

Thomas D. Shanahan  
Shanahan & Associates, P.C.  
545 Fifth Avenue, Suite 1205  
New York, NY 10017  
(212) 867-1100

David B. Cohen  
116 Potter Road  
Scarsdale, NY 10583  
(914) 472-7378

Attorneys for Plaintiff-Appellant  
Anthony DeRosa

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE COURT – FIRST DEPARTMENT

\_\_\_\_\_  
ANTHONY DEROSA,

Plaintiff-Appellant,

-against-

JP MORGAN CHASE, sued herein as  
CHASE MANHATTAN MORTGAGE CORP., and  
SEMYON PESOCHINSKY, sued herein as John Doe No.2,

Defendants-Respondents,

-and-

SAVANNAH OWNERS CORP.,

Defendant  
\_\_\_\_\_

X

Index Number: 107473/01  
New York County Supreme Court

NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affirmations of David B. Cohen and Thomas D. Shanahan, each dated April 9, 2004, the affidavit of Anthony DeRosa dated April 9, 2004, with exhibits annexed thereto and all prior papers and proceedings in this matter, the undersigned will move this Court on the 26<sup>th</sup> day of April, 2004 at 10:00 o'clock in the forenoon of that day or as soon

thereafter as counsel can be heard, at the Courthouse located at 27 Madison Avenue at 25<sup>th</sup> Street, New York, NY 10010, for the following relief:

1. Pursuant to §2221 CPLR, to reargue the appeal resulting in the order of this Court dated March 23, 2004 ("the Order") dismissing this action, and upon granting such motion for reargument, vacating that portion of the order dismissing this action and providing that this case be returned to the Supreme Court for proceedings consistent with the modified Order.

2. For such other and further relief as this Court may deem just, equitable and proper in the circumstances.

PLEASE TAKE FURTHER NOTICE that answering affidavits, if any, are required to be served upon the undersigned at least seven (7) days (12 days if by mail) prior to the return date of this motion.

Dated: April 9, 2004  
Scarsdale, New York

---

David B. Cohen  
116 Potter Road  
Scarsdale, New York 10583  
(914) 472-7378

and

---

Thomas D. Shanahan  
Shanahan & Associates, P.C.  
545 Fifth Avenue, Suite 1205  
New York, New York 10017  
(212) 867-1100

Attorneys for Plaintiff-Appellant  
Anthony DeRosa

TO: Jeffrey Eillender, Esq.  
Schlam, Stone & Dolan  
Attorneys for Defendant-Respondent  
Semyon Pesochinsky  
26 Broadway, Suite 1900  
New York, New York 10004

Steven Zaino, Esq.  
Pittoni, Bonchonsky & Zaino  
Attorneys for Defendant-Respondent  
JP Morgan Chase  
226 Seventh Avenue  
Garden City, New York 11530

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE COURT – FIRST DEPARTMENT

\_\_\_\_\_  
ANTHONY DEROSA, X

Plaintiff-Appellant,

Index Number: 107473/01  
New York County Supreme Court

-against-

AFFIRMATION OF  
COUNSEL FOR  
PLAINTIFF-APPELLANT

JP MORGAN CHASE, sued herein as  
CHASE MANHATTAN MORTGAGE CORP., and  
SEMYON PESOCHINSKY, sued herein as John Doe No.2,

Defendants-Respondents,

-and-

SAVANNAH OWNERS CORP.,

Defendant

\_\_\_\_\_  
X

State of New York            )  
  )ss  
County of Westchester        )

DAVID B. COHEN, an attorney duly licensed to practice law in the courts of this State, affirms the following under the penalties for perjury:

1. I am co-counsel to plaintiff-appellant, Anthony DeRosa ("appellant") on this appeal, and I respectfully submit this motion to reargue the appellant's appeal giving rise to the order of this Court dated March 23, 2004 ("the Order", Exhibit "A"). In the event that the Court grants appellant's motion for reargument, we further respectfully request that the Court thereupon modify the Order so as to vacate that portion thereof which found that defendant-respondent JP Morgan Chase's ("Chase's) foreclosure was a commercially reasonable one, and that it remand the case to the Supreme Court for proceedings not inconsistent with the Court's modified Order.

2. All prior affidavits and affirmations previously submitted in this matter, with annexed exhibits, are incorporated herein by reference as if fully restated.

