

Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES
Justice

PART 17

-----X
GIOVE COMPANY, INC,
Plaintiff,

Index No.: 26059/04
Motion Date: 2/20/08
Motion Cal. No.: 35

-against-

CITIBANK, N.A., FINEST ABSTRACT AND TITLE
SERVICES and UNITED GENERAL TITLE
INSURANCE COMPANY,
Defendants.

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The following papers numbered 1 to 12 read on this motion by defendant **CITIBANK, N.A.** (“Citibank”) for an order granting summary judgment in its favor pursuant to CPLR § 3212 and dismissing the claim for restitution of money damages in the supplemental amended complaint, as against Citibank.

	PAPERS NUMBERED
Notice of Motion-Statement-Affidavit-Exhibits.....	1-5
Memorandum of Law.....	6-7
Affirmation in Opposition-Exhibits.....	8-10
Reply Memorandum of Law.....	11-12

Upon the foregoing papers it is ordered that the motion by defendant Citibank for an order granting summary judgment in its favor pursuant to CPLR § 3212 and dismissing the claim for restitution of mortgage recording taxes paid in refinancing its mortgages, on the grounds that, *inter alia*, the action is barred by the voluntary payment doctrine, plaintiff Giove Company, Inc., (“GCI”) assumed an obligation to pay the taxes, and GCI cannot establish with competent evidence that Citibank caused it to pay the recording taxes is granted, for the following reasons:

The following facts are not in dispute: GCI borrowed \$495,000 from Citibank secured by a mortgage on commercial property located at 108-20 180th Street, Jamaica, New York (the “Property”). In April 1998, the Citibank Mortgage had a balance of \$290,165.60 and GCI refinanced the outstanding Citibank loan with Roosevelt Savings Bank. Roosevelt (1) paid the \$290,165.60 balance to Citibank; (2) took an assignment of the Citibank Mortgage; (3) issued

to GCI a new commercial mortgage loan in the sum of \$709,834.40 (the “Roosevelt Mortgage”); and (4) consolidated the Citibank Mortgage with the Roosevelt Mortgage to form a single lien in the amount of \$1,000,000, under a Consolidation & Modification Agreement. The First Consolidated Mortgage was duly recorded in the Register’s Office of Queens County. While the assignment of the Citibank mortgage allowed GCI to avoid paying mortgage recording taxes a second time on the outstanding balance, GCI had to pay the mortgage recording tax on the new money (\$709,834.40) that it borrowed from Roosevelt. Shortly after the assignment to Roosevelt, Allan L. Pullin, Esq., GCI’s attorney, sent a letter dated May 20, 1998 to Citibank, in which he indicated that the Citibank loan “was satisfied on or about May 7, 1998, (as well as the real property mortgage)[.]” After receiving the letter from GCI’s attorney, Citibank notified GCI, by letter to John Giove, the comptroller of GCI that it had received full payment of interest and principal and offered to prepare and file a Satisfaction provided that GCI paid Citibank a Mortgage Satisfaction fee, in the amount of \$100. The letter explained that “[t]his fee is used to offset the cost of preparing the Mortgage Satisfaction, which we deliver on your behalf to the County to be recorded.” Thereafter, GCI tendered a check to Citibank in the amount of \$100 to cover Citibank’s cost of preparing and filing the Satisfaction of Mortgage. The check was signed by William V. Giove, the owner of GCI and Citibank thereafter prepared the Satisfaction of Mortgage and sent it to the City Register for recording with a cashier’s check to cover the cost of the fee for filing a Satisfaction. Citibank also sent to GCI a letter dated March 2, 1999, with the original Satisfaction, by certified mail return receipt, which advised GCI that:

The Satisfaction of Mortgage has been forwarded to the Register of Queens County, and will be returned to you after recording. You should retain the recorded Satisfaction Mortgage as a record of discharge of your mortgage.

The Satisfaction itself directs that upon filing the recorded Satisfaction is to be returned to GCI and GCI received a copy of the recorded Satisfaction from the County Clerk. Subsequently, in or about June 2002, GCI negotiated with Roosevelt to have Roosevelt assign the First Consolidated Mortgage to John A. Loconsolo, Loconsolo Realty Corp., and Victoria Loconsolo Foundation, Inc. (collectively “Loconsolo”). Loconsolo is a private lender and friend of the principals of GCI. At the time, the unpaid principal balance of the First Consolidated Loan was \$804,127.54, which GCI and Loconsolo agreed would be assumed and consolidated with a new mortgage loan on the Property to form a single mortgage of

\$1,500,000. (the “Second Consolidated Loan”) In late January 2004, GCI began negotiating with North Fork Bank (“North Fork”) to do another refinancing and assignment of existing mortgages. After several months of negotiation, North Fork and GCI reached an agreement on the final terms for a mortgage loan.

