

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

D35482  
O/kmb

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

Argued - May 31, 2012

REINALDO E. RIVERA, J.P.  
RANDALL T. ENG  
PLUMMER E. LOTT  
JEFFREY A. COHEN, JJ.

---

2011-06032

DECISION & ORDER

Neighborhood Housing Services of New York City,  
Inc., appellant, v Floyd Hawkins, respondent, et al.,  
defendants.

(Index No. 32085/08)

---

Cullen and Dykman, LLP, Garden City, N.Y. (Ruth O'Connor of counsel), for  
appellant.

David J. Bryan and Andrew Malozemoff, Brooklyn, N.Y., for respondent.

In an action to foreclose a mortgage, the plaintiff appeals from an order of the  
Supreme Court, Kings County (Silber, J.), dated April 7, 2011, which denied those branches of its  
motion which were for summary judgment on the complaint and dismissing the counterclaim of the  
defendant Floyd Hawkins, which sought an award of an attorney's fee.

ORDERED that the order is modified, on the law, by deleting the provision thereof  
denying that branch of the plaintiff's motion which was for summary judgment dismissing the  
counterclaim of the defendant Floyd Hawkins, which sought an award of an attorney's fee, and  
substituting therefor a provision granting that branch of the motion; as so modified, the order is  
affirmed, without costs or disbursements.

The plaintiff established its prima facie entitlement to judgment as a matter of law  
by presenting the subject mortgage, the unpaid note, and evidence of the default of the defendant  
Floyd Hawkins (*see Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer*, 67 AD3d 872, 873;  
*Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, 625-626; *Washington Mut. Bank, F.A.  
v O'Connor*, 63 AD3d 832, 833). In opposition, Hawkins raised triable issues of fact regarding his

defenses including, inter alia, the defense based on his claim that the loan proceeds disbursed to the contractor were never authorized (*see Bankers Trust Co. of Cal., N.A. v Sciarpelletti*, 28 AD3d 408, 411). Accordingly, the Supreme Court properly denied that branch of the plaintiff's motion which was for summary judgment on the complaint.

However, the Supreme Court should have granted that branch of the plaintiff's motion which was for summary judgment dismissing Hawkins's counterclaim, which sought an award of an attorney's fee. Since there is no statute in New York authorizing the recovery of an attorney's fee in a mortgage foreclosure action, such a fee may only be recovered if it is contractually authorized (*see Levine v Infidelity, Inc.*, 2 AD3d 691, 692). Here, the plaintiff established its prima facie entitlement to judgment as a matter of law dismissing the counterclaim by demonstrating that there is no contractual provision obligating it to pay Hawkins an attorney's fee. Hawkins failed to raise a triable issue of fact in opposition.

RIVERA, J.P., ENG, LOTT and COHEN, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court