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COURT OF APPEALS  
STATE OF NEW YORK

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US BANK NATIONAL ASSOCIATION,  
  
Respondent,

-against-

KENYATTA NELSON AND SAFIYA NELSON,  
  
Appellants.

No. 86

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20 Eagle Street  
Albany, New York  
November 17, 2020

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this  
2 afternoon's calendar is appeal number 86, US Bank National  
3 Association v. Nelson.

4 Let's wait a moment and give these gentlemen an  
5 opportunity to leave the courtroom.

6 (Pause)

7 CHIEF JUDGE DIFIORE: Counsel?

8 MR. FOLEY: May it please the court. My name is  
9 Jared Foley from Gallet, Dreyer, & Berkey, and I represent  
10 the appellants, Kenyatta Nelson and Safiya Nelson.

11 May I reserve three minutes for rebuttal, please?

12 CHIEF JUDGE DIFIORE: Of course, sir, you may.

13 MR. FOLEY: Your Honors - - -

14 JUDGE FEINMAN: Let me ask you a question. Did  
15 you have an opportunity to make any argument about standing  
16 in opposition to the summary judgment motion?

17 MR. FOLEY: In opposition to the summary  
18 judgment, we did not make a - - - we did not challenge  
19 standing there. However - - -

20 JUDGE FEINMAN: So since you didn't, how are  
21 those arguments preserved, in your view?

22 MR. FOLEY: Well, in several ways. As an initial  
23 matter, the issue of whether or not it's been waived is  
24 largely moot as a result of Real Property Law 1302-a, which  
25 was enacted this time about December of last year. 1302-a



1 provides that the initial standing in a foreclosure action  
2 can be raised at any time prior to a foreclosure sale,  
3 which hasn't happened here yet.

4 JUDGE STEIN: Well, but there's an issue as to  
5 whether it applies to this case because, arguably, it would  
6 undo actions that were already taken in this case. I  
7 understand the two sides of this are there - - - there are  
8 actions that have been taken, such as summary judgment, and  
9 it's already water over the dam. And the other argument  
10 is, no, the mere fact that there has not been a judgment of  
11 foreclosure and sale makes the new law applicable to this  
12 case.

13 MR. FOLEY: Well, I think that - - -

14 JUDGE STEIN: But I think that's - - - you know,  
15 that's - - - that's the difficult question that we have to  
16 answer.

17 MR. FOLEY: Understood. And I think that the - -  
18 - I would refer to this Court's decisions in In re Gleason  
19 and in the Matter of OnBank. In those cases - - - those  
20 cases involved remedial statutes, just like the remedial  
21 statute here, where the case looked at several factors to  
22 determine whether or not it's a statute that would apply  
23 retroactively to pending litigation. They looked at the  
24 legislative history to determine whether or not it was a  
25 clarifying statute.



1 JUDGE STEIN: Let me just stop you for a second  
2 because I don't think the question is really whether it's -  
3 - - well, maybe it is. Depending upon how you define  
4 "retroactive".

5 MR. FOLEY: Right.

6 JUDGE STEIN: So are - - - are you saying - - -

7 MR. FOLEY: So - - -

8 JUDGE STEIN: I guess my - - - my question, if  
9 there is - - - if I actually asked one, is - - - is more to  
10 what does that mean, "retroactive"? Assuming that it could  
11 apply to this case because it's still pending - - -

12 MR. FOLEY: Right.

13 JUDGE STEIN: - - - have - - - has there been  
14 steps taken in the case that - - - that make that not  
15 applicable?

16 MR. FOLEY: So I'll take a step back and we look  
17 at the standards in Simonson, which refers that - - - which  
18 it sounds like you're referring to, where that case  
19 involved a statute that was, you know, purely procedural.  
20 It did not address something - - - a remedial statute in a  
21 way that we're talking about here, a statute that was  
22 designed to correct imperfections in the law.