In an 18-page letter agreement, dated May 21, 2004, North Fork agreed that it would issue a mortgage loan to GCI, in the amount of \$1,850,000, under the terms and conditions set forth therein. William V. Giove, Jr. executed the Commitment Letter on GCI’s behalf, thus, agreeing to its terms. Under the terms of the Commitment Letter, GCI agreed that North Fork, “in its sole discretion and in the discretion of its counsel, may accept an assignment of the mortgage [the Consolidated Mortgages] presently encumbering the Premises[.]” For North Fork to approve an assignment, however, CGI had to satisfy certain requirements, which were stated in the Commitment Letter:

The assignment of the existing mortgage shall be arranged by the Borrower or its counsel who shall provide Bank’s counsel at least two weeks prior to the closing with (I) a detailed payoff letter relating to such existing mortgage; and (ii) true and complete copies of the existing note; and (iii) a true and complete copy of the recorded mortgage(s); and (iv) a draft of an assignment of such mortgage. Upon approval of such assignment by the Bank and its counsel, the Borrower, or its counsel, shall arrange for delivery AT CLOSING of the (I) original note; and (ii) the original recorded mortgage; and (iii) three (3) original copies of the assignment, each in due form for recording; and (iv) any other documents reasonably required to consummate the assignment and terminate the existing lienholder’s interest in the Premises.

John Giove, testified that he reviewed this provision of the Commitment Letter with Roya Namvar, Esq., the attorney retained by GCI to handle this transaction. There is no evidence that any of these documents (e.g., detailed payoff letter, draft assignment of mortgages) were ever prepared, much less submitted to – and accepted by – North Fork. Indisputably, North Fork never agreed in writing to accept the assignment of mortgages from GCI.. When North Fork issued the Commitment Letter, Advantage Title Agency, Inc. (“Advantage Title”) issued a title report on the Property (the “Title Report”). The Title Report

cited the existence of the Satisfaction and stated that a court order “expunging said satisfaction is required” in order to remove it as an “exception ”:

9. By satisfaction dated March 2, 1999 and recorded March 4, 1999, in Reel 5137 Page 776, Citibank, N.A. purported to satisfy mortgage “A” herein, despite said mortgage having been previously consolidated with mortgage “B” herein. Said mortgages were subsequently consolidated with mortgages “C” and “D” herein. Proof is required that mortgages “A” – “D” herein, as consolidated to form a single lien in the amount of \$1,500,000.00, are valid first lien and proof is required that the satisfaction of mortgage in Reel 5137 Page 776 was erroneous. A court order expunging said satisfaction is required.” Emphasis added.

Ms. Namvar, acknowledged that she had reviewed the Title Report that was dated May 1, 2004. Although GCI and its counsel had the title report – listing the Satisfaction – four months prior to the closing, GCI’s counsel testified that she noticed the Satisfaction of Mortgage listed within the exceptions only approximately two weeks prior to the closing scheduled for August 9, 2004. The Title Report itself put GCI on notice that “a court order expunging” the Satisfaction was required. However, GCI and its counsel made no attempt to obtain a court order expunging the Satisfaction. Ms. Namvar testified that she believed GCI had two options: “One, to get this satisfaction cancelled, voided, set aside [which] would take time.” Although North Fork was willing to provide the time needed to expunge the Satisfaction, GCI chose not to postpone the closing, but instead went with the second option and closed on the refinancing, paid the mortgage tax, and then started the instant litigation against Citibank to get the money back that Giove Company had to pay with respect to the mortgage tax.

At the closing on the North Fork loan, GCI alleges that it was advised by Advantage Title that GCI would owe \$37,000. in mortgage recording tax. Then, several days later, Advantage Title allegedly advised that an additional \$13,875. was due in mortgage recording taxes. GCI alleges in its complaint that it paid \$50,875. in mortgage recording taxes at the closing, representing recording taxes on all existing mortgages, not just the satisfied Citibank Mortgage. At the time that the Satisfaction for the Citibank Mortgage was filed, the outstanding amount of the Citibank loan was approximately \$295,000. The New York City mortgage recording tax is

assessed at the rate of 2% of the loan amount. The maximum amount of the mortgage recording tax attributable to the satisfied Citibank loan, therefore, was approximately \$5, 900.

