

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

D18458
G/kmg

_____AD3d_____

Argued - February 21, 2008

A. GAIL PRUDENTI, P.J.
HOWARD MILLER
MARK C. DILLON
WILLIAM E. McCARTHY, JJ.

2007-04709

DECISION & ORDER

U.S. Bank National Association TR U/S 6/01/98
(Home Equity Loan Trust 1998-2), appellant, v
Linda Alvarez, respondent.

(Index No. 16509/04)

Stim & Warmuth, P.C. (Glenn P. Warmuth of counsel), for appellant.

O'Brien & Manister, P.C., Hicksville, N.Y. (Todd J. Manister of counsel), for
respondent.

In an action to foreclose a mortgage, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Nassau County (Murphy, J.), dated April 25, 2007, as denied that branch of its motion which was for summary judgment on the complaint and denied those branches of its motion whose were to dismiss the affirmative defense of fraud and the counterclaim for rescission of the note and mortgage.

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

In order to establish its prima facie entitlement to summary judgment in a foreclosure action, a plaintiff must submit the mortgage and unpaid note, along with evidence of default (*see Hoffman v Kraus*, 260 AD2d 435, 436; *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467). The burden then shifts to the defendant to demonstrate “the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff” (*id.* at 467; *see Nassau Trust Co. v Montrose Concrete Prods.*

March 18, 2008

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U.S. BANK NATIONAL ASSOCIATION TR U/S 6/01/98
(HOME EQUITY LOAN TRUST 1998-2) v ALVAREZ

Corp., 56 NY2d 175, 183).

Here, after the plaintiff, the assignee of a note and mortgage executed by the defendant, established, prima facie, its entitlement to judgment as a matter of law, the defendant raised triable issues of fact concerning the defense of fraud and the counterclaim for rescission, which precluded the granting of summary judgment to the plaintiff (*see Bankers Trust Co. of Cal., N.A. v Sciarpelletti*, 28 AD3d 408, 411-412; *State St. Bank & Trust Co. v Boayke*, 249 AD2d 535; *Horowitz v Griggs*, 245 AD2d 486).

The plaintiff's remaining contentions are without merit.

PRUDENTI, P.J., MILLER, DILLON and McCARTHY, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court