### A THRESHOLD MATTER OF JURISDICTION

3. As a threshold matter, the Court stated, in its majority decision, that I consented to the jurisdiction of this Court to act as a nisi prius, i.e., trial, court, is a dramatic perversion of my intent.

4. When asked by the Court on oral argument back on October 1, 2003, I remember that the question was: "Does the Court have jurisdiction over this case?" or words to that effect, and not, for instance: "Do you consent to this Court's original jurisdiction to determine the facts de novo in the place and stead of the Supreme Court?"

5. Obviously, I would not consent to the appellant's relinquishment of his right to discovery. The appellant was not afforded that right in the trial court nor, apparently is this Court amenable to affording him that right.

6. Even assuming arguendo, without conceding, that I had been so remiss as to consent to the jurisdiction of this Court as a de novo trier of the facts, the lawyers in this matter may not confer the necessary jurisdiction on this Court. The law determines this Court's jurisdiction, and not lawyers.

### THIS COURT IMPROPERLY ASSUMED JURISDICTION TO BE A FACT-TRIER AND THEN REPEATEDLY ERRED ON THE FACTS

7. Initially, this Court's finding that the Notice of Sale ("the Notice") was published in Newsday's "New York City Edition" is erroneous. Newsday's "New York City Edition" did not exist until June 2001 (Record, hereinafter simply "R.", page 240, ¶28a), well after the Notice's publication in "LONG ISLAND NEWSDAY". This Court in its decision stated,

"... defendant convincingly shows that Newsday's New York City Edition satisfies §231 (2) (a) because it is published in all five boroughs of New York City ..."

and

"The bank also published notices of the sale of the property in the New York City edition of Newsday on February 8, 15 and 22, 2000."

Clearly, given the fact that Newsday's "New York City Edition" did not commence life until well after the Notice was published, §231 (2)(a) RPAPL irrefutably has **NOT** been satisfied. This Court erred with respect to this most elemental, yet critical, fact of this case.

8. Indeed, appellant included the circulation of "NEWSDAY" on the date in question in the record (R.169). On April 24, 2001, the total daily circulation of "NEWSDAY" included 471,750 in Long Island and 104,942 in Queens, but **NONE** for the other four boroughs in New York City. In the publisher's statement for March 2001 (R.169), it is recited that: "Newsday serves Long Island and Queens..." He makes no mention of the other four boroughs, and in fact all of this publication's marketing materials at the time and date in question confirm that "Newsday" served **ONLY** Long Island and Queens. (R.169-178). Thus, this Court irrefutably erred in stating that §231(2) (a) RPAPL had been satisfied.

9. This Court further erred as a fact trier in finding that the doorman had purportedly signed for two of the subject notices. In appellant's conversations with the doorman in question, he has denied the validity of his alleged signature, or even delivery of the letters in question. We clearly have not had the opportunity to depose the doorman in question, nor to challenge the allegations of defendant-respondent JP Morgan Chase ("Chase").

10. Appellant has **NOT** been granted his right of discovery. Although Chase was granted discovery by the trial court (Diamond, J.), appellant DeRosa

has not been granted the same right, a matter explicitly brought to the attention of this Court in appellant's brief at page 21 thereof.

11. The trial court's decisions granted Chase's motion to dismiss in the preliminary conference stage of this litigation, in contravention of appellant's rights.

12. Appellant has not been afforded the opportunity to obtain the testimony of any witnesses (whose positions we submit will be shown to have been misrepresented by Chase), or demand any documents, nor has appellant been granted his day in court. Judge Diamond precluded appellant from uncovering evidence against Chase, thus depriving him of all of the aforesaid, to say nothing of justice and fair dealing.

13. This Court also erred in its Order when it ruled that,

"On March 9, 2001, plaintiff advised Chase that he had the funds to pay off his mortgage. We note, however, that plaintiff has not denied the allegation contained in defendant Pesochinsky's attorney's affidavit, dated December 19, 2001, that plaintiff had made no maintenance payments since March 31, 2000."

14. Once again a factual finding by this Court is incorrect. Appellant DeRosa paid \$7,837.67 in maintenance charges in the period of time in question (R.95). After the auction of March 1, 2001, defendant-respondent Pesochinsky repeatedly, albeit falsely, argued that appellant continually refused to pay his rent to this date.