23 JUDGE STEIN: Well, isn't it - - - can't it be  
24 both? I mean, can't it be procedural and remedial? How is  
25 this - - -



1 MR. FOLEY: It can, but I would also, again, look  
2 at, you know, the way the analysis done by yourselves in In  
3 re Gleason and OnBank. In those cases, when you looked at  
4 the - - - you looked at the statutory history to determine,  
5 one, whether or not it was a clarifying statute, to  
6 determine whether or not the - - - the intent was to  
7 address overreach by judges in other courts and whether or  
8 not there is a sense of urgency. And all that is present  
9 here, in fact.

10 So you have the legislative history, and I would  
11 refer you, again, to the - - - the sponsor's memo in  
12 support of Chapter 739. It specifically says that this is  
13 a statute that is meant to clarify. And if you look at the  
14 bill jacket, many of the letters in support also note that  
15 it's a clarifying statute.

16 Also the legislator - - - legislature took  
17 specific aim at courts that found that standing could be  
18 waived, if not raised as an affirmative defense, saying  
19 that ownership of a note is a, quote, "clear requirement"  
20 for a foreclosure or cause of action. "Clear requirement"  
21 is the language that they use.

22 JUDGE STEIN: You mean as distinguished from  
23 being a holder of a note; is that - - - are you - - - are  
24 you saying that this - - - this statute changed that?

25 MR. FOLEY: I don't think it actually changed



1 anything.

2 JUDGE STEIN: Okay.

3 MR. FOLEY: I think what it's saying is that to  
4 be - - - to bring a foreclosure cause of action at bottom,  
5 you need to show that you have some legal or equitable  
6 interest. So if you say, now - - -

7 JUDGE STEIN: Okay. But that doesn't necessarily  
8 mean ownership, right? It could - - -

9 MR. FOLEY: Well, you - - -

10 JUDGE STEIN: I mean, you could be the holder of  
11 a bearer note.

12 MR. FOLEY: Yes, you could, in theory, I suppose.

13 JUDGE STEIN: Okay.

14 MR. FOLEY: But so this statute looked at - - -  
15 specified that it was a clarifying statute and specified  
16 that it was meant to correct overreach by judges that found  
17 that standing could be waived, and - - -

18 JUDGE WILSON: If the statute didn't change  
19 anything, wouldn't the ordinary rules before the statute  
20 have been, if there's a summary judgment motion and you  
21 oppose it on one ground but not on the other ground, and  
22 here the only ground was that it was essentially moot and  
23 had already been decided - - -

24 MR. FOLEY: Right.

25 JUDGE WILSON: - - - and there's then a grant of



1 summary judgment, that that's the end of it.

2 MR. FOLEY: Well, for the purposes - - -

3 JUDGE WILSON: Did it change that?

4 MR. FOLEY: I think for the purposes of  
5 preservation, well, you - - - well, you need to look at the  
6 purpose of preservation. Preservation is meant to give the  
7 court and to give the opposing counsel an opportunity to -  
8 - - well, notice of a potential error, and give them the  
9 opportunity to address that error. Given the unique  
10 procedure here in a foreclosure proceeding, this  
11 opportunity was had, only raised the issue in the cross-  
12 motion to dismiss in addition to raising it in our pro se  
13 answer where we challenge ownership. Now - - -

14 JUDGE FAHEY: Let me just ask you a question.  
15 Let's assume for a moment that you did fail to preserve it.  
16 The way I read the record, standing wasn't raised until the  
17 cross-motion to dismiss after the referee's judgment. So  
18 it wasn't preserved before then. But the question is, and  
19 I don't know - - - I'm not sure I know the answer, but it  
20 seems the question is whether or not standing is an element  
21 of the cause of action. If it's not an element of the  
22 cause of action, if it's a just disability question, then  
23 your argument may have value. If it's an element of the  
24 cause - - - the cause of action, then you have a more  
25 difficult row to hoe on the preservation issue. Would you



1 - - - would you agree with that?

2 MR. FOLEY: Well - - -

3 JUDGE FAHEY: Do you understand what I'm saying,  
4 that on one side, it seems to me you have a cause of  
5 action, and the question is whether or not standing is an  
6 element. And then on the other side you have the question  
7 of just disability, which is really the limits of the legal  
8 issues that the court can consider.

