

**The Board of Mgrs.of Cent. Park Place  
Condominium v Potoschnig**

2012 NY Slip Op 32314(U)

September 4, 2012

Sup Ct, New York County

Docket Number: 118205/09

Judge: Judith J. Gische

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE  
*Justice*

PART 10

Index Number : 118205/2009  
BOARD OF MANAGERS  
vs.  
POTOSCHNIG, HUBERT  
SEQUENCE NUMBER : 003  
DEFAULT JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 003

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits -- Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

## FILED

SEP 06 2012

MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.  
NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

*Conference 10/18/2012 Pt 10  
60 C Em 232 @ 9:30 am  
also Rara Case (113006-09) Sunday*

Dated: 9/4/12

[Signature], J.S.C.  
HON. JUDITH J. GISCHE

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

-----X  
The Board of Managers of Central Park  
Place Condominium,

Plaintiff (s),

**-against-**

Hubert Potoschnig a/k/a Hubert W.  
Potoschnig, American Express Centurion B,  
Joanna Behar, et al.

Defendant (s).

DECISION/ORDER  
Index No.: 118205/09  
Seq. No.: 003

PRESENT:  
Hon. Judith J. Gische  
J.S.C.

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

<b>Papers</b>	<b>FILED</b>	<b>Numbered</b>
Pltff's n/m (3215, 3212) w/MIB affirm, EB affid, exhs	.....	1,2
HP Amended x/m w/HP affid, exhs	.....	3
Pltff's reply w/ MIB, EB affid, exhs	.....	4
HP reply w/HP affid	.....	5

SEP 06 2012

NEW YORK  
COUNTY CLERK'S OFFICE

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

**GISCHE J.:**

This is an action to foreclose upon a lien for unpaid condominium common charges claimed to be presently in excess of \$78,000. The Board of Managers of Central Park Place Condominium ("plaintiff") now moves for entry of a default judgment against Hubert Potoschnig ("Potoschnig") or, alternatively, summary judgment on its complaint. Potoschnig, who is self represented, has cross moved to vacate his default and other relief.

**Facts and Arguments**

This action was commenced with the filing of the summons and verified complaint on December 29, 2009. The defendants were served at the subject condominium unit,

301, West 57<sup>th</sup> Street, Apt. 49D, New York, New York 10019 ("apartment"). American Express Centurion Bank was nominally named. The other defendant, Joanna Behar, is Potoschnig's former tenant.

The affidavit of service plaintiff has filed shows that three (3) attempts were made to personally serve Behar and Potoschnig at the apartment. The attempts were made on different days and at different times. Unsuccessful at personal service, the process server affixed the summons and complaint to the apartment door on January 13, 2010 and completed service by mailing a copy of the summons and complaint to each defendant at the apartment on January 13, 2010. Neither defendant answered the complaint within the time allowed by the CPLR which would have been 30 days thereafter.

A prior motion (sequence no. 1) by plaintiff for the appointment of a receiver to collect rent from Potoschnig's tenant was denied for reasons set forth in the court's decision and order dated July 27, 2010. The decision was made on default although, once again, there was due proof the motion and summons and complaint were served (CPLR 3215[g]). There is no proof, however, that the decision/order denying that motion was served on the defendants, nor does the affirmation by counsel contain any such representation.

In December 2011, plaintiff hired a new attorney. Following substitution of counsel, the plaintiff moved (January 24, 2012) for summary judgment and for the appointment of a referee to compute the amounts plaintiff is due. That motion (sequence no. 2) was served on the defendants at the apartment. In response to the motion, Potoschnig filed an answer (February 22, 2012) asserting defenses. Among the

affirmative defenses asserted by him are: improper service, failure to name necessary parties holding other mortgages on the property and failure to comply with the notice requirements of RPAPL 1320. Potoschnig also challenged plaintiff's computation of arrears on the basis that, *inter alia*, payments he made were not credited. That motion was scheduled for argument and Potoschnig appeared in court. The minutes of the argument were transcribed (Steno 4/19/12).

