2020-02-07

Bronx Park Phase II Preserv. LLC v. Sakanoko

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART K

BRONX PARK PHASE II PRESERVATION LLC L&T Index No.: 040737/2018

Petitioner,

DECISION/ORDER

-against-

BABA SAKANOKO

Respondents,

Address: 2000 Valentine Avenue
Apt 204
Bronx, New York 10457

Recitation, as required by CPLR § 2219 (a), of the papers considered in review of Respondent's Motion.

PAPERS	NUMBERED
Respondent's Notice of Motion; Attorney Affirmation; Affidavit in Support; Memorandum of Law; & Exhibits ("A" – "H")	1, 2, 3, 4, 5
Petitioner's Affirmation in Opposition & Exhibits ("1" - "5")	6, 7
Respondent's Memorandum of Law in Reply Affirmation & Exhibit "A"	7, 8

Upon the foregoing cited papers, the Decision and Order on Respondent's Motion is as follows:

BACKGROUND

Bronx Park Phase II Preservation LLC ("Petitioner") commenced the within summary holdover proceeding against Baba Sakanoko ("Respondent") seeking possession of 1971 Webster Avenue, Apartment 7E, Bronx, New York 10457 ("the subject premises") on the ground that the Respondent violated a substantial obligation of his tenancy. Specifically, Petitioner asserts that Respondent's lease included a conditional limitation which provided for its early termination where the Respondent failed to maintain his Section 8 benefits through the CVR New York Westchester HCV Program. The predicate notices and the facts contained therein

assert that the Respondent triggered this conditional limitation when he was terminated from the Section 8 Program. Petitioner further asserts that it had a business and/or economic reason constituting good cause to terminate Respondent's tenancy in that his failure to maintain the Section 8 benefits resulted in a loss of rental income for the Petitioner.

Respondent, represented by counsel, moves to dismiss the instant proceeding pursuant to CPLR § 3211 (a)(1) and (a)(7) as well as pursuant to CPLR § 3212. Respondent asserts that this proceeding should be dismissed as the grounds of this holdover proceeding have been cured. For the reasons cited below, Respondent's motion is DENIED.

THE LAW AND ITS APPLICATION

Respondent's Section 8 benefits from the CVR New York Westchester HCV Program (hereinafter "CVR") were terminated on November 30, 2017. The termination was based upon the Respondent's purported violation of his familial obligations under HUD Regulations 24 CFR 982.551. In at least one notice to the Respondent, CVR asserted that the Respondent "failed to provide truthful and complete information/documentation required to complete an annual/interim recertification as requested on 9/7/17, 9/19/17, & 10/4/17".[1] It is undisputed that Respondent's lease included a conditional limitation which provided for its early termination where the Respondent failed to maintain his Section 8 benefits through CVR. It is this conditional limitation which forms one of at least two discernable claims upon which the Petitioner has predicated this holdover proceeding. It is further undisputed that Respondent's Section 8 subsidy was thereafter reinstated during the pendency of this holdover proceeding. Although the restoration was effective February 1, 2019, it did not include any retroactive payments to the Petitioner for the time period that the Respondent was terminated from the program: a period of approximately fourteen (14) months.[2]

Respondent now asserts in his moving papers that the eviction remedy herein sought by the Petitioner does not lie since Respondent's Section 8 subsidy was restored. Petitioner stands in opposition. It asserts that the Respondent has not cured all claims alleged in the predicate notices. Petitioner avers that it had an additional basis for terminating Respondent's tenancy. That basis, pursuant to 24 CFR 982.310 (d)(1)(iv), allows a landlord to terminate a tenancy for good cause where there is "a business or economic reason for termination of the tenancy." The business or economic reason is explained in the predicate notices as a loss of rental income from the Section 8 subsidy: an amount which is said to be $27,437.

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[1] Petitioner's Exhibit "5"

[2] Respondent's Exhibit "B" and "C"

Respondent replies to this claim by stating that it cannot be mandated to pay the Section 8 portion of the rent.

The issue which now concerns this Court is whether the Petitioner has a cause of action pursuant to 24 CFR 982.310 (d)(1)(iv) for the lost rental income from the Section 8 subsidy during the time period for which the Respondent was terminated from the Section 8 program. Especially, where, as here, the Respondent's Section 8 subsidy was reinstated during the pendency of this proceeding. This Court is of the opinion that Petitioner still has a viable claim.

It is well-established precedent that a "Section 8 tenant agrees in the Section 8 lease only to pay the tenant share of the rent. Absent a showing by [a] landlord of a new agreement ... a Section 8 tenant does not become liable for the Section 8 share of the rent as 'rent' even after termination of the subsidy." (Vincenzi v Strong, 16 Misc 3d 1121 [A] [Civ Ct, Bronx County 2007, Madhavan, J.], quoting *Prospect Place HDFC v Gaildon*, 6 Misc 3d 135 [A] [1st Dept 2005]). It is this precisely this prohibition which provides one part of the foundation for Petitioner's claim. Petitioner here has suffered a significant economic loss in the sum of $27,437 as a result of the unpaid Section 8 benefits which accrued during the period that Respondent was terminated from the program. Petitioner cannot recover this sum from the Respondent in a nonpayment proceeding as there is no agreement obligating the Respondent to pay any sum in excess of her tenant share and, absent such agreement, any claim would be prohibited by federal law and regulations governing HAP contracts as well as the case law interpreting the same. Nor can Petitioner seemingly recover from CVR given the apparent propriety of CVR's determination in terminating Respondent's subsidy.

