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Bronx Park Phase II Preserv. LLC v. V.C.

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Respondent's eviction from the apartment that is the subject of this proceeding based on its allegations, contained in a notice to cure and notice to terminate annexed to the petition, that Respondent is violating a substantial obligation of his tenancy and permitting and/or committing a nuisance. Petitioner alleges Respondent has been "loitering throughout the building at all hours of the day and night on almost a daily basis yelling, screaming banging and pounding;" he has been "making inappropriate comments to other tenants...deemed to be sexually harassing and/or discriminates [sic] toward other tenants;" he has sent "notes and letters to other tenants...deemed to be inappropriate;"¹ has made "numerous unfounded complaints about other neighboring tenants claiming" they were harassing him "when in fact [he] is harassing and disturbing them;" he has been "observed banging on another tenant's door so hard that [he] damaged the apartment door" requiring [Petitioner] to replace it; and he has been observed removing door knobs "from the emergency exit [sic] throughout the building" forcing [Petitioner] to replace the door knobs. Further, the notice to terminate alleges that Respondent was observed on video "attempting to break into and enter another tenant's apartment...[and removing] the tenant's door knob" and that he was arrested by the New York Police Department and charged with various crimes.

Respondent has answered. He has denied the allegations in the predicate notices, raised objections in point of law as to Petitioner's failure to state a cause of action and raised affirmative defenses related to his having cured and his entitlement to a reasonable accommodation pursuant to the Fair Housing Act, Section 504 of the Rehabilitation Act, the

¹ Language from these alleged notes, which Petitioner asserts Respondent has admitted sending, is included in the predicate notices.

Americans with Disabilities Act and related state and local laws. Respondent has also counterclaimed for attorney's fees.

This proceeding has been on the court's calendar for almost five years. There has been extensive motion practice during the proceeding. Most recently, a trial in the proceeding was scheduled for March 17, 2020 but before reaching that date, the court reduced its calendars due to the onset of the COVID-19 pandemic and the trial was delayed.

In the motion currently before the court, Respondent seeks an order staying the trial and/or granting a reasonable accommodation² to Respondent, the guardian ad litem ("GAL") who has been assigned to assist Respondent in this proceeding and Respondent's counsel in regard to the conduct of the trial. Respondent argues that he, his GAL and his attorney all suffer from "medical vulnerabilities" to COVID-19 and as a result should not be required to appear in court for an in-person trial in this proceeding and risk being exposed to the virus. Further, Respondent argues that conducting a virtual trial would deprive him of a "meaningful and...equally effective access to a fair trial." As a result, Respondent argues he must be granted a reasonable accommodation and the trial must be stayed.³ Additionally, Respondent argues the trial should be stayed pursuant to the COVID-19 Emergency Eviction and Foreclosure

² Respondent argues he is entitled to a reasonable accommodation pursuant to the Americans with Disabilities Act, the Rehabilitation Act of 1973, the New York State Human Rights Law and the New York City Human Rights Law.

³ Respondent's motion is denied, as moot, to the extent it seeks a stay of the trial, pursuant to CPLR 2201, on Fifth Amendment grounds and because criminal charges are pending against him for alleged acts that are part of the underlying claims against him in this proceeding. Respondent has acknowledged he has entered a plea in relation to those criminal charges since he filed this motion.

Prevention Act of 2020 (“CEEPPA”) (L. 2020, ch. 381) based on his submission of a hardship declaration.⁴

Petitioner opposes the motion. It argues Respondent should be denied a stay of the trial and/or a reasonable accommodation in that he has not provided an affidavit from anyone with personal knowledge of issues related to the alleged medical conditions that would justify granting him a reasonable accommodation. Further, Petitioner argues CEEPPA does not stay a trial based on the factual circumstances presented here. Petitioner asserts affidavits that have been submitted stating Respondent continues to act in a manner that poses a danger to other tenants in the building places this proceeding within the category of cases CEEPPA specifically exempts from a stay of the proceeding moving forward.⁵

Discussion

Respondent’s motion is granted solely to the extent a virtual trial will be held in this proceeding. Although Respondent has not provided medical documentation demonstrating a disability in support of his request for a reasonable accommodation, affidavits submitted by

⁴ Issues related to the applicability of the stay provisions in the CEEPPA were not raised in the initial motion papers filed by Respondent. However, considering the law was not enacted until after the initial motion papers were filed, the court has permitted the parties to address issues raised by the statute in papers filed in opposition to the motion, in reply to the opposition, in supplemental papers and e-mails in support and opposition to the motion and at oral argument on the motion.