9 And if standing is an aspect of just disability,  
10 then that's a threshold issue that has to be considered at  
11 the outset of litigation at a pre - - - it comes before the  
12 question of the elements or anything else. And that's  
13 whether or not the court - - - the question is can the  
14 court exercise jurisdiction. And it - - - it's not a  
15 question of preservation; it's a question of whether the  
16 court can take any action then.

17 MR. FOLEY: Right.

18 JUDGE FAHEY: You see the difference?

19 MR. FOLEY: I do.

20 JUDGE FAHEY: So if it's a just disability  
21 question, then we get to your next argument which is if  
22 it's retroactive.

23 MR. FOLEY: Right.

24 JUDGE FAHEY: If it's not, then we don't.

25 MR. FOLEY: Well, I would say that this is





1 actually - - - is a threshold issue. It goes to whether or  
2 not you actually had the ability, had any interest at all  
3 in - - - in this thing that you're trying to foreclose  
4 upon.

5 JUDGE FAHEY: Um-hum.

6 MR. FOLEY: If you - - -

7 JUDGE STEIN: But then what about 3211(e)?

8 MR. FOLEY: Um-hum.

9 JUDGE STEIN: And obviously the - - - the new  
10 statute overrides that - - -

11 MR. FOLEY: Right.

12 JUDGE STEIN: - - - in foreclosure actions,  
13 right?

14 MR. FOLEY: Um-hum.

15 JUDGE STEIN: But - - - but certainly standing  
16 can be brought as an affirmative - - - as an affirmative  
17 defense, and in fact must be brought as an affirmative  
18 defense in lots of other kinds of actions. So how could  
19 that have to do with just disability if you can waive that  
20 defense in other actions but not in this action?

21 MR. FOLEY: Well, I mean, I would actually - - -  
22 you talk about other - - - other kinds of actions, but I  
23 would actually refer to the example that was put forward by  
24 opposing counsel in trespass actions. In that kind - - -  
25 in those kinds of cases, courts have found that possession



1           - - - so in a trespass action, you need to - - - trespass  
2           action is filed when there's interference with a possessory  
3           interest in property. But several courts have found that  
4           possession is an essential element, right? It's - - - you  
5           can't bring that trespass action unless you show some kind  
6           of interest in this first. I think that's the kind of  
7           thing that we're dealing with here as well.

8                         JUDGE WILSON: You're saying that the plaintiff  
9           in a foreclosure action would need to say I'm the holder of  
10          the note or the owner of the note or somebody with  
11          otherwise legal ability to enforce the note, and that's an  
12          element of their claim?

13                        MR. FOLEY: Yes. And here's the thing: there's  
14          a clear gap in the chain of ownership here. We have - - -

15                        JUDGE GARCIA: Before you get to the gap here,  
16          has any court ever held that it's an element of the claim?

17                        MR. FOLEY: Well, I would refer this court to  
18          Campaign v. Barba and Witelson v. Jamaica Estates. In  
19          those cases they make clear that ownership is part of the  
20          prima facie case for a - - - for a foreclosure action.

21                        JUDGE GARCIA: And did you ever make that  
22          argument below?

23                        MR. FOLEY: We made the argument on our cross-  
24          motion to dismiss.

25                        JUDGE GARCIA: You never - - - as far as I read



1 the record, it wasn't because it was an element of the  
2 cause of action, though. I thought that you made that  
3 element argument for the first time in your reargument  
4 motion at the Appellate Division.

5 MR. FOLEY: Actually, I read it differently. I  
6 read it as making, actually, both arguments. Then since -  
7 - - then since ownership is - - - whether conceived as of  
8 an issue of standing or whether conceived of as an issue of  
9 - - - as an element, you have to prove that first before  
10 you - - -

11 JUDGE GARCIA: But at the trial level, you were  
12 making the argument as an argument of standing or, I think,  
13 capacity.

14 MR. FOLEY: Right.

15 JUDGE GARCIA: But it was standing. It wasn't as  
16 an element of the - - - of the cause of action. The first  
17 time I read the record as the element of a cause of action  
18 argument was made at the Appellate Division in the  
19 reargument motion.

