

Citicorp Trust Bank,FSB v Vidaurre
2008 NY Slip Op 33164(U)
July 10, 2008
Supreme Court, Richmond County
Docket Number: 100603/07
Judge: Anthony I. Giacobbe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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

Plaintiffs,

-against-

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 names 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.)

Defendants.
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Trial Part 9
Present:
Hon. Anthony I. Giacobbe

DECISION

Index No. 100603/07
Motion No. 004

The following papers numbered 1 to 3 were submitted on the 13th day of June, 2008:

Notice of Motion for Summary Judgment and Order of Reference by Plaintiff with supporting papers (dated May 5, 2008)	1
Affidavit in Opposition by Defendant Giftports, Inc. d/b/a Jomashop, with supporting papers (dated June 5, 2008)	2
Reply Affirmation (dated June 10, 2008)	3

Upon the foregoing papers, the motion is decided as indicated herein.

Plaintiff Citicorp Trust Bank, FSB (“Citicorp”) moves by notice of motion for an order (1) pursuant to CPLR 3211 and 3212 granting it summary judgment and/or dismissing the answer of defendant, Giftports, Inc. d/b/a Jomashop (“Giftports”), (2) leave to treat said answer as a limited notice of appearance, entitling Giftports through its attorney to receive, a copy of the notice of sale, discontinuance and surplus money proceedings, if any, and (3) an order granting it a Judgment of Foreclosure and Sale and appointment of a Referee to Compute.

Citicorp commenced this action seeking a judgment of foreclosure and sale based upon a default in payment of a mortgage loan dated July 17, 2004 executed by defendants Elena C. Vidaurre, a/k/a, Elena C. Vidaurre Gilles and Patrick Gilles, and secured by the premises known as 205 Aspen Knolls Way, Staten Island, New York. A previous motion to foreclose on the mortgage was deemed withdrawn by decision and order of this Court dated July 16, 2007 to allow Giftports time to answer. The action was commenced by the filing and service of a summons with complaint upon defendants on or about February 12, 2007. Issue was joined by the service of an answer by Giftports on or about October 26, 2007, which was amended on or about November 15, 2007. The remaining defendants have not answered or appeared.

At issue in the present motion is the question of priority, and whether a viable defense to the foreclosure action has been presented.

The following facts appear uncontroverted. Under date of July 17, 2004, defendants Elena C. Vidaurre a/k/a Elena C. Vidaurre-Gilles and Patrick Gilles executed a note and mortgage in favor of Citicorp secured by the premises known as 205 Aspen Knolls Way, Staten Island, New York. The note and mortgage were apparently recorded on November 29, 2004. Thereafter, the borrowers allegedly failed to make the payment due October 22, 2006 and subsequently, whereupon Citicorp, pursuant to the terms of their agreement, accelerated the balance due under the note and mortgage and commenced the instant action.

As is relevant, defendant Giftports, a retailer engaged in the internet sale of luxury goods hired Elena Vidaurre as a shipping return clerk on or about December 5, 2002, and claims that from January 1, 2003 through January 1, 2005, Ms. Viduarre used her position to steal from her employer approximately one million dollars (\$1,000,000.00) in goods and fraudulent credits.¹ Insofar as it appears, on November 1, 2006, Ms. Vidaurre pled guilty to multiple charges of Grand Larceny and related charges under New York County Indictment Number 3872/2005 in connection with the

¹On January 10, 2005 Giftports filed a "*lis pendens*" and purchased an index number (No. 100091/05) in Richmond County in order to commence an action against Ms. Viadaurre and Patrick Gilles, but never purchased or filed a Request for Judicial Intervention.

