madero, 80 AD3d 751, 752 [2nd Dept. 2011], citing U.S. Bank. NA v Collymore, *supra* at 753). However, the failure of a plaintiff to establish that it was either the lawful holder or assignee of the subject note at the time the action was commenced, does not require the dismissal of the action at this stage, (see US Bank N.A., v. Madero, supra at 753).

Therefore, for the afore-noted reasons, the defendant, Ofra Levin's, motion to reargue is granted, and upon reargument the prior motion, is again denied.

This constitutes the decision and Order of the Court.

ENTER:

Dated: DEC 6 2012

/s/ Thomas A. Adams
HON. THOMAS A. ADAMS
Supreme Court Justice

(Entered December 10, 2012
Nassau County
County Clerk's Office)