At oral argument, Potoschnig again raised the issue of improper service and whether the late fees plaintiff is charging him are usurious. Potoschnig claims his actual residence is in Connecticut, plaintiff knows this because that is where rent bills are sent by its property manager, and that despite having this information readily available, plaintiff persisted in trying to serve him personally at the apartment, perhaps anticipating that he would not receive the papers. Following oral argument, plaintiff's prior motion for summary judgment was denied on the basis that issue had not been joined when the motion was brought. The denial was without prejudice (Steno 4/19/12 and Order, Gische J., 4/19/12). The motion presently before the court seeks the same relief that was previously denied without prejudice and Potoschnig's cross motion articulates in writing the arguments he raised orally at that time.

**Discussion**

The first issue is whether the late answer should be accepted. If it is rejected, as plaintiff urges, plaintiff's motion would only be considered to the extent it seeks entry of a default judgment since summary judgment is not available unless and until issue is joined (CPLR § 3211 [a]; Schmidt v. Solow Management Corp., 111 A.D.2d 619 [1<sup>st</sup> Dept., 1985]). This would require that Potoschnig set forth an excusable default and

meritorious defense (CPLR 5015), unless he can show that he was improperly served. Improper service would render this case a nullity, however, because the court would not have personal jurisdiction over him (see Tremont Federal Sav. and Loan Ass'n v. Ndanusa, 144 A.D.2d 660 [2<sup>nd</sup> Dept., 1988] app. dismissed 73 NY2d 918 [1989]). On the other hand, a motion for entry of a default judgment must be brought by the plaintiff within one (1) year of the default in answering (CPLR 3215 [c]). The deadline for the motion would have been one year and one month after service on Potoschnig was completed.

An affidavit of service by a process server which specifies the papers served, the person whom was served, and the date, time, address and sets forth facts showing that service was made by an authorized person, and in an authorized manner, constitutes prima facie evidence of proper service (Maldonado v. County of Suffolk, 229 A.D.2d 376 [2<sup>nd</sup> Dept. 1996]). A mere denial of receipt of papers that were properly served is insufficient to rebut the presumption of proper service (Fish & Richardson, P.C. v. Schindler, 75 A.D.3d 219 [1<sup>st</sup> Dept. 2010]). Plaintiff has proved that Potoschnig was served at that last known address it had for him within the state. Even if Akam mailed his rent bills to another address, there is no indication that the plaintiff had this information readily available to it or that it was deliberately ignored. A person may have more than one residence and there is no statement by Potoschnig that he notified the plaintiff that his Connecticut address was to be used for service of process. It is Potoschnig's obligation to notify the U.S. Postal Service of a new address by filing a change of address. Potoschnig's related argument, that the board had a duty to exercise "due diligence" in finding out where he lives is misplaced.

The email Potoschnig provides dated March 8, 2010 demonstrates he knew about

this case shortly after it was served. In that email, from plaintiff's prior lawyer to Potoschnig, the attorney advises defendant that "I am advised the board accepts your proposal. I will draft a Stipulation of Settlement and send it for your review." There is further, later correspondence that well into July 2011 Potoschnig and plaintiff's former counsel were engaged in negotiations about the arrears. Thus, Potoschnig has not shown he was improperly served with the summons and complaint, or that he did not know about this action. To the contrary, he knew about the action, but did not answer or appear until after plaintiff's new counsel brought the first motion for summary judgment.

Although that answer was served late and plaintiff urges the court to declare it a nullity, the court assumes that Potoschnig's negotiations with prior counsel may have given defendant the mis-impression that he could deal with the claims against him informally. It is this state's public policy that disputes be determined on their merits rather than on default (CPLR 3012 [d]; Guzetti v. City of New York, 32 AD3d 234 [1<sup>st</sup> Dept 2006]). Furthermore, this particular action involves a residential premises (more on this point later). For this reason, the court denies plaintiff's motion for entry of a default judgment on the merits and also because it was not timely brought, within one year of Potoschnig's default in answering the complaint. Consequently, Potoschnig's cross motion for the default against him to be vacated and for acceptance of the answer, despite its lateness, is granted. The court will now consider whether plaintiff is entitled to summary judgment.

