

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

D33038  
O/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - October 28, 2011

WILLIAM F. MASTRO, J.P.  
CHERYL E. CHAMBERS  
SANDRA L. SGROI  
ROBERT J. MILLER, JJ.

2010-06260  
2010-10403

DECISION & ORDER

Dorit Levy, respondent, v Prime East 15th, LLC, et al.,  
appellants, et al., defendants.

(Index No. 38793/05)

Sanford F. Young, P.C., New York, N.Y., for appellants.

Mark I. Schreck, Lawrence, N.Y. (Cheryl Schreck of counsel), for respondent.

In an action to foreclose a mortgage, the defendants Prime East 15th, LLC, and Jacob Frank appeal, as limited by their brief, from (1) so much of an order of the Supreme Court, Kings County (Solomon, J.), dated May 19, 2010, as denied their cross motion for summary judgment dismissing the complaint insofar as asserted against them, and (2) so much of an order of the same court dated August 19, 2010, as denied that branch of their separate cross motion which was pursuant to CPLR 5015(a)(3) to vacate so much of the order dated May 19, 2010, as directed them to produce a certain memorandum.

ORDERED that the orders are affirmed insofar as appealed from, with one bill of costs.

The defendants Prime East 15th, LLC, and Jacob Frank (hereinafter together the appellants) failed to establish their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). The appellants did not demonstrate that the mortgage at issue was invalid due to the seller's failure to convey marketable title to the underlying property or for lack of consideration (*see*

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*Wranovics v Finnerty*, 277 AD2d 841, 843; *Hamm v Slavin*, 257 AD2d 805, 806-807; *Vinciguerra v Northside Partnership*, 188 AD2d 861, 862-863). Furthermore, the appellants failed to demonstrate that they were not in default in their payment of the mortgage at the time the action was commenced, or that they were not provided notice of that alleged default. Accordingly, the Supreme Court properly denied the appellants' cross motion for summary judgment dismissing the complaint insofar as asserted against them, regardless of the sufficiency of the plaintiff's opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

Additionally, because the appellants failed to establish the existence of fraud, misrepresentation, or misconduct on the part of the plaintiff, the Supreme Court properly denied that branch of their separate cross motion which was pursuant to CPLR 5015(a)(3) to vacate so much of the order dated May 19, 2010, as directed them to produce a certain memorandum (*see Citicorp Vendor Fin., Inc. v Island Garden Basketball, Inc.*, 27 AD3d 608, 609; *Aames Capital Corp. v Davidsohn*, 24 AD3d 474, 475; *Abacus Real Estate Fin. Co. v P.A.R. Constr. & Maintenance Corp.*, 128 AD2d 821, 821).

MASTRO, J.P., CHAMBERS, SGROI and MILLER, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan  
Clerk of the Court