20 MR. FOLEY: Um - - -

21 JUDGE GARCIA: And then you make it here, but I  
22 don't think that argu - - - I cannot - - - I read the cites  
23 to the record, but those seem to me to go to standing as a  
24 - - - you know, as an affirmative defense.

25 MR. FOLEY: I understand, Your Honor. I read



1 those as kind of intertwined arguments.

2 JUDGE STEIN: Well, how can an affirmative  
3 defense also be an element of the cause of action? One - -  
4 - one requires pleading by the plaintiff, and the other  
5 requires being raised by the defendant. How can it be  
6 both?

7 MR. FOLEY: Well, I - - - I think our argument  
8 was that whether it's conceived of as an element or  
9 conceived of as an issue of standing, they haven't proven  
10 either, given - - -

11 JUDGE RIVERA: I thought your - - - I'm over  
12 here. Sorry.

13 MR. FOLEY: Yeah.

14 JUDGE RIVERA: The masks, I know, make it  
15 difficult. I thought your argument was that they have to  
16 establish standing, and that's - - -

17 MR. FOLEY: Yes.

18 JUDGE RIVERA: That's what you're arguing, that  
19 they didn't do that. So to that extent, it is an element  
20 of the claim. They cannot succeed unless they show that  
21 they are properly the ones to bring this action.

22 MR. FOLEY: Well, let me deal - - -

23 JUDGE RIVERA: And - - - and your argument was  
24 that, certainly what the dissent was arguing below is if  
25 you find it anywhere in the pleading, that's good enough.



1 It doesn't have to come under the title of affirmative  
2 defense.

3 MR. FOLEY: That's correct. And so - - -

4 JUDGE RIVERA: Let me just, before I forget, can  
5 I just clarify with you, do you agree that Rule 3211  
6 requires the assertion of standing, wherever it may be,  
7 whatever you label it, right, as being lacking from the  
8 plaintiff's side at a particular point during the  
9 litigation?

10 MR. FOLEY: Well - - -

11 JUDGE RIVERA: Do you think 3211 covers standing?

12 MR. FOLEY: I believe 3211(e) does cover  
13 standing.

14 JUDGE RIVERA: Where would I find it?

15 MR. FOLEY: Or rather, standing isn't actually  
16 mentioned, but it's kind of like the catch-all at the end  
17 of 3211(e). But my view on how it was raised is this, that  
18 standing - - - when the issue of standing is actually pled  
19 on the face of the complaint, there's no need to - - - to  
20 plead it separately.

21 JUDGE RIVERA: Um-hum. I understand, but if it  
22 doesn't fit under 3211, you don't have a problem, right?  
23 Because you're arguing at some point you raised it.

24 MR. FOLEY: That's correct.

25 JUDGE RIVERA: Maybe, maybe not.



1 MR. FOLEY: All right.

2 JUDGE RIVERA: Okay. My last question; I see  
3 you've run out of time. Let's say that the court doesn't  
4 agree with you, in terms of the pleading and how to read  
5 the pleading, but thinks the more prudent course is to have  
6 a consideration of this new statute and its retroactivity  
7 by a lower court, should we not just remit since that was  
8 not addressed?

9 MR. FOLEY: I think that this court is capable of  
10 deciding that issue.

11 JUDGE RIVERA: Okay.

12 MR. FOLEY: I - - - I think this court's - - -

13 JUDGE RIVERA: Okay.

14 MR. FOLEY: - - - capable of deciding it.

15 CHIEF JUDGE DIFIORE: Thank you, counsel.

16 Counsel?

17 MS. WELLINGTON: Katie Wellington - - - may it  
18 please the court - - - on behalf of plaintiff.

19 Defendants did not raise standing in their  
20 answer, and they did not raise standing at summary  
21 judgment, despite being represented by counsel and despite  
22 having three separate opportunities to raise that argument,  
23 nor did they seek to vacate or reargue the summary judgment  
24 ruling in plaintiff's favor.

25 JUDGE WILSON: So in the context of a mortgage



1 foreclosure action, does there have to be something in the  
2 complaint asserting that you have the right to act on the  
3 note, either that you own it, or you hold it, or you've  
4 been assigned it, or something?