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See, Barr v. County of Albany*, 50 NY2d 247 (1980); *Miceli v. Purex*, 84 AD2d 562 (2d Dept. 1981); *Bronson v March*, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in *Daliendo v Johnson*, 147 AD2d 312,317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

It is well-settled that a voluntary payment made with full knowledge of the facts, absent fraud or mistake of fact or law, cannot be recovered. *See Gimbel Bros. v. Brook Shopping Ctrs.*, 118 A.D.2d 532 (2d Dept. 1986) (no mistake of fact or mistake of law bars recovery of payment made voluntarily); *See also, Dillon v. U-A Columbia Cablevision of Westchester, Inc.*, 100 N.Y.2d 525 (2003.) (According to the complaint, plaintiff knew she would be charged a \$ 5 late fee if she did not make timely payment to her cable television company. Plaintiff paid the fee and any alleged mischaracterization of the \$ 5 late fee as an administrative fee did not overcome application of the voluntary payment doctrine.) Here, by tendering its check to Citibank for \$100. to cover the cost of preparing and filing the Satisfaction, GCI clearly consented to, and ratified, Citibank's acts. Accordingly, its instant attempt to avoid the consequences of its payment is barred by the voluntary payment doctrine. *Id.*

Plaintiff's claim that this doctrine does not apply since the instant case claims Citibank was negligent in filing the mortgage satisfaction is misplaced. First, the complaint fails to set forth a claim that negligence by Citibank caused the filing of the satisfaction. Second, plaintiff has failed to offer any evidence that shows Citibank was negligent. Third, plaintiff has failed to offer any case law that the voluntary payment doctrine does not apply to payments made as a result of negligence. Fourth, even if negligence barred the application of this doctrine, plaintiff had full knowledge of Citibank's filing the satisfaction of mortgage and by waiting over seven years to undo this action, plaintiff clearly assumed the risk of owing mortgage recording taxes. Moreover, plaintiff again assumed the risk of having to pay mortgage recording taxes when it chose to close upon the North Fork refinance loan without having expunged the satisfaction of

mortgage. *See, Culver & Theisen, Inc. v. Starr Realty Co. (NE) LLC*, 307 A.D.2d 910 (2d Dept 2003.) *See, Jobco-Mitchel Fields Inc. v. Lazarus*, 156 A.D.2d 426, 428 548 N.Y.S.2d 700, 702 (2d Dep't 1989) *See also, Arbegast v Board of Education*, 65 NY2d 161 (1985.) has failed to set forth.

GCI's opposition also fails to offer any proof that the Satisfaction, in fact, directly caused GCI to pay more in recording taxes than it would have otherwise. GCI had no contractual right to force North Fork to take an assignment in order to minimize GCI's tax liability. Moreover, under the circumstances, even if there was no Satisfaction, GCI does not offer any proof that it, or anyone else on its behalf, took any of the necessary steps to gain North Fork's acceptance of the assignment. North Fork's commitment letter clearly states that approval of an assignment could not be obtained. Thus, the Satisfaction made no difference in the absence of any proof that GCI did what was otherwise necessary to secure approval by North Fork for an assignment. *See 767 Third Ave. LLC v. Orix Capital Mkts. LLC*, 26 A.D.3d 216, 812 N.Y.S.2d 8 (1st Dep't 2006) (no statutory right exists to an assignment of mortgage.)

Furthermore, there is no proof that the Satisfaction caused GCI to pay more in recording taxes than it would have otherwise. Absent evidence that demonstrates GCI had a right to pay a reduced tax, GCI cannot show that the Satisfaction caused its injury. Finally, mortgage recording taxes are typically calculated based upon the new amount or money being loaned upon refinancing and there is no support for GCI's allegations that its tax liability would have been zero. *See 767 Third Ave., supra*, 26 A.D.2d at 217.

Based upon the above, defendant Citibank's motion for an order granting summary judgment in its favor and dismissing Plaintiff's claim for restitution of money damages contained in the second count in the supplemental amended complaint, is granted.

Dated: February 27, 2008

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ORIN R. KITZES, J.S.C.