

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

D25865
C/prt

_____AD3d_____

Submitted - December 17, 2009

A. GAIL PRUDENTI, P.J.
WILLIAM F. MASTRO
ANITA R. FLORIO
LEONARD B. AUSTIN, JJ.

2008-07560

DECISION & ORDER

Mortgage Electronic Registration Systems, Inc., etc.,
plaintiff, v Mary Elliot, et al., defendants, New York
City Department of Housing Preservation, appellant;
Citimortgage, Inc., nonparty-respondent.

(Index No. 15334/04)

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Barry P. Schwartz and
Scott Shorr of counsel), for appellant.

Sweeney, Gallo, Reich & Bolz, LLP, Rego Park, N.Y. (Rosemarie A. Klie of
counsel), for nonparty-respondent.

In an action to foreclose a mortgage, the defendant New York City Department of
Housing Preservation appeals, as limited by its brief, from so much of an order of the Supreme Court,
Kings County (Vaughan, J.), dated May 1, 2008, as granted, in part, that branch of the motion of
nonparty Citimortgage, Inc., which was for an award of an attorney's fee to be paid from the subject
surplus funds.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs,
and that branch of the motion of nonparty Citimortgage, Inc., which was for an award of an
attorney's fee to be paid from the subject surplus funds is denied.

There is no authority for the allowance of an attorney's fee from the surplus funds in
an action to foreclose a mortgage (*see Reilly v Empire State Improvement Corp.*, 251 NY 351, 353;
Realty Assoc. Sec. Corp. v Jaybar Realty Corp., 257 App Div 1001, 1001, *affd* 282 NY 603; *Sadow*

v Poskin Realty Corp., 63 Misc 2d 499, 508-509). Thus, the Supreme Court was without authority to award \$3,000 from the surplus funds to Sweeney, Gallo, Reich & Bolz, LLP, attorneys for the nonparty claimant Citimortgage, Inc., as an attorney's fee.

The parties' remaining contentions either are without merit or need not be reached in light of our determination.

PRUDENTI, P.J., MASTRO, FLORIO and AUSTIN, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court