

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

D32557
Y/prt

_____AD3d_____

Argued - September 30, 2011

WILLIAM F. MASTRO, A.P.J.
ARIEL E. BELEN
L. PRISCILLA HALL
PLUMMER E. LOTT, JJ.

2010-09610

DECISION & ORDER

Washington Mutual Bank, etc., respondent, v
Edith Valencia, et al., appellants, et al., defendants.

(Index No. 4556/08)

Stephen A. Katz, New York, N.Y., for appellants.

Rosicki, Rosicki & Associates, P.C., Plainview, N.Y. (Andrew Morganstern of counsel), for respondent.

In an action, inter alia, to foreclose a mortgage, the defendants Edith Valencia and Ricaurte Valencia appeal from an order of the Supreme Court, Queens County (Markey, J.), dated August 12, 2010, which, among other things, upon the default of the defendant Edith Valencia in appearing or answering, granted the plaintiff's motion for summary judgment on the complaint. Justice Hall has been substituted for Justice Angiolillo (*see* 22 NYCRR 670.1[c]).

ORDERED that the appeal by the defendant Edith Valencia is dismissed, as no appeal lies from an order entered on the default of the appealing party (*see* CPLR 5511; *Development Strategies Co., LLC, Profit Sharing Plan v Astoria Equities, Inc.*, 71 AD3d 628, 628); and it is further,

ORDERED that the order is affirmed insofar as appealed from by the defendant Ricaurte Valencia; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff, payable by the defendant Ricaurte Valencia.

February 14, 2012

WASHINGTON MUTUAL BANK v VALENCIA

Page 1.

“[I]n moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default” (*Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856, 856, quoting *Republic Natl. Bank of N.Y. v O’Kane*, 308 AD2d 482, 482; see *Rossrock Fund II, L.P. v Osborne*, 82 AD3d 737, 737; *Ames Funding Corp. v Houston*, 44 AD3d 692, 693, cert denied 555 US 1048; *Village Bank v Wild Oaks Holding*, 196 AD2d 812, 812). Here, the plaintiff satisfied its prima facie burden on that branch of its motion which was for summary judgment on the complaint insofar as asserted against the defendant Ricaurte Valencia (hereinafter the defendant). Accordingly, it was incumbent on the defendant to establish by admissible evidence the existence of a triable issue of fact as to a defense (see *Grogg v South Rd. Assoc., L.P.*, 74 AD3d 1021, 1022; see also *Pennsylvania Higher Educ. Assistance Agency v Musheyev*, 68 AD3d 736, 736; *Quest Commercial, LLC v Rovner*, 35 AD3d 576, 576; *Famolaro v Crest Offset, Inc.*, 24 AD3d 604, 605; *Bank of N.Y. v Vega Tech. USA, LLC*, 18 AD3d 678, 679).

The defendant raised the defense that he was authorized to rescind the underlying transaction, and in fact did so, pursuant to the Truth in Lending Act (hereinafter TILA) (see 15 USC § 1601, *et seq.*). However, under the relevant provisions of the TILA, only an “obligor” is authorized to rescind a subject transaction (15 USC § 1635[a]). Although the defendant signed the mortgage, he did not sign the note at issue. Thus, the defendant was not an obligor within the meaning of 15 USC § 1635(a), and therefore was not authorized pursuant to the TILA to rescind the underlying transaction at issue (see *Falkiner v OneWest Bank, FSB*, 780 F Supp 2d 460 [ED Va]; *Moazed v First Union Mtge. Corp.*, 319 F Supp 2d 268, 273 n 4 [D Conn]; cf. *Ferreira v Mortgage Elec. Registration Sys., Inc.*, 2011 WL 1842864, 2011 US Dist LEXIS 52055 [D Mass]). Furthermore, the defendant did not tender any evidence tending to show that he or the defendant Edith Valencia, his wife, was using the subject property as a “principal dwelling,” and therefore, that the right of rescission set forth in 15 USC § 1635(a) was applicable to the underlying transaction. Thus, the defendant failed to establish by admissible evidence the existence of a triable issue of fact as to a defense based on the TILA right of rescission set forth in 15 USC § 1635(a).

The defendant’s remaining contention is improperly raised for the first time on appeal, and, accordingly, is not properly before this Court (see *Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 755).

MASTRO, A.P.J., BELEN, HALL and LOTT, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court