15. On the contrary, appellant DeRosa has not, in fact, received a monthly bill for maintenance charges for more than three years. He never refused to pay his rent, nor was he ever even given the opportunity to pay his monthly rent; he was only given a demand to pay a huge lump sum, which was in dispute.

16. It should be noted that DeRosa commenced paying (at the beginning of March 2004) his monthly maintenance charges of \$1,188.30 per month pursuant to an arrangement devised by Judge Solomon and agreed to by appellant. Judge Solomon has also stayed, for the moment, the meritless enforcement proceedings undertaken by defendant-respondent Pesochinsky's counsel in the bogus collateral action in which Pesochinsky seeks damages against DeRosa for "tortious interference".

17. The Court might wish to consider this additional determinative fact: In any event, the contract pursuant to which defendant-respondent JP Morgan Chase agreed to sell the DeRosa home (i.e., his cooperative apartment on West 89<sup>th</sup> Street in Manhattan) to defendant-respondent Pesochinsky is an absolute nullity, having expired pursuant to its very terms, which included, inter alia, a provision that the proposed sale transaction close within one year, a period of time which has long since come and gone.

#### THIS COURT DISREGARDED WRITTEN EVIDENCE

18. Most notably absent from the Order is reference to the letter from Chase's lawyers to defendant-respondent Pesochinsky's attorneys on April 1, 2001 (R.222). In this letter, Chase admits to defects in the Notice, thus returning Pesochinsky's escrow deposit and acknowledging Chase's position as follows:

"The terms of sale are now deemed cancelled and terminated."

19. We are thus at a loss to comprehend how, if the mortgagee (Chase) itself cancelled the sale, this Court can determine that it allegedly passed muster.

20. When this Court stepped in to decide the matter de novo, it did so based on the incomplete record - the record based on only one side having been permitted to conduct discovery. Justice Diamond's rulings resulted in this egregiously unfair and incomplete record. This Court ruled that Justice Diamond lacked jurisdiction and that her decision is null and void. However, this Court uses

the poisoned fruit of Justice Diamond's rulings - the flawed record - as the basis for its de novo decision. Moreover, the Court made clearly erroneous findings, even with this record.

INASMUCH AS THE COURT HAS ACTED  
AS A DE NOVO FACT TRIER, APPELLANT  
SHOULD HAVE AN AUTOMATIC APPEAL  
TO THE COURT OF APPEALS

21. In determining as a de novo fact trier that appellant's complaint is without merit, appellant therefore has an automatic right of appeal to the Court of Appeals. By invalidating all of the rulings of the trial court (Diamond, J.), but then effectively adopting them as its own, this Court cannot extinguish appellant's right to appeal from fact determinations of first impression, such as we have here.

22. If this Court had done what the dissent (Judge Andrias) had recommended, i.e., return this case to the Supreme Court so that a judge other than Judge Diamond could sit, if that judge had ruled against appellant, DeRosa would have had an automatic right to appeal to this Court.

23. Thus, appellant has the right to appeal to the Court of Appeals, since he would have had the right to appeal to this Court if this Court had not taken jurisdiction to make de novo fact determinations.

CONCLUSION

WHEREFORE, plaintiff-appellant Anthony DeRosa respectfully requests that this motion be granted in its entirety, together with such other and further relief as this Court deems fair, just and appropriate, and that the Court either grant appellant's motion for reargument, that it thereupon modify the Order so as to vacate that portion thereof which found that Chase's foreclosure sale was a commercially reasonable one, and that it remand the case to the Supreme Court for proceedings not inconsistent with the Court's modified Order.

Dated: April 9, 2004  
New York, New York

---

DAVID B. COHEN

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE COURT – FIRST DEPARTMENT

\_\_\_\_\_  
Anthony DeRosa, X

Plaintiff-Appellant,

Index Number: 107473/01  
New York County Supreme Court

-against-

AFFIRMATION  
OF COUNSEL

JP Morgan Chase, sued herein as  
Chase Manhattan Mortgage Corp., and  
Semyon Pesochinsky, sued herein as John Doe No.2

Defendants-Respondents,

-and-

Savannah Owners Corp.,

Defendant

\_\_\_\_\_  
X

**State of New York )**  
**)ss**  
**County of New York )**

Thomas D. Shanahan, an attorney duly licensed to practice law in the courts of this State, affirms the following under the penalties for perjury,

1. I am co-counsel for Plaintiff-Appellant Anthony DeRosa on this appeal, and I respectfully submit this application to reargue the facts and circumstances giving rise to the Order of this Court dated March 23, 2004.
2. All prior Affidavits and Affirmations in this matter are incorporated herein by reference as if fully restated.
3. I have reviewed the affirmation of co-counsel (Mr. David B. Cohen, Esq.) submitted in support of this action, and affirm that it is accurate. I fully subscribe to co-counsel's position.