5 MS. WELLINGTON: So there has to be a statement  
6 in the complaint that - - - that we are the owner, the  
7 plaintiff is the owner or the holder of the note.

8 JUDGE WILSON: And that's part of your burden to  
9 make your case out?

10 MS. WELLINGTON: No, so that - - - that is not  
11 part of the elements of a foreclosure claim. So there are  
12 three elements of a foreclosure claim. There are literally  
13 hundreds of cases holding that. And that's simply that  
14 there's a mortgage, an unpaid note, and evidence of  
15 default.

16 Standing, which is really what we're talking  
17 about here, is an affirmative defense. And standing is  
18 about whether the plaintiff has an interest in the case  
19 sufficient to bring it before the court. And that's not an  
20 element to the case; that's a separate question. And this  
21 court has long hold that standing is an affirmative  
22 defense.

23 JUDGE RIVERA: So let's play that one out. If  
24 you're saying, no, you don't have to prove that you're the  
25 person to actually bring it, unless they challenge it - - -



1 MS. WELLINGTON: Unless they challenge it.

2 JUDGE RIVERA: Okay. All right. So let's say  
3 you win, and it turns out you weren't the entity who should  
4 have brought that action, what recourse, if any, is  
5 available to someone like Mr. or Ms., whatever, the  
6 Nelsons?

7 MS. WELLINGTON: So I think certainly if there's  
8 a default judgment, there might be an opportunity to vacate  
9 a default judgment on account of fraud, new information,  
10 something like that.

11 JUDGE RIVERA: And if there's not a default?

12 MS. WELLINGTON: And I think the same rule - - -

13 JUDGE RIVERA: Or they just didn't raise it.

14 MS. WELLINGTON: Well, CPLR 5015 allows for a  
15 court to undo a prior judgment due to new evidence that's  
16 introduced. So that may be one way to go back and try to  
17 get at that, although I think that's a pretty significant  
18 bar, depending on when this argument - - -

19 JUDGE RIVERA: Yeah, and given that the stakes  
20 are so high, right, someone's homestead, doesn't it seem  
21 that the legislature, of course, is more interested that  
22 you all carry that burden rather than risking exactly what  
23 you've now described?

24 MS. WELLINGTON: So I think what this new law  
25 that came into effect is saying is we're not going to make





1 a defendant raise standing affirmatively in the answer, but  
2 that doesn't mean that there doesn't have to be some kind  
3 of - - - of determination of that at summary judgment. So  
4 where they don't raise standing of summary judgment either,  
5 I think it's not really fair to - - - to ask us to  
6 affirmatively rebut an argument that's never - - - never  
7 been raised.

8 But certainly the legislature thought about that,  
9 and they changed the rules going forward. But under this  
10 court's longstanding precedent, procedural rules only apply  
11 retroactively to a stage in the proceeding of - - - that is  
12 - - - that has not yet happened.

13 JUDGE STEIN: Let me ask you this. If the new  
14 statute says that essentially you - - - you don't waive the  
15 defense by not raising it in the answer or in a summary  
16 judgment motion, it says you can raise it at any time  
17 before there's a judgment of foreclosure and sale, how then  
18 has a waiver already occurred here, because there is not  
19 yet any judgment of foreclosure and sale?

20 MS. WELLINGTON: So I think two answers here is,  
21 under the old rules, the proper time to raise this issue  
22 was in the answer. So that's the stage of the proceeding  
23 we're looking at, and that was long, long ago, eleven years  
24 ago.

25 JUDGE STEIN: But this is a pending proceeding,



1 so why doesn't - - - the legislation says this act takes  
2 effect immediately. So we have a pending proceeding, it  
3 hasn't gotten to judgment of foreclosure and sale. Why  
4 wouldn't the new statute apply?

5 MS. WELLINGTON: So when you're looking at the  
6 retroactivity of procedural rule, you have to - - - to  
7 look, has under the old rules, has that relevant procedural  
8 step finished. And here, under the old rules, the relevant  
9 procedural step was the answer.

