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

ANTHONY DEROSA, | Index Number: 107473/01
New York County Supreme Court

Plaintiff-Appellant,

-against- NOTICE OF APPEAL

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

S I R S :

PLEASE TAKE NOTICE, that the above named plaintiff hereby appeals to the Court of Appeals from an order of the Appellate Division, First Department (Exhibit "A"), entered in the office of the Clerk of the Appellate Division on March 24, 2004, and which order declared the orders of the Supreme Court, New York County (Diamond, J.) null and void, and after a de novo review, acting as a court of original jurisdiction, dismissed the summons and complaint and granted final judgment in favor of defendants-respondents.

One justice of this court (Andrias, J.), dissented on questions of law and due process in favor of plaintiff from those portions of the order exercising nisi prius jurisdiction, reviewing the facts de novo, and acting as a court or original jurisdiction, and the dissenter recommended that the matter be remanded to the Supreme Court for further proceedings.

PLEASE TAKE FURTHER NOTICE that the plaintiff appeals from each and every part of the aforesaid order, as well as from the entirety thereof.

Dated: New York, New York
April 12, 2004

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

ANTHONY DEROSA,

Plaintiff-Appellant,

Index Number: 107473/01
New York County Supreme Court

-against-

PLAINTIFF-APPELLANT'S JURISDICTIONAL STATEMENT

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

TO THE HONORABLE JUSTICES OF THE COURT:

1. The title of the case is as set forth above.

2. Plaintiff appeals to the Court of Appeals as of right from the order of the Appellate Division, First Department, entered on March 24, 2004 (Exhibit "A"), declaring the proceedings before the Supreme Court, New York County (Diamond, J.) null and void, and after reviewing the facts de novo, dismissing the summons and complaint herein. Plaintiff appeals from the aforesaid order embodying the exercise of nisi prius jurisdiction by the Appellate Division.

3. Plaintiff's notice of appeal is being filed with this court on April 12, 2004, and copies served by mail, upon the following attorneys representing all parties to this action, as well as the New York State Attorney General; at their respective addresses set forth hereinbelow:

Jeffrey Eillender, Esq.
Schlam, Stone & Dolan
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New York, New York 10004

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New York, New York 10041

Proceedings In The Trial Court

4. The trial judge in this matter (Diamond, J.) issued orders granting two motions to dismiss filed by respondents Semyon Pesochinsky ("Pesochinsky") and JP Morgan/Chase ("Chase"). The first order dated June 4, 2002 was filed with the clerk of the trial court on July 10, 2002 (Exhibit "B"). The second order, dated November 29, 2002, was filed with the clerk of the trial court on December 20, 2002 (Exhibit "C").

5. A notice of appeal from the order dated June 4, 2002 was filed on August 16, 2002. A notice of appeal from the order dated November 29, 2002 was filed on December 27, 2002. Both orders were consolidated for purposes of appeal in an order of the Appellant Division, dated June 12, 2003.

6. The issues on appeal were as follows:

Appeal of Order dated June 4, 2002

Whether the trial court erred in denying the plaintiff's motion to amend the complaint and further erred in granting the motion by respondent Chase to dismiss, absent a factual hearing as to the commercial reasonableness and sufficiency of the notice of default and the notice of sale purportedly delivered to plaintiff based upon the following: both notices were sent to an improper address; no proof of actual notice to plaintiff had been offered; the publication of the notice of sale took place outside of the county in which the realty is located; and respondent Chase itself declared the notice of sale deficient and void. Finally, the issue on appeal was whether or not the

trial court erred in determining issues of fact solely on the basis of papers submitted in support of motions, instead of holding a hearing at which all sides could have testified, presented evidence, and cross-examined witnesses.

Appeal of Order dated November 29, 2002

Whether the trial court erred in denying the plaintiff's motion to renew and reargue, absent a factual hearing as to the commercial reasonableness and sufficiency of the notice of default and the notice of sale purportedly delivered to plaintiff, based upon the following: both notices were sent to an improper address; no proof of actual notice to plaintiff had been offered; the publication of the notice of sale took place outside of the county in which the realty is located; respondent Chase itself declared the notice of sale deficient and void, and whether or not the court erred in determining issues solely on the basis of papers submitted in support of motions, instead of holding a hearing, at which all sides could have testified, presented evidence, and cross-examined witnesses.

Finally, the issue raised on appeal in connection with this order was whether or not the trial court erred in denominating the relevant motion as one to reargue.

JURISDICTIONAL BASIS

Proceedings in Appellate Division, First Department

7. On October 1, 2003, the Appellate Division heard oral argument on the appeal.

8. By written decision dated March 23, 2004, the Appellate Division declared all proceedings in the trial court null and void, inasmuch as the trial court judge had failed to disclose her financial interest in, and other ties to, respondent Chase.

9. The Appellate Division then exercised nisi prius jurisdiction, and reviewed the record on appeal de novo, acting as a court of original jurisdiction.

10. The Appellate Division then granted the motions to dismiss, determining that even in light of numerous defects in the foreclosure process, the sale was "commercially reasonable as a matter of law."