4. This court has incorrectly stated in its decision on March, 23, 2004, that both attorneys for Plaintiff-Appellant, Anthony DeRosa, granted permission to this court to act as the trial court, and conduct a de novo review.
5. Both myself, and co-counsel never consented to such a request, nor did our client Plaintiff-Appellant give his consent to this court.
6. When asked by the Court on oral argument back on October 1, 2003, it was my belief that the court was asking the question of Jurisdiction to decide the rare issues pertaining to the disqualification of Judge Marylin G. Diamond, and not asking for permission to decide this case based on a de novo review.

WHEREFORE, Plaintiff-Appellant Anthony DeRosa respectfully requests that this motion be granted in its entirety, together with such other and further relief as this Court deems fair, just, and appropriate.

Dated: April 9, 2004  
New York, NY

---

Thomas D. Shanahan  
Shanahan & Associates, P.C.  
545 Fifth Ave., Suite 1205  
New York, New York 10017  
(212) 867-1100

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE COURT – FIRST DEPARTMENT

\_\_\_\_\_  
ANTHONY DEROSA, X

Plaintiff-Appellant,

Index Number: 107473/01  
New York County Supreme Court

-against-

AFFIDAVIT  
IN SUPPORT

JP MORGAN CHASE, sued herein as  
CHASE MANHATTAN MORTGAGE CORP., and  
SEMYON PESOCHINSKY, sued herein as John Doe No.2

Defendants-Respondents,

-and-

SAVANNAH OWNERS CORP.,

Defendant

\_\_\_\_\_  
X

**State of New York )**  
**)ss**  
**County of New York )**

Anthony DeRosa, being duly sworn, deposes and says:

1. I am the Plaintiff-Appellant (“the appellant”) on this appeal, and I am fully familiar with the facts and circumstances herein.
2. I have reviewed the affirmations of my counsel, Messrs. Cohen and Shanahan, submitted in support of this motion, and confirm that they are wholly truthful and accurate. I fully and unequivocally attest and bear witness to the facts set forth therein.
3. I am truly bewildered and perplexed by this court’s denial of my day in Court. Judge Diamond granted the motion of defendant-respondent JP Morgan/Chase (“respondent Chase”) to dismiss in the preliminary conference stage of my litigation. Accordingly, I have NEVER been granted my right to

discovery. For the record, I've never been afforded the opportunity to obtain testimony from any witnesses (who dispute respondent's version of the facts), or obtain any documents. Chase has been granted certain discovery, to date, while I have not been accorded an equivalent right. Judge Diamond simply did not want me to uncover proper evidence against her friends over at Chase in my litigation, a strategy which is presumably perpetuated by this court's decision.

4. Based on my education, professional experience, and expertise in financial investigation and analysis, I am confident that I would uncover much more evidence of the bogus nature of the foreclosure sale, and the unholy alliance between the respondents had I been granted, or if I were now granted, my right to discovery.

5. I was indeed present at the oral argument of my appeal in this Court on October 1, 2003, and I can unequivocally attest to the fact that this Court was not then invited to determine this case on the basis of a de novo review. Instead, we understood that the court was asking if it had jurisdiction to preside over the unique and rare issues; we simply thought the court were asking if it could decide the distinctive conflict issues involving a justice of the court. Perhaps the Court should have phrased the question specifically as, "If this court could conduct a de novo review" rather than simply ask "if it had jurisdiction" thus removing any questions of this courts intention's.

6. I am confident that this Court understands and appreciates the critical importance of providing me with the opportunity, inter alia, to depose the bidder, auctioneer, and other key witnesses to support my claims of impropriety and negligence by these respondents. I also seek documents, production and answers to very specific interrogatories.