10 JUDGE GARCIA: But what about Collazo, our case,  
11 Collazo, where it was a venue choice, right, and they had  
12 sent it to the agency, we got that, the law had changed,  
13 made it plaintiff's choice. And the judge already had  
14 decided to send it, and we sent it back and said no, under  
15 the new law plaintiff gets to choose the forum and - - -  
16 the venue, and it's in - - - it's in your court now,  
17 basically undoing the judge's decision made, let's assume,  
18 legitimately, under the old law, where the judge had  
19 discretion to do that. So how is that different?

20 MS. WELLINGTON: So this court has said it takes  
21 exceptional conditions to apply a new procedural rule  
22 retroactively. And you looked at the text of the statute.  
23 Here there's certainly nothing in the text of the statute  
24 that suggests it applies retroactively. But even also look  
25 to the legis - - -



1                   JUDGE GARCIA: It almost seems like this isn't  
2 even a retroactivity issue because the - - - if you take  
3 that statute to mean you can make this motion anytime up to  
4 foreclosure, that hasn't happened here yet. So if this  
5 case was going forward, and all of these things had  
6 happened just the way they happened here, but it was after  
7 the statute - - - and I get - - - I understand the  
8 difference there, but you would still have this time now to  
9 make that motion, so why is it retroactive, in any sense,  
10 really?

11                   MS. WELLINGTON: Well, I think two answers. The  
12 first is there hasn't been a lot of case law on 1302-a, and  
13 I - - - and I certainly think you can read Section 1302-a  
14 as only addressing that initial period, which is the  
15 answer, which is to say, okay, you didn't raise it in the  
16 answer, it's preserved for summary judgment. It's not  
17 necessarily saying that if you don't even contest it at  
18 summary judgment that that's - - - that's sufficient, you  
19 can raise it all the way at the end. I certainly think  
20 there's ambiguity, at a minimum, in the statute as to that.  
21 It's also - - -

22                   JUDGE FEINMAN: So given that, I'm going to ask  
23 you the question that Judge Rivera asked your adversary,  
24 which is would it be proper for us to say, okay, this may  
25 have been okay under the old law, but we're going to remit



1           it to the trial court to sort out this whole issue of the  
2           effect of the new statute?

3                       MS. WELLINGTON: You know, certainly this  
4           litigation has been going on for eleven years. We've paid  
5           over 43,000 dollars in property taxes and insurance on this  
6           property, and that's as of 2016. So we certainly would  
7           like to resolve this case. That said, the retroactivity  
8           issue here is quite important. There are more than 25,000  
9           foreclosure actions filed in New York parts every year. So  
10          certainly whatever rules you - - - you set here will be  
11          very important.

12                      And I'll point out that there are a lot of  
13          interesting and important procedural questions at stake  
14          such as, even in a default action where, you know, if you  
15          take - - - take the statute to say you can raise it after a  
16          default, you still have to seek relief from the default.  
17          You still have to meet that standard, which is the  
18          excusable neglect standard. And - - -

19                      JUDGE RIVERA: Okay. But that's not what's going  
20          on here. But so let me ask you this, along your analysis  
21          of the retroactivity, I get your point, you've paid a lot  
22          of money, this court should just decide this. But on the  
23          issue of the retroactivity, as you seem to be analyzing it,  
24          I'm - - - I'm not really clear because the case is on  
25          appeal, and they have challenged whether or not they



1 actually did preserve this question of standing. So it's  
2 not really like we are past the point of the standing and  
3 now they're coming in and saying, oh, there's a new law  
4 that would have saved us, right? They've been challenging  
5 this. This is, in part, what they're doing here. So why  
6 wouldn't the statute now apply?

7 MS. WELLINGTON: So under the old rule, they  
8 waited until after summary judgment to challenge here.

9 JUDGE RIVERA: I understand - - -

10 MS. WELLINGTON: That's far too - - -

11 JUDGE RIVERA: - - - but that's your argument  
12 against their challenge. But what I'm saying is the rules  
13 are usually, case is pending, if the rule changes along the  
14 way, it applies. And so they're still challenging this  
15 question of whether or not they did properly preserve their  
16 standing challenge. Why wouldn't the new statute now apply  
17 as a consequence?