The loss of the Section 8 portion of the rent cannot be the sole basis for a claim under 24 CFR 982.310 (d)(1)(iv) (*see generally* 24 CFR 982.310 [b][2]). The other integral piece for such a claim requires a wrongful act on the part of the tenant which resulted in the underlying termination of the subsidy. The Appellate Term holding in 53-63 Partners, L.P. v Paez, which the Respondent cites in his papers, does not call for a different result (63 Misc 3d 158 [A] [App Term 1st Dept 2019]). In 53-63 Partners, L.P. v Paez, the Appellate Term affirmed a lower court ruling which dismissed a holdover proceeding on a tenant's motion which established by documentary evidence that the Section 8 subsidy was reinstated. The Appellate Term reached its holding by citing to an earlier decision by the Term in DU 1st Realty Co. LP v Robinson.[3] This earlier ruling similarly held that a holdover eviction proceeding was not available as a remedy to a landlord where the tenant's Section 8 subsidy was reinstated. This earlier decision from the Appellate Term was

[3] 35 Misc 3d 138 [A] [App Term 1st Dept 2012]

reached with one important qualification. The ruling held that such claims lacked viability in those instance where it could not be shown that the tenant's termination from the program was a purposeful act on the part of the tenant (35 Misc 3d 138 [A] [App Term 1st Dept 2012]).

In the case at bar, Respondent failed to eliminate a triable issue of fact concerning the nature of his termination and whether such termination was a result of his wrongful and purposeful actions. CVR requested the following documents from the Respondent in the notices leading up to his termination: a) Four (4) current and consecutive pay stubs from Fatimata's[4] employment at Starbucks; b) an SSI award letter for Abubakar; c) a self-employment certificate; d) a Bank of America bank statements from the Respondent for the period of July 1 – July 31; and e) school records for Fatimata indicating her status as a full-time student.

In CVR's final notice before resorting to termination of Respondent's subsidy, the agency acknowledged receipt of the SSI award letter and the Bank of America bank statement. The remaining three documents demands were alleged to be outstanding. Respondent asserts in his affidavit that he faxed the requested documents to CVR on or about October 11, 2017[5]: or some five (5) days before the ultimate deadline set by CVR. Respondent's assertion, however, that it was agency error which resulted in the termination of his subsidy is unsupported by the record. Nor do the annexed records eliminate the possibility that Respondent's own actions contributed to the termination of the subsidy. First, had the agency improperly terminated Respondent's benefits, Respondent had every administrative appeal at his disposal as well as the option of initiating an Article 78 proceeding to annul the termination of his subsidy. Respondent failed to exercise those remedies. Irrespective of this deficiency, the exhibit[6] which Respondent annexed as proof that he timely complied with CVR's final request contradicts his own claim that it was agency error. On or about October 11, 2017, Respondent asserts that he faxed all of the requisite documents to CVR. The submission, however, only contains school records for Respondent's six children. The submission did not include any self-employment certificate or, as Respondent claims in his affidavit, proof of his unemployment. Nor did it include any information pertaining to "Fatimata's" employment at Starbucks. Documents which the agency requested in all of its notices prior to termination.

The documents submitted to CVR on October 11, 2017 are disconcerting and also raise the possibility that Respondent was engaging in a purposeful act to hide household income so as to prevent the agency from setting Respondent's share of

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[4] Fatimata is the name provided in all of the notices sent by CVR

[5] Respondent annexes his submission to CVR as Exhibit "E" to the moving papers

[6] Respondent's Exhibit "E"

the rent at a higher amount. Respondent submitted school records for all six of his children on October 11, 2017 even though the agency only requested records[7] for "Fatimata." Upon scrutinizing the submission annexed to Respondent's moving papers, the school records for five of his six children were dated between October 3, 2017 and October 6, 2017 or for the current school year. A school record for the remaining child, Fatmata, was dated October 13, 2016 or for the preceding school year. Federal regulations specify the amounts which are to be included in the calculation of annual income for the purpose of determining the total tenant payment for the housing choice voucher program. Earnings in excess of $480 for each full-time student, 18 years or older, are to be excluded from the annual income of the household.[8] Since Fatmata would have been 19 years old at the time of recertification, there is a serious question concerning Respondent's actions and whether he engaged in a purposeful act which was intended to obfuscate CVR's ability to ascertain whether Fatmata was enrolled as a full-time student. Especially, in light of the additional submissions from the other children which were not germane to the agency's request. Had Respondent failed to establish Fatmata's status as a full-time student, her income, if any, from employment from Starbucks[9] would have been included to determine Respondent's share of the rent. Although the agency misspelled the name of Respondent's daughter as "Fatimata" throughout all of its notices, Respondent was seemingly aware that the agency was referring to Fatmata at all times as she was the only daughter to have been employed by Starbucks.

Therefore, given the above, Respondent's motion to dismiss the instant proceeding is hereby denied.

CONCLUSION

Accordingly, it is hereby:

ORDERED, those prongs of Respondent's motion seeking dismissal are DENIED; and it is further

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[7] The agency requested school records as well as records concerning her employment at Starbucks

[8] Housing Choice Voucher Program Guidebook, EXHIBIT 5-2, INCOME EXCLUSIONS, Paragraph (11) Earnings in excess of $480 for each full-time student 18 years or older (excluding the head of household and
spouse)

[9] Although Respondent asserts that he submitted proof to CVR that Fatmata was terminated from employment at Starbucks, Respondent failed to annex proof of the same to the moving papers.

ORDERED, that this proceeding is restored to the Court's calendar on March 16, 2020 at 9:30 a.m. in Part K, Room 350 for all purposes, including trial.

This constitutes the Decision/Order of this Court.

Dated: Bronx, New York
February 7, 2020

HON. KRZYSZTOF LACH
Judge, Housing Court