⁵ Petitioner’s additional argument, that this motion is untimely based on a stipulation of settlement, dated April 11, 2018, in which the parties agreed to a trial date of May 21, 2018 and that any pre-trial motions were required to be filed by May 21, 2018, over two and a half years before this motion was filed, lacks merit. The issues in this motion, that are not moot, arise from the COVID-19 pandemic which could not have been foreseen by the parties when they agreed to the terms of the April 11, 2018 stipulation.

Respondent and the GAL assigned to assist him in this proceeding attest to their vulnerability to severe illness if they become infected with COVID-19. Respondent states he suffers from Chronic Obstructive Pulmonary Disease (“COPD”) and that he is 68 years old. His GAL states she is over 65 years old.⁶

In any case, currently all bench trials and hearings in Housing Court are conducted virtually unless the respective Deputy Chief Administrative Judge permits otherwise.⁷ This court possesses the authority to devise and make new processes and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it. Judiciary Law § 2-b(3). The “Court of Appeals and the Appellate Division, First Department, have repeatedly held that one such procedure that courts may employ, albeit in exceptional circumstances, is the use of video testimony...” *Ciccone v. One W. 64th St., Inc.*, 69 Misc 3d 585 (Sup Ct NY County 2020), citing *People v. Wrotten*, 14 NY3d 33 (2009); *Wynona Apts. LLC v. Ramirez*, 70 Misc 3d 591 (Civ Ct Kings County 2020).

The COVID-19 pandemic and the dangers it poses to litigants and witnesses who would be required to come into the courthouse for an in-person trial constitutes an exceptional circumstance that justifies a virtual bench trial in this proceeding. *Bonilla v. State*, 71 Misc 3d 235 (Ct of Claims 2021); *C.C. v. A.R.*, 69 Misc 3d 983 (Sup Ct Kings County 2020); *Ciccone v. One W. 64th St., Inc.*, 69 Misc 3d 585 (Sup Ct NY County 2020); *Wynona Apts. LLC v. Ramirez*, 70 Misc 3d 591 (Civ Ct Kings County 2020); *In re Kevin M. v. Alexander C.*, 2020 WL 7975941

⁶ Although the motion also argues the attorney representing Respondent is in a high-risk group for severe illness if he is infected with COVID-19, that attorney is not currently handling Respondent’s case.

⁷ See, November 13, 2020, Memorandum of Chief Administrative Judge Lawrence K. Marks.

(Fam Ct Nassau County 2020). Even now, more than a year into the pandemic, it has not been declared safe for courts to resume full in-person operations. Although a rising percentage of the adult population has received at least one dose of a COVID-19 vaccine, given the unpredictable nature of the COVID-19 pandemic and persistently high infection rate⁸ it is unknown when the court's operations will return to normal procedures with all litigants appearing in-person (*Bonilla v. State*, 71 Misc 3d 235 [Ct of Claims 2021]). Accordingly, it is necessary for the trial in this proceeding to be held virtually.

Respondent himself acknowledges that holding a virtual trial is clearly "the 'reasonable' option."⁹ However, his argument that conducting a virtual trial is not compatible with his right to due process is unavailing. Although there may be circumstances in which conducting a virtual bench trial is inappropriate, the arguments provided by Respondent as to why a virtual trial should not be held in this proceeding are not persuasive.

Respondent argues the court will be unable to make credibility assessments of the witnesses if a virtual trial is held and the court will be unable to verify witnesses are testifying from memory and not reading from documents. With advances in video conferencing technology the parties and the court are able to participate in a virtual trial with high image quality using readily available computer programs. Utilizing these programs, the court and the parties will be able to assess each witness' demeanor and credibility by observing them directly on a screen. *C.C. v. A.R.*, 69 Misc 3d 983 (Sup Ct Kings County 2020); *Ciccone v. One W. 64th*

⁸ According to the tracking of the coronavirus done by The New York Times, as of May 5, 2021, New York City remains at a "very high risk" level for exposure to COVID-19.