18 MS. WELLINGTON: So that's - - -

19 JUDGE RIVERA: They haven't conceded - - - what  
20 I'm saying is they haven't conceded that point and now come  
21 in and said, oh, okay, so we lost under the old rules;  
22 that's very clear, we always agreed to that, but now we've  
23 got another shot. Instead, they've been challenging  
24 throughout whether or not they had properly preserved  
25 standing.

1 MS. WELLINGTON: So when it comes to new  
2 procedural rules, it is important to look at the procedures  
3 that were in place when the parties were litigating a  
4 claim. So think about, you know, if the rules change on  
5 when you have to serve process or serve notice. I mean,  
6 you're not going to apply that new rule eleven years back  
7 in - - - in the past.

8 JUDGE RIVERA: No, no, I know, but I'm sorry - -  
9 -

10 MS. WELLINGTON: And that's why - - -

11 JUDGE RIVERA: - - - I'm not being clear. My  
12 point is that he - - - their side has never conceded that  
13 they didn't comply with the existing framework. I  
14 understand your position, and it's been successful, but he  
15 continues to challenge it.

16 So the consequence, it's a pending action, as  
17 Judge Stein mentioned before, so why doesn't the new rule  
18 then apply? I could absolutely appreciate your argument if  
19 indeed they had taken the position, yeah, we missed that,  
20 but here are other grounds why nevertheless we should be  
21 successful.

22 MS. WELLINGTON: I think it's really important  
23 here that there are different retroactivity rules for  
24 procedures. So if you are, say, litigating this issue of  
25 did you comply with the sixty-day notice requirement for



1 eleven years, and then it becomes a ninety-day notice  
2 requirement, you're not going to apply that new notice  
3 requirement eleven years in the past to this procedural  
4 action.

5 And I'll point out here there - - - there are  
6 other procedural rules at play. Defendants have never  
7 sought to vacate that summary judgment ruling, and that's  
8 exactly what the Supreme Court held here which is, even if  
9 defendants had raised - - - raised standing in their  
10 answer, the summary judgment motion disposed of it, and the  
11 court wasn't at liberty, at that point in the proceeding,  
12 to go back and reopen the summary judgment proceedings,  
13 particularly without some kind of motion by defendant.

14 So we think the - - - the decision below is well-  
15 reasoned and - - - and is correctly decided, and we ask  
16 this court to affirm.

17 CHIEF JUDGE DIFIORE: Thank you, counsel.

18 Mr. Foley?

19 MR. FOLEY: Yes. 1302-a applies here. It just  
20 does. I mean, the opposing counsel has concern about  
21 rights that have already vested, but nothing has been  
22 vested yet. There - - - there has been no foreclosure sale  
23 yet, so there's no reason why it shouldn't apply here.

24 Opposing counsel - - -

25 JUDGE FEINMAN: What about her hypothetical that,



1           okay, before you needed sixty days' notice, and now they  
2           make a new rule, the legislature says you need to give  
3           ninety days' notice.

4                       MR. FOLEY: Right.

5                       JUDGE FEINMAN: How would that play out?

6                       MR. FOLEY: I think that's a very different  
7           circumstance because that's like you lose - - - you lose  
8           the right to bring summary - - - bring a summary judgment  
9           motion. That - - -

10                      JUDGE RIVERA: Well, isn't actually the analogy,  
11           if I'm understanding Judge Feinman's question and - - - and  
12           her point, isn't actually the analogy that you would have  
13           been challenging, no, no, we did provide that notice within  
14           the sixty days, and that's what the dispute is.

15                      MR. FOLEY: Right.

16                      JUDGE RIVERA: As opposed to conceding, no, we  
17           didn't do that within sixty days. Because I - - - I  
18           thought that's what's going on in this case, you having  
19           conceded that you didn't assert standing; that's your whole  
20           argument.