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (Winegrad v. New York Univ. Med.

Ctr., 64 NY2d 851, 853 [1985]). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (Dauman Displays, Inc. v Masturzo, 168 AD2d 204, 205 [1<sup>st</sup> Dept 1990] lv dismissed 77 NY2d 939 [1991]); Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223, 231 [1978]).

Plaintiff claims Potoschnig owes \$78,056 in unpaid common and other charges. Aside from his defense of improper service, raises several other defenses. One defense is that the Notice of Lien for Unpaid Common Charges filed by plaintiff is defective because it is unverified. Another defense is that plaintiff failed to comply with the notice requirements of RPL §§1303 and 1320 which pertain to residential premises. The third defense is that there are mortgage holders who should have been, but were not, named defendants in this action because they have a secured interest in the property. A final defense is that plaintiff's late and other fees are miscalculated, if not usurious.

RPL § 339-z sets forth the filing requirements for a unpaid common charges lien. One requirement is that the lien be "verified" by the Board of Managers, on behalf of the unit owners. The lien filed by plaintiff is admittedly acknowledged, not verified. However, examining what is required by the statute, the court finds that all the necessary information is provided in the body of the lien.

Although there is legal authority that a Mechanic's Lien is defective if it only has a corporate acknowledgment, and is not verified, mechanic's liens afford a different kind of notice. Lien Law § 17's requirement for the verification is much stricter than what RPL § 339-aa requires. In a mechanic's lien, the person making the verification must attest to

the truthfulness of the statement in the lien (In re James Passero & Sons, 237 AD2d 638 [4<sup>th</sup> Dept 1933]). There is no such requirement in RPL § 339-aa. Furthermore, by statute (RPL § 339-z) a condominium board has a lien on any unpaid common charges. Thus, the filing of the Notice of Lien is notice that the unit owner has unpaid common charges and the amount.

Potoschnig cites the case of Board of Directors of Hunt Club at Coram Homeowners Assn., Inc. v Hebb, 72 A.D.3d 997 [2<sup>nd</sup> Dept 2010]. That case deals with verification of liens where the lienor is a home owner's association and, therefore, the holding of that case is inapplicable to the case at bar because here the subject of the lien is real property whereas Board of Directors of Hunt Club at Coram Homeowners Assn., Inc. v Hebb involved unpaid assessments by a shareholder. Plaintiff has, therefore, proved that its lien is properly filed and, therefore, effective.

Plaintiff has proved that Potoschnig is in arrears of his common and other charges. Potoschnig makes no claim that he is not in arrears, but challenges plaintiff's calculations. He denies owing more than \$78,000. Plaintiff has prepared a schedule of the arrears. Not considering late charges, interest and legal fees, plaintiff has shown that Potoschnig has \$29,883.05 in unpaid common charges from August 2008 to July 2012, \$3,276.42 in unpaid electric charges (same period), and that he did not pay total capital assessments of \$1,355.16 (August 2008, \$608.21; September 2011, \$677.58; October 2011, \$677.58). Potoschnig made a payment of \$677.58 which the bank shows he was credited for. This leaves at least \$33,837.05 as unpaid, due and owing by Potoschnig for the period August 2008 - July 2012. Potoschnig raises no defense that he paid these common and other charges. Since there are no issues of fact, plaintiff is

entitled to summary judgment on the amount that is owned and undisputed.

Plaintiff, however, seeks a judgment of foreclosure that includes legal fees of \$27,403.80, late fees and interest. RPL §§ 339-z and 339-aa place limitations on a condominium's lien and its right to foreclose on such lien, to unpaid common charges and interest, a condominium does not have a right to foreclose based on a claim for attorney's fees (Board of Managers of Dickerson Pond Condominium I v. Jagwani, 276 A.D.2d 517 [2<sup>nd</sup> Dept 2000]). It is also unclear how the late fees/interest charges are calculated and whether they are collectable.