⁹ Affirmation in support of motion by Steven Hasty, para. 54.

St., Inc., 69 Misc3d 585 (Sup Ct NY County 2020). Further, the court will be able discern if a witness is reading from documents while testifying or testifying from memory.

Respondent also argues that dealing with photo and video evidence will be challenging in a virtual trial. However, the parties will not be prevented from presenting these forms of evidence at a virtual bench trial. The Microsoft Teams platform utilized by the court, including its screen sharing capacity, allows for a party to present documentary and visual evidence at trials and for all the parties involved in the trial to view the exhibit. *Wyona Apt. LLC v. Ramirez*, 70 Misc 3d 591 (Civ Ct Kings County 2020).

Further, Respondent argues he will not be able to communicate confidentially with his attorney during a virtual trial in that there “is no breakout room function in Skype for Business,” and he will not be permitted to communicate his impressions to his attorney “in real time.” These arguments are misplaced. The court is no longer utilizing Skype for Business as the program to conduct virtual trials. Microsoft Teams is being used which permits “breakout rooms.”

Moreover, Respondent and his attorney are not barred by this order from participating in the trial from the same location and sitting near each other as they would in the courtroom if that is what they choose to do.¹⁰ Even if they are not at the same location for the trial, Respondents and their attorney may use other means of communicating with each other, such as various forms of messaging that are readily available, and they may seek, at the court’s discretion, a break in the trial to have a chance to speak with each other. Respondents have not provided any authority

¹⁰ The court is aware of many law offices that have their clients (parties in a proceeding) participate in a trial from their office, either in the same room where the attorney is participating or in a nearby room. This arrangement assures the quality of the equipment to be used by the party to participate in the trial and the ability of the attorney and party to communicate with each other.

establishing it would be a constitutional infirmity if they must communicate with each other by a means other than talking while the court is hearing the presentation of evidence.

Additionally, Respondent's assertion that he describes himself as "not being computer literate" is not a basis to stay the trial until it can be conducted in-person. Participation in a virtual trial on the Microsoft Teams program involves little more than the clicking of a tab in an e-mail that will be sent to everyone who will be participating in the trial. If Respondent is unable to perform that task or he has a concern about the reliability of his internet connectivity, as mentioned above, his attorney may arrange for him to participate in the trial at their offices. In the alternative, for litigants who are otherwise unable to participate in court proceedings by video, the court provides a kiosk in the courthouse equipped with a computer, at which COVID-19 safety measures are followed, where participants can participate in video conferences and virtual trials.

Under these circumstances, where an adequate alternative to an in-person trial is available to the parties, and this proceeding is based on Petitioner's assertion that Respondent is causing a nuisance at the premises with allegations that he is endangering other tenants at the premises with by acts and threats of physical violence, it is inappropriate for the court to stay the bench trial in this proceeding indefinitely, as Respondent requests, until such time that it is recognized as safe to resume in-person trials. *Ciccone v. One W. 64th St., Inc.*, 69 Misc 3d 585 (Sup Ct NY County 2020); *A.S. v. N.S.*, 68 Misc 3d 767 (Sup Ct NY County 2020); *Perez v. 1857 Walton Realty Corp.*, 2021 NY Slip Op 50270(U) (Civ Ct Bronx County).

Even if Respondent is entitled to a reasonable accommodation, he has provided no legal authority for his position that conducting a virtual trial is not a sufficient reasonable

accommodation and that instead the court's only recourse is to indefinitely stay the trial. Title II of the American with Disabilities Act, one of the statutes cited to by Respondent in support of his motion, does not require an indefinite stay of this proceeding. "Title II...requires only 'reasonable modifications' that would not fundamentally alter the nature of the service provided..." *Tennessee v. Lane*, 541 US 509, 531 (2004). Under this standard, conducting the trial in this proceeding virtually constitutes the type of reasonable accommodation contemplated by the law.