21                      MR. FOLEY: And that's true. I mean, like, going  
22           back to, I believe it was, you know, 2011 or 2012, we've  
23           consistently - - - we've contested standing. We contested  
24           standing on the cross-motion to dismiss. I believe we - -  
25           -





1 JUDGE STEIN: But under the old rules, you didn't  
2 do that in a timely manner.

3 MR. FOLEY: I mean, I - - -

4 JUDGE STEIN: Or do you think you did?

5 MR. FOLEY: I - - - I think we did.

6 JUDGE STEIN: How?

7 MR. FOLEY: Because it's not unusual - - -

8 JUDGE STEIN: By denying - - - be general denial?  
9 Is that - - - is that your position?

10 MR. FOLEY: No, we denied that they own the note  
11 of mortgage, something that they pled on the face of the  
12 complaint, because they pled it and we denied it - - -

13 JUDGE STEIN: You specifically denied it, or - -  
14 -

15 MR. FOLEY: - - - we thereby put it at issue.

16 JUDGE STEIN: Did you specifically deny it, or  
17 did you deny it wholesale with most of the - - -

18 MR. FOLEY: We denied it with other paragraphs as  
19 well.

20 JUDGE STEIN: Okay. And in your view, that is  
21 enough to raise standing, or was enough under the old  
22 statute; is that your position?

23 MR. FOLEY: Absolutely. They put it at issue in  
24 their complaint, right? They - - -

25 JUDGE STEIN: So let's just take that one step



1 further. That means that when a plaintiff alleges certain  
2 things, right, and there's a general denial, not anything  
3 specific as to any specific allegations, then the - - -  
4 then that plaintiff has to anticipate what possible  
5 defenses could be brought against each and every factual  
6 allegation made in the complaint or otherwise they lose?  
7 Is that - - - is that what you're saying?

8 MR. FOLEY: No, I mean - - -

9 JUDGE STEIN: So how is this different from that  
10 then? I - - -

11 MR. FOLEY: Look, the - - - it's not, and I - - -  
12 I agree with Justice Duffy here. In - - - in the first and  
13 third paragraphs of the complaint, it's not as if they  
14 lumped together a bunch of, you know, allegations that were  
15 unrelated. They said - - - they, in essence, alleged  
16 standing, and then we denied it. And so - - -

17 JUDGE WILSON: Right, and so you - - -

18 MR. FOLEY: But if I can say this, about  
19 surprise, right, because there's been a lot of focus on,  
20 oh, well, we've been - - - we were surprised here, right?

21 JUDGE WILSON: Right, there's an allegation - - -

22 MR. FOLEY: But it's really that second part of  
23 3018 (b) - - -

24 JUDGE WILSON: There's an allegation - - -

25 MR. FOLEY: - - - which appoints in the



1 commentary it's a sturdy foundation by - - -

2 JUDGE WILSON: Let me just ask you this.

3 MR. FOLEY: Um-hum.

4 JUDGE WILSON: There's an allegation in the  
5 complaint that they're the holder of the note, right?

6 MR. FOLEY: Yeah.

7 JUDGE WILSON: And you DKI that?

8 MR. FOLEY: Yes.

9 JUDGE WILSON: Understandably, because how do you  
10 know they have the note, right?

11 MR. FOLEY: Right.

12 JUDGE WILSON: They then put in an affidavit  
13 saying, essentially like the affidavit we were just talking  
14 about in the prior case, along with a copy of the note  
15 attached. They move for summary judgment - - -

16 MR. FOLEY: Right.

17 JUDGE WILSON: - - - and there's no response to  
18 that.

19 MR. FOLEY: Right.

20 JUDGE WILSON: Why doesn't that end it?

21 MR. FOLEY: Well, I don't think it ends it  
22 because, well, we brought it up on our cross-motion to  
23 dismiss, and we gave the - - - we alerted the court and we  
24 alerted the opposing counsel that there was an issue here.  
25 And they had the opportunity to weigh in there. They had



1 an opportunity to weigh in on that, and they actually did  
2 it. It's really as simple as that.

3 CHIEF JUDGE DIFIORE: Thank you, counsel.

4 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of US Bank National Association v. Kenyatta Nelson and Safiya Nelson, No. 86, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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