

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI  
COURT OF APPEALS

DAISEY M. GANDY AND/OR  
UNKNOWN JOHN DOES OR JANE DOES

APPELLANTS

VS.

NO.: 2007-CA-306

CITICORP TRUST BANK, FSB

APPELLEE

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BRIEF OF APPELLEE

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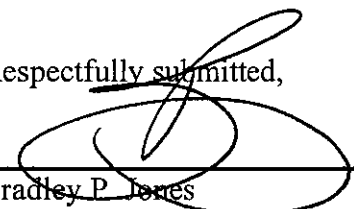
CITICORP TRUST BANK, FSB

APPELLEE

**CERTIFICATE OF INTERESTED PERSONS**

1. Vanessa J. Jones – Attorney of Record for Appellants.
2. The Heirs at Law of Daisy Gandy, deceased – Appellants.
3. Citicorp Trust Bank, FSB – Appellee.
4. Bradley P. Jones, Merideth Drummond and Adams & Edens, P.A. – Attorneys of Record for Appellee.
5. Lester F. Williamson, Jr. Circuit Judge, Wayne County, MS.

Respectfully submitted,



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Bradley P. Jones  
MSB No. 9731

## TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE CASE.....	1
ARGUMENT	
A. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN EXERCISING JURISDICTION IN HEARING THIS CASE.....	4
B. WHETHER THE CIRCUIT COURT ERRED IN FINDING THAT THE FILING OF AN ESTATE BY THE HEIRS AT LAW OF THE DECEDENT DOES NOT PREVENT A FORECLOSURE ON REAL PROPERTY WHICH IS SUBJECT TO A LIEN.....	7
C. WHETHER THE GUBERNATORIAL PROCLAMATION OF OCTOBER 2005 BARS APPELLEE FROM INEQUITABLE FORECLOSURE OF SAID PROPERTY.....	9
CONCLUSION.....	10
CERTIFICATE OF SERVICE.....	11

## TABLE OF AUTHORITIES

### CASES

<i>Martin v. Leslie</i> , 91 So.2d 743, 229 Miss. 656,658-59 (1957).....	7
<i>Tate v. Tate</i> , 64 So.2d 908, 910, 217 Miss. 734, 740 (1953).....	5
<i>White v. Usry</i> , 800 So.2d 125, 127 (Miss. Ct. App. 2001).....	6

### STATUTES

Miss. Code Ann., § 9-5-83 (1972), as amended .....	4
Miss. Code Ann., § 11-25-1 (1972), as amended .....	5
Miss. Code Ann., § 9-9-21 (1) (1972), as amended .....	5
Miss. Code Ann., § 11-25-5 (1972), as amended .....	5
Miss. Code Ann., § 11-25-105 (1972), as amended .....	5
Miss. Code Ann., § 11-51-83 (1972), as amended .....	6
Miss. Code Ann., § 11-51-85 (1972), as amended .....	6
Miss. Code Ann., § 91-7-167 (1972), as amended .....	7
Miss. Code Ann., §§ 91-7- 261 through 91-7-275 (1972), as amended .....	8
Miss. Code Ann., § 89-1-301, et seq, (1972), as amended .....	9

## STATEMENT OF THE CASE

The subject case involves the appeal of the decision of the Circuit Court of Wayne County, Mississippi, rendered on January 16, 2007, in which the Circuit Court of Wayne County awarded possession of that certain real property located at 1302 Joiner Street, Waynesboro, Mississippi, to Appellee, Citicorp Trust Bank, FSB, (hereinafter, "Citicorp"). Citicorp is the current owner of said property by virtue of that certain Substitute Trustee's Deed dated April 15, 2005, and recorded on May 16, 2005 in Deed Book 1136 at Page 619 in the office of the Chancery Clerk of Wayne County, Mississippi.

Prior to the foreclosure that resulted in Citicorp's ownership, on May 9, 1996, Daisy Gandy, deceased, executed a Deed of Trust in favor of First Financial Family Services, Inc., predecessor to Citicorp. Said Deed of Trust was thereafter recorded in the office of the Wayne County Chancery Clerk in Deed of Trust Book 888 at Page 619. Upon information and belief, Daisy Gandy passed away on September 16, 1999. Subsequent to the death of Daisy Gandy, persons unknown to Citicorp continued to tender certain monthly payments, but the loan account ultimately fell into default.

In November 2004, Citicorp referred the file to the offices of Adams & Edens, P.A. for foreclosure. Citicorp appointed Lem Adams, III, as Substitute Trustee in the subject Deed of Trust. Adams, in his capacity as Substitute Trustee, initiated foreclosure by posting and publishing a Notice of Sale in the ordinary course for a foreclosure sale on

April 14, 2005. In connection therewith, an agent for the Substitute Trustee conducted the foreclosure sale on April 14, 2005, and Citicorp was the highest and only bidder. Following the sale, Lem Adams, III, in his capacity as Substitute Trustee conveyed title to Citicorp by Substitute Trustee's Deed.