Additionally, Respondent asserts this proceeding is stayed by CEEFPA because he has submitted a hardship declaration. The legislative intent of CEEFPA is "to avoid as many evictions...as possible for people experiencing a financial hardship during the COVID-19 pandemic or who cannot move due to an increased risk of severe illness or death from COVID-19." CEEFPA, § 3. To achieve this legislative intent, CEEFPA placed an initial stay of 60 days, from the effective date of the statute (December 28, 2020), on all eviction proceedings, regardless of their procedural posture, to give tenants in those proceedings threatened with eviction an opportunity to receive and file a hardship declaration, the language of which is stated in the statute. CEEFPA, Part A, § 2.

After the passage of these 60 days, CEEPA provides an additional stay of an eviction proceeding in which a warrant of eviction has not yet been issued (CEEFPA, Part A, § 6, as amended), or on the execution of a warrant of eviction if the warrant has already been issued (CEEFPA, Part A, § 8, as amended), through August 31, 2021, if the tenant provides a hardship declaration to the petitioner in the eviction proceeding, the petitioner's agent or the court. CEEFPA does not provide a mechanism for a landlord to challenge the assertions made by a

tenant in a hardship declaration. Thus, the stays authorized by CEEFPA are invoked with a tenant merely providing the petitioner, the petitioner's agent or the court with a hardship declaration. CEEFPA, Part A, § 6.

However, CEEFPA carves out an exception to any stays of an eviction proceeding, even where a tenant has provided a hardship declaration, if the "tenant is persistently and unreasonably engaging in behavior that substantially infringes on the use and enjoyment of other tenants or occupants or causes a substantial safety hazard to others..." CEEFPA, Part A, § 9.

Respondent argues this exception to the invocation of a stay of this proceeding does not apply in this proceeding because section 9 of CEEFPA, Part A, which states the exception, does not specifically state the procedure by which Petitioner can establish that he is engaging in behavior proscribed by the statute - endangering the safety of others tenants - where, as here, a judgment has not already been entered against him. In making this argument Respondent draws a contrast with proceedings where a judgment has already been issued. For proceedings in that procedural posture, CEEFPA specifically states a hearing shall be held to "determine whether the tenant is continuing to persist in engaging in unreasonable behavior that substantially infringes on the use and enjoyment of other tenants or occupants or causes a substantial safety hazard to others." CEEFPA, Part A, § 9(2). Therefore, Respondent argues, considering CEEFPA does not specifically state how to proceed in a case in which a judgment has not yet been entered, the statute stays proceedings in that procedural posture after the tenant provides a hardship declaration. Also, Respondent argues that without a procedure for moving forward in pre-judgment cases, Petitioner is left with mere allegations of Respondent's objectionable conduct

which, according to the language of the statute, “shall not be sufficient evidence to establish that [Respondent] has engaged in...behavior [endangering other tenants].” CEEFPA, Part A, § 9(3).

Petitioner disputes that a stay pursuant to CEEFPA is applicable considering the factual circumstances that form the basis of this proceeding. Moreover, Petitioner has provided affidavits from 2 tenants and a security officer at the premises alleging Respondent continues to engage in behavior endangering the health and safety of other tenants at the building. One tenant avers in his affidavit that he was awoken at 3:58 a.m. on February 26, 2021 by Respondent loudly banging on his door with a hammer and that Respondent has been trying to “break into [his] apartment with a hammer for years.”¹¹ The second tenant states in an affidavit, that he has an “active order of protection against [Respondent],” that on four separate days in February 2021 and one day in March 2021 Respondent has attempted to break into his home, and that he fears for his life as well as his family’s. The security officer’s affidavit states that he reviewed security camera footage at the premises which confirmed Respondent was trying to break into the first tenant’s apartment on February 26th.

In determining the application of CEEFPA to these circumstances, the court’s primary consideration is to give effect to the intention of the legislature and the clearest indicator of that intent is the text of the statute guided by the principle that a statute must be construed as a whole and that its various sections must be considered together and with reference to each other. *Town of Aurora v. Village of East Aurora*, 32 NY3d 366 (2018); *New York County Lawyers’ Ass’n v. Bloomberg*, 19 NY3d 712 (2012). In doing so, a court must give the statute a sensible and

¹¹ This affidavit is accompanied by still photos taken from video footage of a man the tenant identified as Respondent holding a hammer kicking an apartment door.

practical over-all construction which furthers its scheme and purpose, and which harmonizes all its interlocking provisions. *In re Jamie J.*, 30 NY3d 275 (2017); *Long v. Adirondack Park Agency*, 76 NY2d 416 (1990); *Ryder v City of New York*, 32 AD3d 836 (2d 2006).