Plaintiff brushes aside Potoschnig's claim, that RPL §§ 1303 and 1320 were not complied with by stating that these sections of the law do not apply because the apartment is investment, not residential, property. Although Potoschnig does not live at the property, the nature of the property is not self-evident from that fact alone. Apparently Potoschnig bought the apartment in 2005 and rented it out in 2008. Therefore, Potoschnig has raised issues of fact whether these sections of the law apply and, if so, whether plaintiff complied with them.

Also brushed aside is Potoschnig's defense that there are necessary parties who were not named in this action but should have been because of their interest as mortgage holders. By law, the board of managers of a condominium has a lien on each unit for unpaid common charges, that lien has priority over all other liens, except for all sums unpaid on a first mortgage (Bankers Trust Co. v. Board of Managers of Park 900 Condominium, 81 NY2d 1033 [1993]). This issue came up tangentially when plaintiff moved for the appointment of a receiver (Order, Glische J., 7/27/10), but remains unresolved. The court has learned there is a pending foreclosure action against this

same apartment by the holder of a 2<sup>nd</sup> mortgage (Raja v. Potoschnig, Sup Ct., N.Y. Co. Index No. 113006-09). In the Raja action, reference is made in the complaint to a first mortgage held by New Century Mortgage. The Hon. Paul Wooten has now been referred to this court as a related action.

As the moving party, plaintiff has the burden of showing there are no unresolved material issues of fact by tendering evidence in admissible form (Winegrad v. New York Univ. Med. Ctr., supra). Where there is any doubt as to the existence of a material issue of fact, the motion for summary judgment must be denied (Dauman Displays, Inc. v Masturzo, supra; Rotuba Extruders, Inc. v Ceppos, supra). Although plaintiff has proved this action was properly commenced against Potoschnig, and that there are arrears of at least \$33,837.05 in common charges and other arrears, there are triable issues whether the plaintiff had to comply with notice under RPL §§ 1303 and 1320. There is also a triable issue whether plaintiff was required, but failed, to name other lenders as defendants in this action. These defenses, if proved, will impact plaintiff's right to foreclose on the unit. Therefore, plaintiff's motion for summary judgment is granted only to the limited extent provided, otherwise it is denied.

No preliminary conference has ever been held in this case. The court schedules a preliminary conference for **OCTOBER 18, 2012** at 9:30 a.m. in Part 10, 60 Centre Street, Room 232. The Raja case is also scheduled for conference that day as well. Plaintiff shall serve a copy of this decision on the attorneys in the Raja action: JEFFREY I. BAUM & ASSOCIATES, 666 OLD COUNTRY ROAD, GARDEN CITY 11530-2016; GEORGE CHRISTOPOULOS P.C., 949 COUNTY ROUTE 53 OSWEGO NY 13126; DORF & NELSON, LLP, 555 THEODORE FREMD AVE BLA300, RYE, NY 10580. Plaintiff shall

file proof of service with the clerk in the part on OCTOBER 13, 2012.

### Conclusion

Plaintiff's motion for entry of a default judgment is denied. Potoschnig's cross motion to vacate his default is granted and the late answer is accepted. Issue having been joined, the court has addressed the merits of plaintiff's motion for summary judgment. The motion is granted only to the limited extent stated above, otherwise it is denied. A preliminary is scheduled for **OCTOBER 18, 2012** at 9:30 a.m. in Part 10, 60 Centre Street, Room 232. The case of Raia v. Potoschnig, Sup Ct., N.Y. Co. Index No. 113006-09 is also scheduled for a conference that day. Plaintiff to serve the attorneys identified and file proof of same on the date of the appearance.

In accordance with the foregoing,

It is hereby

**ORDERED** that any relief not specifically addressed is hereby denied; and it is further

**ORDERED** that this constitutes the decision and order of the court.

Dated: New York, New York  
September 4, 2012

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**FILED**

**SEP 06 2012**

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