Presumably in an attempt to stop the subject foreclosure proceeding, Appellant, Mary Gandy (one of the heirs at law of Daisy Gandy), retained counsel and caused an estate proceeding to be opened for Daisy Gandy. On or about April 5, 2005, the Chancery Court of Wayne County, Mississippi, entered a judgment opening an estate, appointing Mary Gandy as Administrator of the Estate of Daisy Gandy, waiving the requirements of bond and appraisal, and directing the Clerk of the Chancery Court to issue Letters of Administration. Subsequent to the issuance of this Judgment, Mary Gandy took the appropriate Oath; and thereafter, the Wayne County Chancery Clerk issued Letters of Administration. Thereafter, on or about May 10, 2005, Mary Gandy, in her capacity as Administrator of the Estate of Daisy Gandy, provided Notice to Creditors, including Citicorp, of the opening of the estate and of the creditor's right to probate a claim. No further action was taken in the estate proceeding until January, 2007, when counsel for the heirs filed a Motion to Stay the Order of the Circuit Court. The estate proceeding remains open at the present time.

Despite assertions by the Gandy heirs, and their counsel, the April 5, 2005, Chancery Court Judgment contains no mention of or reference to the "insolvency" of the estate, but to the contrary reflects that the estate consisted of certain personal, real and mixed property without reference to any indebtedness owed. No evidence was presented or

offered on the Justice Court or Circuit Court levels that a finding of insolvency was ever made in the estate proceeding. Likewise, the Record before the Court is wholly devoid of any such evidence.

Citicorp elected to proceed with its foreclosure to enforce its lien. Despite having knowledge of the impending foreclosure and despite having an open proceeding in the Wayne County Chancery Court, neither Mary Gandy nor the other heirs of Daisy Gandy sought injunctive relief to stop Citicorp from proceeding to sale. Additionally, prior to completion of the foreclosure any number of options to stop the foreclosure sale were available to Mary Gandy including, but not limited to, the filing of bankruptcy, and reinstatement of the loan. Moreover, subsequent to the foreclosure, the Gandy heirs could have filed an appropriate action in Chancery Court contesting the validity of Citicorp's foreclosure. The Gandy heirs took no action whatsoever, other than causing an estate proceeding to be opened.

Following the foreclosure sale and the recording of its Substitute Trustee's Deed, Citicorp, as record owner of the referenced property, filed a possessory action in the Justice Court of Wayne County. The Justice Court ruled in favor of Mary Gandy and refused to grant possession unto Citicorp. Essentially, the Justice Court Judge agreed with the argument of the Gandy heirs that a secured creditor is obligated to participate in the estate proceeding. Citicorp, being aggrieved by the decision of the Justice Court, appealed the decision to the Circuit Court of Wayne County for a trial, *de novo*, on the

possession issue by way of Complaint for Unlawful Entry and Detainer.

The Circuit Court overturned the ruling of the Justice Court and found that Citicorp was in fact entitled to possession of the subject real property. (R., 31-33). The Gandy heirs perfected this appeal and have asserted three assignments of error.

### ARGUMENT

#### A. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN EXERCISING JURISDICTION IN HEARING THIS CASE.

The first assignment of error of the Gandy heirs at law is whether the Circuit Court abused its discretion in exercising its jurisdiction in hearing the subject case. The heirs essentially assert that after the estate was opened in the Chancery Court of Wayne County, the subject possessory action fell under the sole jurisdiction of the Chancery Court. As authority, the heirs cite Mississippi Code Annotated, § 9-5-83 (1972), as amended, which deals with the jurisdiction and powers of the Chancery Court and Circuit courts. Citicorp agrees that the Chancery Court has the power and authority to hear disputed estate matters, but would respectfully show that the decision appealed from by the heirs at law of Daisy Gandy was not such a matter, but rather simply involved the owner of real property seeking possession from one wrongfully withholding the same.

The heirs fail to recognize that upon completion of the foreclosure on April 14, 2005, and the recording of the referenced trustee's deed, the subject real property ceased to be part of the estate, as ownership became fully vested in Citicorp. Accordingly, the reliance of the Gandy heirs upon the filing of and opening of an estate proceeding as a basis for "stopping" or "staying" Citicorp's foreclosure action was ill-advised and



contrary to law.

