

**Citicorp Trust Bank, FSB v Vidaurre**

2007 NY Slip Op 32248(U)

July 16, 2007

Supreme Court, Richmond County

Docket Number: 1006032/0071

Judge: Anthony Giacobbe

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

-----X  
CITICORP TRUST BANK, FSB  
c/o Citifinancial Mortgage Company  
1111 North Point  
Coppell, TX 75019

Plaintiff,

-against

TRIAL PART 9

Present:  
Hon. ANTHONY I. GIACOBBE

Decision and Order

ELENA C. VIDAURRE a/k/a ELENA C.  
VIDAURRE-GILLES, PATRICK GILLES, BOARD  
OF MANAGERS FOR THE ASPEN KNOLLS CORP.,  
GIFTPORTS, INC. d/b/a JOMASHOP, NEW YORK  
CITY ENVIRONMENTAL CONTROL BOARD,  
NEW YORK CITY PARKING VIOLATIONS BUREAU,  
NEW YORK CITY TRANSIT ADJUDICATION BUREAU,  
NEW YORK STATE DEPARTMENT OF TAXATION  
AND FINANCE, PEOPLE OF THE STATE OF NEW YORK,  
JOHN DOE (Said name being fictitious, it being the intention  
of plaintiff to designate any and all occupants of premises being  
foreclosed herein, and any parties, corporations or entities, if  
any, having or claiming an interest or lien upon the Mortgaged  
Premises.)

Index No. 100603/07  
Motion Nos. 001, 002

Defendants.

-----X  
The following papers numbered 1 to 5 were used on these motions the 18<sup>th</sup> day of May, 2007:

	Pages Numbered
Notice of Motion for Order of Reference	
with Supporting Papers.....	1
Order to Show Cause for Leave to Extend Time to Answer	
with Supporting Papers.....	2
Affirmation in Opposition with Supporting Papers.....	3
Reply Affirmation.....	4
Proposed Answer.....	5

Upon the foregoing papers, the order to show cause for leave to extend defendant Giftports, Inc.'s time to answer the complaint is granted; plaintiff's motion for an order of reference is withdrawn (*see*, letter dated May 10, 2007 by plaintiffs' counsel).

This is an action to foreclose a mortgage on certain premises located at 205 Aspen Knolls Way, Staten Island, New York. In moving for leave to extend its time to answer, Giftports, Inc. (hereinafter "Giftports") alleges that service upon it was effectuated by delivery of process to the Secretary of State and, thereafter, by mail to its registered agent, i.e., the attorney who incorporated Giftports. Defendant maintains that it never received a copy of the summons and complaint because this attorney/registered agent was deceased. Giftports retained counsel on March 27, 2007, when it first learned of the action. On that day, its counsel allegedly faxed a notice of appearance and a letter to plaintiff's counsel requesting a copy of the summons and complaint. This was followed on March 30, 2007 by a faxed request for an extension of time to answer, which had expired less than two weeks earlier, i.e., on March 22, 2007. Plaintiff's counsel rejected the request by letter dated April 3, 2007, necessitating this application.

Movant further maintains that it has a meritorious defense to the underlying foreclosure action, i.e., that it has a superior lien on the subject property by virtue of a *lis pendens* filed in connection with an action entitled Giftports, Inc. d/b/a Jomashop v. Vidaurre and Gilles, bearing Index No. 100091/05. In that action, Giftports seeks to impose a constructive trust on the subject property arising from the codefendants alleged use of embezzled funds to improve the subject property.

It is well established that “[w]hether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits” (Harczark v. Drive Variety, Inc., 21 AD3d 876, 876-877 [2<sup>nd</sup> Dept. 2005]).

Consonant with the foregoing, in view of the reasonable excuse proffered for defendant’s minimal delay in answering the complaint, the promptness with which relief was sought, the submission of evidence demonstrating the existence of a meritorious defense, and the lack of prejudice that will inure to plaintiff at this early stage of the proceedings, defendant Giftports’ application for an extension of time to serve and file an answer will be granted (*see*, CPLR 2004, 3012[d]; Warshaw v. Carlis Realty Corp., 111 AD2d 919, 920 [2<sup>nd</sup> Dept.], *app dismissed*, 66 NY2d 759 [1985]; *accord*, New York & Presbyterian Hospital v. Auto One Ins. Co., 28 AD3d 441 [2<sup>nd</sup> Dept. 2006]).

Accordingly, it is

ORDERED, that defendant’s application for an extension of time to answer the complaint is granted; and it is further

ORDERED, that defendant shall serve and file its answer within twenty days of the service upon it of a copy of this order with notice of entry; and it is further

ORDERED, that plaintiff's motion for an order of reference is deemed  
withdrawn.

E N T E R,

Dated: July 16, 2007

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J.S.C.