11. The Appellate Division inexplicably ignored the following relevant facts: respondent Chase had deemed the auction null and void (R.222); New York Newsday did not publish a New York City edition in February 2001; no hearing had been held to determine the bona fide nature of the auction of the subject realty (R.240 ¶28a); discovery had been denied to plaintiff although the

trial court permitted discovery by defendants to proceed (Appellant's brief on appeal to the First Department at page 21 thereof); and the doorman logs for the subject realty did not indicate receipt of any notice of an auction sale by respondent Chase R.153, ¶20, 21, 22).

12. The Appellate Division intentionally misstated the following as fact: "that at oral argument, both appellant and respondents invited a de novo review by [the Appellate Division].

THE DISSENT

13. Justice Andrias concurred with the majority decision to declare the trial court proceedings null and void. However, in a strongly worded dissent, his Honor dissented from the majority decision to act as a nisi prius court and decide the motions "upon de novo review of the entire record". Judge Andrias pointed out that the actions of the majority were unprecedented. He further noted that no public policy issue of importance was relevant to this matter, and that in all the cases cited by the majority to justify the exercise of nisi prius jurisdiction, an important issue of public policy was present. Lastly, Judge Andrias correctly noted that in every prior matter involving an exercise of nisi prius jurisdiction, the court had ordered a full and fair hearing of the merits of the action, which has never taken place herein.

ARGUMENTS ON FINDING OF FACT AND CONCLUSION OF LAW TO BE ARGUED IN FAVOR OF REVERSAL

I.

DID THE APPELLATE DIVISION MAKE ERRONEOUS FACTUAL FINDINGS AND LEGAL CONCLUSIONS AS MORE PARTICULARY SET FORTH IN PARAGRAPHS NUMBERED SIX AND ELEVEN HEREINABOVE?

II.

DID THE APPELLATE DIVISION ABUSE ITS DISCRETION AND VIOLATE THE NEW YORK STATE CONSTITUTION, SECTION SIX, ARTICLE TWO, BY EXERCISING NISI PRIUS JURISDICTION AND ACTING AS A COURT OF ORIGINAL JURISDICTION IN A CASE THAT DOES NOT INVOLVE IMPORTANT ISSUES OF PUBLIC POLICY?

III.

DID THE APPELLATE DIVISION ABUSE ITS DISCRETION AND VIOLATE THE NEW YORK STATE CONSTITUTION, SECTION SIX, ARTICLE TWO, BY EXERCISING NISI PRIUS JURISDICTION AND ACTING AS A COURT OF ORIGINAL JURISDICTION, DENYING PETITIONER AN OPPORTUNITY TO CONDUCT DISCOVERY AND DENYING PETITIONER A FULL AND FAIR HEARING OF THE ISSUES IN DISPUTE?

IV.

DID THE APPELLATE DIVISION ABUSE ITS DISCRETION AND VIOLATE THE PLAINTIFF'S DUE PROCESS RIGHTS UNDER THE NEW YORK STATE AND UNITED STATES CONSTITUTIONS BY DENYING PLAINTIFF FULL AND COMPLETE DISCOVERY,

AND

THROUGH ITS FAILURE TO REMAND THE MATTER TO THE TRIAL COURT FOR FURTHER PROCEEDINGS AFTER DECLARING ALL PRIOR TRIAL COURT PROCEEDINGS NULL AND VOID?
(Entire Record, more specifically: 94-96, 143-165, 233-242,
R.222 Respondent Chase declaring foreclosure sale null and void).

V.

DID THE APPELLATE DIVISION ABUSE ITS DISCRETION AND VIOLATE THE PLAINTIFF'S DUE PROCESS RIGHTS UNDER THE UNITED STATES CONSTITUTION AND THE NEW YORK STATE CONSTITUTION, ARTICLE SIX, SECTION TWO, BY AND THROUGH ITS RELIANCE ON A PARTIAL AND FLAWED RECORD RESULTING FROM PREJUDICIAL PROCEEDINGS BEFORE A JUDGE WHO WAS ULTIMATELY DISQUALIFIED FOR HER FAILURE TO DISCLOSE FINANCIAL LINKS TO A DEFENDANT IN THE PROCEEDING?
(Entire Record, more specifically: 94-96, 143-165, 233-242,
R.222 Respondent Chase declaring foreclosure sale null and void).

VI.

DID THE APPELLATE DIVISION ERR IN EMBRACING THE FACTUAL RECORD IN THIS MATTER TO THE DETRIMENT OF PLAINTIFF?
(Entire Record, more specifically: 94-96, 143-165, 233-242,
R.222 Respondent Chase declaring foreclosure sale null and void).

VII.

DID THE APPELLATE DIVISION ERR IN STATING THAT PLAINTIFF HAD CONSENTED TO HAVE A DE NOVO REVIEW TAKE PLACE SOLELY ON THE RECORD ON APPEAL?
(Entire record, more specifically: 143-165, no transcript of oral argument is available to Plaintiff).

We respectfully submit that each of the foregoing questions must be answered in the affirmative.

Dated: New York, New York
April 12, 2004

Respectfully submitted,

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