Citicorp respectfully submits that the heirs' assertion that the Wayne County Circuit Court should have transferred the case to Chancery Court is baseless and incorrect. Mississippi Code Annotated, § 11-25-1, provides as follows:

Any one deprived of the possession of land by force, intimidation, fraud, stratagem, stealth, and any landlord, vendor, vendee, mortgagee, or trustee, or cestui que trust, or other person against whom the possession of land is withheld, by his tenant, vendee, vendor, mortgagor, grantor, or other person, after the expiration of his right by contract, express or implied, to hold possession, and the legal representatives or assigns of him who is so deprived of possession, or from whom possession is so withheld, as against him who so obtained possession, or withholds possession after the expiration of his right, and all persons claiming to hold under him, shall, at any time within one year after such deprivation or withholding of possession, be entitled to the summary remedy herein prescribed.

These suits are by statute given to justice courts and, if one exists in the jurisdiction, county courts. See Miss. Code Ann. §§ 9-9-21(1), 11-25-5, & 11-25-105 (1972), as amended. Such suits cannot determine title, as they are summary proceedings meant only to evict someone who without claim of right is depriving the owner of possession of some part of his property. *Tate v. Tate*, 64 So.2d 908, 910, 217 Miss. 734, 740 (1953).

Citicorp initially filed its Complaint for Unlawful Entry and Detainer in the Justice Court of Wayne County as the record owner of the subject property. Despite the fact that the Justice Court ruled against Citicorp by effectively holding that the matter should have been filed in Chancery Court due to the pending estate matter and "due to the fact that Citicorp was a creditor seeking satisfaction of a debt owed to it", Citicorp was correct and within its rights to appeal this "possessory matter" to the Circuit Court. The

Justice Court improperly failed to recognize that Citicorp had properly taken ownership by foreclosing its lien rights and was simply seeking possession of property owned by it and not pursuing a "claim" against the Estate of Daisy Gandy.

As stated, following the adverse decision in Justice Court, Citicorp properly appealed the matter to the Circuit Court of Wayne County, as Wayne County has no County Court. Appeal to the Circuit Court on Unlawful Entry and Detainer matters is specifically authorized by Mississippi Code Annotated, § 11-51-83 (1972), as amended. Likewise, appeals from civil matters in Justice Court are to be made to the County Court if there be one in the County, and if not, to the Circuit Court. Miss. Code Ann., § 11-51-85 (1972), as amended.

Citicorp recognizes that under certain circumstances a case in Unlawful Entry and Detainer may properly be directed by the Justice Court to the Chancery Court. *White v. Usry*, 800 So.2d 125, 127 (Miss. Ct. App. 2001). In the instant case however, the response filed by Mary Gandy in the Justice Court action was simply an argument that Citicorp should not be entitled to possession since there was an open estate proceeding in Chancery; that the Chancery Court had jurisdiction of the estate; and that Citicorp should have to file "its claim" in that forum. Without a counterclaim or other assertion as to the invalidity of the foreclosure and/or Citicorp's title to and ownership of the subject property, the only matter properly before the Justice Court and the only matter appealed and properly before the Wayne County Circuit Court was that of Citicorp's right to possession of the subject property. Accordingly, with right of possession being a "legal" matter as opposed to a matter of "equity", the Circuit Court was the proper forum to hear

the "possessory" action. (T., 8).

It is well settled law in this State that the owner of a property following a foreclosure can utilize the Unlawful Entry and Detainer action to take possession from the former mortgagor under the foreclosed Deed of Trust. *Martin v. Leslie*, 91 So.2d 743, 229 Miss. 656, 658-59 (1957) (holding that grantees of deed from mortgagee who took title to property through foreclosure entitled to remedy afforded by Unlawful Entry and Detainer statutes). In the case, *sub judice*, Citicorp sought possession from Mary Gandy, an heir at law of Daisy Gandy, who was occupying the property owned by Citicorp. Consequently, the Circuit Court of Wayne County in no way abused its discretion in exercising its jurisdiction in hearing this case.

B. WHETHER THE CIRCUIT COURT ERRED IN FINDING THAT THE FILING OF AN ESTATE BY THE HEIRS AT LAW OF THE DECEDENT DOES NOT PREVENT A FORECLOSURE ON REAL PROPERTY WHICH IS SUBJECT TO A LIEN.

In making its decision to proceed with foreclosure, Citicorp relied specifically on Mississippi Code Annotated, § 91-7-167 (1972), as amended, which provides in pertinent part:

A creditor of a decedent who has a lien of any kind on property of the decedent **shall not be barred of his right to enforce the lien against the property by a failure to present his claim and have it probated and registered**, but shall be barred of all claim to be satisfied out of the assets not affected by such lien ...

