

**Potocnik v Citibank, N.A.**

2006 NY Slip Op 30663(U)

April 19, 2006

Sup Ct, NY County

Docket Number: 106409/05

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

GERDA POTOCHNIK,  
Plaintiff,

Index No.: 106409/05

- v -

Motion Date: 11/30/05

CITIBANK, N.A., TRACY TENANTS CORPORATION,  
and MIRIAM WEISBECKER,  
Defendants.

Motion Seq. No.: 01

Motion Cal. No.: \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion to consolidate.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED

1

2 - 4

**FILED**

APR 25 2006

Cross-Motion:  Yes  No

NEW YORK  
COUNTY CLERK'S OFFICE

Upon the foregoing papers,

The court shall GRANT plaintiff's motion to remove the summary proceeding from the Civil Court of the City of New York and to consolidate such proceeding with the action at bar.

Plaintiff seeks by Order to Show Cause to stay an eviction proceeding pending in the Housing Part of Civil Court, New York County under Index No.: 65297/2005, and consolidate that proceeding with the herein plenary action. The court granted a temporary restraining order staying that proceeding pending resolution of this motion and has adjourned this motion to allow the parties to engage in settlement discussions. As those

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

[\* 2]  
discussions having not borne fruit, the court shall proceed to decide this motion.

For twelve years, plaintiff was the rent-stabilized tenant of the apartment that is the subject of this action. In 1987, plaintiff became the owner of the cooperative apartment, following her purchase of shares allocated to that apartment in a conversion. Defendants allege that plaintiff defaulted on her maintenance payments to the corporation and loan payments to the bank. Eventually, the plaintiff's shares and lease were sold at auction to defendant Miriam Weisbecker and the sale was closed on January 28, 2005. Purchaser Weisbecker then initiated the ~~aforementioned residential holdover proceeding in Civil Court.~~

Plaintiff argues that she never received notice from the defendants of the foreclosure or of any sale of her apartment. She states that due to such lack of notice, coupled with her responsibilities as caretaker of an invalid parent and her own numerous health problems that among other issues affected plaintiff's vision, she has been deprived of the opportunity to challenge the sale. Plaintiff commenced this action to void the sale on the grounds of lack of notice and that the sale was not commercially reasonable. She now moves to stay the Civil Court summary proceeding, and to remove and consolidate it with the herein action.

"Only where Civil Court is without authority to grant the relief sought should the prosecution of a summary proceeding be stayed." Scheff v 230 East 73<sup>rd</sup> Owners Corp., 203 AD2d 151, 152 (1<sup>st</sup> Dept 1994). The question of whether plaintiff received notice of the foreclosure cannot be summarily resolved against the tenant in the holdover proceeding, brought by the new purchaser against her. Zuk v Low, 2002 NY Slip Op 50022(U), 2002 WL 126256 (App Term, 1<sup>st</sup> Dept 2002). Nor does the Civil Court have authority to resolve the question of whether the cooperative corporation has the right to divest plaintiff of her ownership in the apartment without any judicial determination of equitable defenses and counterclaims. See McMillan v Park Towers Owners Corporation, 225 AD2d 742 (2d Dept 1996). On that basis, the issuance of a stay of the Civil Court proceeding was warranted.

Furthermore, the Civil Court action ought to be removed and consolidated with the instant action, as both cases share common questions of law and fact. Morrell & Company v Richalan Realty Corp. (93 AD 2d 736, 737 [1<sup>st</sup> Dept 1983]) is illustrative. There, plaintiff tenant commenced a plenary action for a declaratory judgment and specific performance, asserting that it had properly exercised a right of first refusal to purchase the building under a lease. In reversing the trial court's denial of a motion to consolidate that action with a summary holdover proceeding, the appellate court reasoned that an ultimate finding

\* 4]

in the plenary action that tenant was entitled to purchase the building would render the eviction proceeding academic. Id. So too, here, the question whether plaintiff has been divested of her shares upon proper notice would resolve defendant Weisbecker's proceeding for possession. In addition, as stated above, the declaration of the parties' rights under the proprietary lease pursuant to the Uniform Commercial Code article 9 is only available in Supreme Court. "Therefore, removal and consolidation will permit the resolution of all issues in one forum." See Morrell, supra, at 737.

In that regard, the facts before this court are ~~distinguishable from those in 44-46 West 65th Apartment Corp. v Stvan~~ (3 AD3d 440, 441-442 [1<sup>st</sup> Dept 2004]). In Stvan, landlord's plenary action for breach of contract and fraud against the tenants was totally distinct from the landlord's holdover proceeding for possession against those tenants, which he subsequently brought in the Civil Court, the "proper forum for resolving landlord-tenant issues."

Finally, the mere fact that holdover proceeding will be delayed by the consolidation is not sufficient to bar such relief. Amtorg Trading Corp. v Broadway & 56<sup>th</sup> Street Assocs., 191 AD2d 212 (1st Dept 1993).

Accordingly, it is

ORDERED that the motion is GRANTED and the above-captioned action is consolidated in this Court with the summary proceeding entitled Weisbecker v Potocnik, (Civ Ct, NY County, Index No.: 65297/2005) under New York County Index No.: 106409/2005, and shall bear the caption

GERDA POTOCHNIK,  
Plaintiff,

- v -

Index No.: 106409.2004

CITIBANK, N.A.; TRACY TENANTS  
CORPORATION and MIRIAM WEISBECKER,  
Defendants.

and it is further

ORDERED that the Clerk of the Civil Court of the City of New York, New York County, shall transfer the papers on file under Index No.: 65297/2005, to the Clerk of Supreme Court, New York County, upon service of a certified copy of this order and payment of the appropriate fee, if any; and it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action for and against the respective parties; and it is further

ORDERED that upon service on the Clerk of this Court of a copy of this order with notice of entry, the Clerk shall consolidate the papers in the actions hereby consolidated and shall mark the records to reflect the consolidation; and it is further

ORDERED that a copy of this order with notice of entry shall also be served upon the Clerk of the Trial Support Office (Room 158, 60 Centre Street), who is hereby directed to mark the court's records to reflect the consolidation.

ORDERED that the parties are directed to attend a preliminary conference on June 6, 2006, at 9:30 A.M., at the Courthouse, IAS Part 59, Room 1254, 111 Centre Street, New York, New York.

This is the decision and order of the court.

**Dated:** April 19, 2006

ENTER:

~~Debra A. James~~  
DEBRA A. JAMES  
J.S.C.  
J.S.C.

**FILED**  
APR 25 2006  
NEW YORK  
COUNTY CLERK'S OFFICE