Giftports thefts. As part of the plea bargain, Ms. Vidaurre agreed that the issuance of a confession of judgment would be considered by the Court at the time of sentencing. On May 2, 2007, the Hon. Ronald A. Zweibel, the Judge who took the plea and apparently pronounced sentence, “So Ordered” an agreement dated May 2, 2007 between Giftports and Elena Vidaurre and Patrick Gilles referencing the instant foreclosure action and the Giftports action pending in Richmond County under Index No. 100091/05. In the foregoing the parties agreed (1) that Vidaurre and Gilles would not contest the foreclosure action and would assign to Giftports all their title, right and interest in the proceeds generated by the foreclosure sale; (2) gave Giftports the right to bid up to the amount it was owed as set forth in the confession of judgment executed by Ms. Vidaurre; (3) allowed Vidaurre and Gilles to amend their answer in the Giftports action to admit the allegations of the complaint and consent to the entry of judgment in favor of Giftports; and (4) mutually agreed to cooperate in effectuating the terms of the Agreement and to execute any and all further documents required to effectuate its terms, including (a) any and all documents necessary to enter the judgment referred to in paragraph 1, and (b) to amend the Answer and consent to the entry of judgment as set forth in paragraph 2.²

In opposition to the motion, Giftports contends that it has a constructive trust on the premises which pre-dates the recording of Citicorp’s mortgage lien, and is superior thereto. In addition, it is alleged that Citicorp’s interest in the premises was obtained through a loan that should never have been granted.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see, Rotuba Extruders, Inc. v. Ceppos*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2nd Dept. 2003]). On a motion for summary judgment, the function of the court is issue finding, not issue

²On the same date, Ms. Vidaurre executed a confession of judgment in favor of Giftports in the amount of \$871,665.00 with interest from May 2, 2007, which was again “So Ordered” by Justice Zweibel. On May 15, 2007 Giftports filed said judgment against Ms. Vidaurre with the Richmond County Clerk under a new and different Index No. from that under which the *lis pendens* was filed *i.e.*, 102020/07

determination (*see, Weiner v. Ga-Ro Die Cutting, Inc.*, 104 AD2d 331 [1st Dept. 1984], *aff'd*, 65 NY2d 732 [1985]) In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion (*see, Glennon v. Mayo*, 148 AD2d 580 [2nd Dept. 1989]). To prevail on the motion, the moving party must present *prima facie* evidence of its entitlement to judgment as a matter of law (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]). Upon its failure to do so, the motion will be denied. Once a *prima facie* showing has been made, however, the burden shifts to the party opposing the motion to produce competent evidence demonstrating the existence of triable issues of fact (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]).

With these criteria in mind, the Court finds that plaintiff has established its *prima facie* right to judgment as a matter of law through the production of the note, mortgage and evidence of the default (*see, Aames Funding Corp. v. Houston*, 44 AD3d 692 [2nd Dept. 2007], *lv denied*, 10 NY3d 704 [2008]; *accord, Combined Ventures LLC v. Fiske House Apt. Corp.*, 48 AD3d 399 [2nd Dept. 2008]). As for Giftports' claim of a constructive trust in the premises that is superior to plaintiff's interest, it is well established that there are four requirements for the imposition of a constructive trust: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereof, and (4) unjust enrichment (*see, Sharp v. Kosmalski*, 40 NY2d 119, 121 [1976]). Notably absent here are many of these key elements including the transfer of any goods or money by Giftports in reliance upon any promise by Ms. Vidaurre (*see, Spitz v. Klein*, 33 AD3d 988 [2nd Dept. 2006]). Thus, a constructive trust does not lie. Moreover, neither Giftports nor this Court's independent research has disclosed any case establishing that Giftports' claim constitutes a viable defense to this foreclosure action. Neither has Giftports offered any evidence to establish its priority over the rights of Citicorp in the foreclosure action itself, as opposed to an interest in any surplus generated by the foreclosure sale. Accordingly, the motion for summary judgment should be granted.

The Court has considered the other arguments made by Giftports and finds them to be without merit.

This constitutes the Decision of the Court.

Order signed herewith.

ENTER

Dated: July 10, 2008

J.S.C.