While recognizing that in not participating in the estate proceeding by presenting its claim for probate, Citicorp waived its right to a deficiency claim, Citicorp takes the

position that the mere opening of an estate proceeding in no way prevented or prohibited Citicorp from continuing with its statutory, power of sale foreclosure for the purpose of enforcing its lien against the subject property. (T., 5).

Citicorp asserts that its foreclosure complied with statute and was valid in all respects. Record title passed via Substitute Trustee's Deed, and upon receipt and recording of the same, Citicorp became entitled to possession of the subject property.

The heirs at law of Daisy Gandy in "hind-sight" have attempted to argue that the Estate of Daisy Gandy was an "insolvent estate" thus invoking the insolvent estate statutes found in Mississippi Code Annotated, §§ 91-7-261 through 91-7-275 (1972), as amended, and thereby operating as a "stay" of the foreclosure action. (T., 8-10). Although the heirs asserted at trial that the estate was opened as an "indigent estate" (T.,3) and likewise, have stated in their brief that the estate was found to be insolvent, no such finding appears to have ever been made and certainly no such finding or declaration is contained in the Judgment Opening the Estate. In actuality, the Record before this Court on appeal is completely devoid of any evidence whatsoever on the "insolvency" issue, other than bald assertions by counsel for the heirs in her brief that the Estate of Daisy Gandy was filed as an "insolvent estate" and an unsubstantiated statement at trial that the estate was found to be "insolvent" in the Chancery proceeding. (Appellants' Brief, 5; T., 8)

To the contrary, the April 5 Judgment opening the estate waived bond and appraisal. Under Mississippi Code Annotated, § 91-7-261, the administrator would necessarily have to have provided to the Court an accounting of the assets and the debts

of the estate in order to have obtained an order declaring the estate insolvent in accordance with Mississippi Code Annotated, § 91-7-265. No such order was ever entered in the estate proceeding. Moreover, even if the position of the Gandy heirs that a power of sale foreclosure is stayed by the filing of an "insolvent estate" under Mississippi Code Annotated, §91-7-275, there is no evidence whatsoever that the heirs complied with the insolvent estate statutes by obtaining the requisite declaration of insolvency.

As the legal owner of the subject property following a valid foreclosure, Citicorp properly filed a proceeding in Unlawful Entry and Detainer as provided for under Mississippi law. The Circuit Court concluded that the Citicorp was not required to participate in the estate proceeding and could proceed against the property subject to its lien in order to collect its lien. (R., 31-33). The Court further held that the filing of an estate proceeding by the Gandy heirs was insufficient to prevent a foreclosure on property subject to a lien. (R., 33). Citicorp respectfully submits that the decision of the Circuit Court was correct and should be affirmed.

C. WHETHER THE GUBERNATORIAL PROCLAMATION OF OCTOBER 2005 BARS APPELLEE FROM INEQUITABLE FORECLOSURE OF SAID PROPERTY.

Citicorp, certainly is aware of and recognizes the existence of the Mississippi Relief from Inequitable Mortgage Foreclosures, Execution Sales and the Like after Declared Emergency or Disaster Act as found in Mississippi Code Annotated, Section 89-1-301, et seq. Likewise, Citicorp recognizes and acknowledges the applicability of said Act in the wake of Hurricane Katrina. Notwithstanding, Citicorp would respectfully submit that the

Act has no bearing or applicability, whatsoever, upon a statutory, power of sale foreclosure, completed in its entirety, more than four months prior to Hurricane Katrina and nearly six months prior to the proclamation invoking the relief afforded by the Act.

### CONCLUSION

Following default, Citicorp properly initiated and completed a statutory, power of sale foreclosure in enforcing its lien rights against the property of Daisy Gandy, deceased. Subsequent to the foreclosure action, Citicorp as the record owner of the subject property filed a proper "possessory" action which is purely "legal" in nature. The Circuit Court of Wayne County ultimately determined that Citicorp was entitled to proceed with its foreclosure action in enforcing its lien rights without any obligation to participate in the estate proceeding and correctly awarded possession of the subject property to Citicorp.

Respectfully submitted this the 25<sup>th</sup> day of July, 2007.

CITICORP TRUST BANK, FSB



Bradley P. Jones

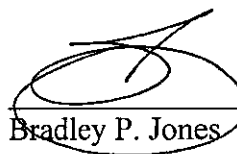
**CERTIFICATE OF SERVICE**

I, Bradley P. Jones, one of the attorneys for Citicorp Trust Bank, FSB, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing document to:

Honorable Lester F. Williamson, Jr.  
Wayne County Circuit Judge  
P.O. Box 86  
Meridian, MS 39304

Ms. Vanessa J. Jones  
Jones Law Firm  
P.O. Box 1554  
Hattiesburg, MS 39403

This the 25<sup>th</sup> day of July, 2007.



Bradley P. Jones