

<b>Board of Mgrs. of Cent. Park Place Condominium v Potoschnig</b>
2010 NY Slip Op 34034(U)
July 27, 2010
Supreme Court, New York County
Docket Number: 118205/09
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X  
THE BOARD OF MANAGERS OF CENTRAL  
PARK PLACE CONDOMINIUM,

Plaintiff,

-against-

HUBERT POTOSCHNIG a/k/a HUBERT W.  
POTOSCHNIG, AMERICAN EXPRESS  
CENTURION B, JOANNA BEHAR, "JOHN  
DOE" and "JANE DOE," the true names of said  
defendants being unknown to plaintiff, the parties  
intended to be any persons having or claiming  
an interest in the premises described in the  
complaint by virtue of being lienors, creditors,  
tenants or occupants in all or part of said  
premises,

Defendants.

-----X

**Decision/Order**

Index No.: 118205/09  
Seq. No. : 001

**Present:**

Hon. Judith J. Gische  
J.S.C.

**FILED**  
AUG 03 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this  
(these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Pltf's motion [§6401(a)] w/ AMF affirm, exhs. ....	1

*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an action brought by plaintiff, The Board of Managers of Central Park  
Place Condominium (the "Condo") against defendant, Hubert Potoschnig  
("Potoschnig"), for appointment of a temporary receiver during the pendency of a  
foreclosure action. The other named defendants have a claim, lien, or interest in the  
property sought to be foreclosed.

This action was commenced with the filing of the summons and complaint on December 9, 2009. Although there is due proof of service of the underlying summons and verified complaint, as well as the instant motion, defendants have not opposed this motion or otherwise appeared in this action within the time provided for in the CPLR. Defendants' time to do so has not been extended by the court. Plaintiff has also filed proof of additional service in compliance with CPLR § 3215 [g]. Therefore, defendants have defaulted in this action and the motion will be considered without opposition.

### **Discussion**

A default in answering the complaint constitutes an admission of factual allegations therein, and the reasonable inferences which may be made therefrom. Rokina Optical Co. Inc. v. Camera King, Inc., 63 N.Y.2d 728 (1984). The following facts have been established by the plaintiff in the complaint and through the sworn affirmation of Allison M. Furman, attorney for plaintiff:

Potoschnig is the owner of Unit 49D, located at 301 West 57<sup>th</sup> Street (the "Unit"). Plaintiff states that on August 28, 2008, Potoschnig leased the Unit to Joanna Behar ("Behar") for monthly rent in the amount of \$3,300. Plaintiff alleges that Potoschnig has failed to pay common charges, electric charges, and late fees totaling \$9,028.55. Plaintiff filed a "lien of common charges" against Potoschnig's property on June 15, 2009.

Plaintiff states that Potoschnig took out three mortgages on the Unit, with three different mortgagees, to wit: New Century Mortgage Corporation on August 1, 2005 for

\$620,000.00; Joseph Raia ("Raia") on December 9, 2005 for \$160,000.00; and George Galleti on April 3, 2009 for \$250,000.00. Plaintiff states that on September 29, 2009, Raia commenced an action in New York County to foreclose on his mortgage (Index. No. 113006/09). Plaintiff now seeks to protect its lien for common charges by having the court appoint a receiver to collect the rent from Behar so they can be used to make necessary disbursements in connection with the maintenance of the Unit, including common charges, meter charges, and payment of taxes as they become due.

### Discussion

CPLR § 6401 (a) states, as follows:

Upon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed, before or after service of the summons and at any time prior to judgment, or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, materially injured or destroyed. . . .

Primarily, temporary receivers serve to avoid the dissipation of assets and conserve property. See Chaline Estates Inc. v. Furcraft Associates, 278 AD2d 141 (1<sup>st</sup> dept. 2001). There must be clear and convincing evidence of the danger of irreparable loss or damage. McBrien v. Murphy, 156 A.D.2d 140 (1st Dept. 1989). The appointment of a temporary receiver is an extreme remedy resulting in the taking and withholding of possession of property and is to be granted only where the applicant makes a clear evidentiary showing of necessity and there is clear proof of danger of irreparable loss or damage. See In Re Armienti, 309 A.D.2d 659 (1st Dept. 2003);

Schachner v. Sikowitz, 94 A.D.2d 709 (2d Dept. 1983); Groh v. Halloran, 86 A.D.2d 30 (1st Dept. 1982). Appointment of a receiver may be denied where the property is sufficient security for the debt and the property is not in danger. Eastbank N.A. v. Malneut Realty Corp., 180 A.D.2d 442 (1st Dept. 1992).

The condominium law, RPL § 339-z, provides that a condominium board's lien for unpaid common charges has priority over any other lien except a first mortgage. Bankers Trust Co. v. Board of Managers of the Park 900 Condominium, 181 A.D.2d, 274 (1st Dept. 1992). However, a condominium board's lien is prior to a second mortgage, even if the condominium's lien was recorded subsequent to the recording of the second mortgage; as it was in this case. Societe Generale v. Charles & Co. Acquisition, Inc., 157 Misc.2d 643 (N.Y. Sup. 1993); RPL § 339-aa. The Condominium Law puts all potential mortgagees on notice that a condominium's lien for unpaid common charges would have priority over all liens other than first mortgages. RPL §§ 339-z and 648 339-aa.

Although plaintiff's lien is senior to the second mortgagee, plaintiff has not established that appointing a temporary receiver under CPLR § 6401 (a) is the appropriate remedy. The Unit is sufficient security for the Board's lien and there is no claim made that the apartment will deteriorate. The apartment is currently being leased for \$3,300.00 a month and plaintiff does not make a clear evidentiary showing that there is danger of irreparable loss or damage.

**Conclusion**

In accordance with the foregoing,

*It is hereby*

**ORDERED** that plaintiff's motion for entry of a default judgment against defendants, appointing a temporary receiver, is denied; and it is further

**ORDERED** that any relief requested but not addressed is hereby expressly denied; and it is further

**ORDERED** that this shall constitute the decision and order of the court.

Dated: New York, New York  
July 27, 2010

So Ordered:

  
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HON. JUDITH J. GISCHE, J.S.C.

**FILED**  
AUG 03 2010  
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