7. Even assuming arguendo, without conceding, that my counsel agreed to a “de novo review”, they had no authority to waive such rights. I have not given my permission to either counsel OR to this court to conduct a “de novo” determination of findings of fact and conclusion of law in this case.
8. I am very troubled and baffled over this Court’s utterly erroneous recitation of facts, specifically pertaining to the Notice of Sale (“the Notice”) being published in Newsday “New York City Edition”, as it is egregiously false for the simple reason that Newsday’s “New York City Edition” did not exist until June 2001 (R240 ¶128a), well after the Notice’s publication in “LONG ISLAND NEWSDAY”. This Court in its decision observed:

“ ...defendant convincingly shows that Newsday’s New York City Edition satisfies § 231 (2) (a) because it is published in all five boroughs of New York City...”

This is quite an impossibility since, as we’ve already noted, Newsday “New York City Edition” did not exist until June 2001, as we necessarily argued, but which nevertheless and goes unnoticed by this court (R 240 ¶128a), which also commented on the Notice’s publication of “the DeRosa Home” and proclaimed in its majority decision of March 23, 2004:

“ The bank also published notices of the sale of the property in the New York City edition of Newsday on February 8, 15 and 22, 2001.”

Clearly, inasmuch as Newsday’s “New York City Edition” did NOT exist or premier until well after the Notice was published, § 231 (2) (a) RPAPL has NOT been satisfied and this court erred on yet another critical issue of fact.

9. This court must realize the compounding effect of all of the errors in the Notice. What has actually transpired is that a Notice was published in an established "Long Island Newspaper", whose readership is "Long-Island orientated", with the address of the property being auctioned containing a erroneous zip-code (11514) which reflects a "Long Island address", and finally the Notice itself, containing an erroneous date of the sale. What is the reader to assume? Where is the property being auctioned truly located? Is the property in Long Island, in view of the fact the zip-code reflects Long Island? Is this an error in print? Is this a legitimate auction? Is this Notice just being published for public record on an auction that was held last year? These are just a few of the questions a prospective bidder reading the Notice might pose.
10. As pillars of the court in whom the citizenry has reposed its trust to do justice, surely the court can appreciate the importance of these issues; this is my home, which is the subject of this appeal, and these respondents should not be allowed to continue to perpetuate their bogus sale with the implicit approval of this court.
11. In the final analysis, this court errs as Judge Diamond did by making decisions when discovery has not even been undertaken by me, and there are strongly disputed questions of fact.
12. Most disturbing is the fact that this Court has voided all of Judge Diamond's decisions in a 5-0 decision for her overwhelming conflicts of interest, yet the majority, in a split decision, appears to adopt her decision as the framework for its majority opinion, presumably oblivious to the fact that while Judge Diamond was indeed conflicted, her motive was to foreclose my right to discovery, and to refrain from allowing questions of fact to be argued, all for the

purpose of preventing me from uncovering evidence in my litigation against her good friends over at Chase and elsewhere, which I surely would have uncovered.

13. The court also states in its majority opinion:

“that it is undisputed that the bank sent notices of the default and sale by regular and certified mail.”

How could the Court possibly subscribe to such a notion, when the fact is that I have consistently and persistently refuted that conclusion since it surfaced? Once again, I dispute the contention that the bank actually sent me the notices.

14. Most bizarre and inexplicable is the absence of reference in the court’s decision to the letter from Chase to defendant-respondent Pesochinsky’s attorneys on April 1, 2001 (R222). In this letter, Chase admits to negligence and defects in the Notice, thereby returning respondent Pesochinsky’s escrow deposit and declaring that the Chase position is that the “The terms of sale are now deemed cancelled and terminated.” Inasmuch as this document is part of the record on appeal, and is highly relevant to the bona fides of the claims in this litigation, how the Court could possibly ignore such evidence in its de novo review is deeply disturbing to me and other right thinking persons.

15. For all the foregoing reasons, I respectfully request that the Court grant the instant motion for reargument, and upon such reargument, that it modify the majority decision of March 23, 2004, so as to decline de novo jurisdiction of the facts and therefore remand the case to the Supreme Court for proceedings not inconsistent with such modified decision/order. Failing that, we ask the Court to take no steps inimical to our automatic appeal to the Court of Appeals.

---

Anthony DeRosa

Sworn to before me this 9<sup>th</sup>. Day of April, 2004

---

Notary Public