

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

D36864
W/hu

_____AD3d_____

Argued - October 16, 2012

REINALDO E. RIVERA, J.P.
CHERYL E. CHAMBERS
L. PRISCILLA HALL
PLUMMER E. LOTT, JJ.

2012-01351

DECISION & ORDER

Indymac Federal Bank, FSB, appellant, v Luisa Batista,
respondent, et al., defendants.

(Index No. 9014/09)

Frenkel, Lambert, Weiss, Weisman & Gordon, LLP, Bay Shore, N.Y. (Timothy Riselvato of counsel), for appellant.

Donna Dougherty, Rego Park, N.Y. (Dianne Woodburn and Hilary Bauer of counsel), for respondent.

In an action to foreclose a mortgage, the plaintiff appeals, by permission, from an order of the Supreme Court, Queens County (Hart, J.), entered December 21, 2011, which, inter alia, sua sponte, declared that the mortgage on the subject property is null and void, and prohibited the plaintiff from seeking a deficiency judgment against the defendant Luisa Batista or from filing an Internal Revenue Service Form 1099-c.

ORDERED that the order is reversed, on the law, with costs.

Contrary to the contention of the defendant Luisa Batista, the record does not reflect that the order appealed from was entered as the result of a settlement, which would require dismissal of the appeal (*see* CPLR 2104; *Matter of Martinez v Martinez*, 15 AD3d 663). Since the order appealed from was not the result of a settlement, and the only basis for, inter alia, declaring the subject mortgage null and void was a colloquy between the Supreme Court and Batista, during which the plaintiff was not afforded the opportunity to present evidence and cross-examine Batista, the plaintiff was deprived of its right to due process of law (*see Logan v Zimmerman Brush Co.*, 455 US 422, 429). Accordingly, the order must be reversed.

December 19, 2012

Page 1.

INDYMAC FEDERAL BANK, FSB v BATISTA

RIVERA, J.P., CHAMBERS, HALL and LOTT, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "Aprilanne Agostino". The signature is written in a cursive, flowing style with a large initial 'A'.

Aprilanne Agostino
Clerk of the Court