Applying a sensible and practical over-all construction to CEEFPA, the statute does not stay this proceeding. Based on the language of the statute, while its intent is to keep as many tenants threatened with eviction in their homes while the COVID-19 pandemic poses a danger to the community, it plainly does not mean to stay an eviction proceeding against a tenant, such as Respondent, who is facing removal from his home due to the danger he allegedly poses to other tenants at the building where he lives.

The general language in the opening clause of Section 9 of CEEFPA, Part A, that states the stays required by the statute upon a tenant's filing of a hardship declaration do not apply to cases based on allegations of nuisance type behavior that affects other tenants, is not nullified by the specific language in the statute as to how to proceed in cases in which a judgment has already been entered (CEEFPA, Part A, § 9[2]). In light of the overall scheme of the statute, the specific language for the process to be followed in cases where, prior to CEEFPA's enactment, a judgment has already been entered after a landlord has proven a cause of action related to a tenant endangering other tenants and occupants of a building serves to clarify that a hearing is required as to whether allegations that the tenant is persisting in posing a danger to the other residents of the building have been "established." It is not meant to exclude cases where a tenant is persistently acting in an objectionable manner, but a judgment has not yet been entered, from the category of eviction proceedings that are exempt from the stays authorized by the statute. The same type of adjudication that is required at a hearing in an eviction proceeding that is post-

judgment on the effective date of CEEFPA is required to be made at trial in a case such this in which a judgment has not yet been entered. *Trustees of Columbia University v. Grant*, Civ Ct, NY County, Jan 22, 2021, Schneider, J., L&T Index No. 62400/19.

The legal authority Respondent has cited in support of his position are inapplicable to the circumstances of this proceeding. *CG-N Affordable, LLC v. Bolshakov*, 2021 NYLF LEXIS 202, *5 (Civ Ct NY County) is readily distinguishable from the facts presented here in that affidavits have been presented from individuals with personal knowledge alleging Respondent's objectionable conduct has persisted. Also, *Schwesinger v. Perlis*, 2021 NY Slip Op 21043 (Civ Ct NY County 2021) is inapplicable in that the procedural posture in that case is different from here. In *Perlis*, a judgment had been entered against the tenant on December 14, 2020, prior to the effective date of CEEFPA. Consequently, the procedure specifically outlined in CEEFPA Part A, § 9(2) was required to be followed.

For these reasons, as stated above, CEEFPA does not stay this proceeding.

Respondent's motion is also denied to the extent it seeks an order staying the trial, pursuant to CPLR 2201, because it would be unjust to force Respondent into homelessness given the public health crisis created by the COVID-19 pandemic. Conducting a trial in this proceeding does not equate with forcing Respondent into homelessness. Certainly, it is possible that after a trial the court will rule Petitioner is entitled to a final judgment of possession and to evict Respondent. But it is also possible Petitioner will be unable to prove their petition or that Respondent will prevail on one of his defenses. Further, the New York State legislature, in enacting CEEFPA, has declared it to be the public policy of the state that the adjudication of


eviction proceedings such as this, in which Respondent allegedly poses a danger to other occupants of the building, should move forward despite the dangers posed by the pandemic.

For all the reasons stated above, Respondent's motion is denied except, absent an amendment to the abovementioned memorandum directing that Housing Court trials be conducted virtually at this time, the trial in this proceeding will be held virtually.

This proceeding is placed back on the court's calendar on June 1, 2021, from 3:30 p.m. to 4:30 p.m. for a pre-trial conference. The parties are required to appear before the court by video/telephone conference. If needed, call 718-618-3566 or e-mail civbxhs-virtual@nycourts.gov, prior to the court date, for information on how to appear by video/telephone conference. If appearing by video/telephone conference is not possible you must notify the court at 718-618-3566 at least 3 business days before June 1, 2021.

This constitutes the decision and order of the court.

Dated: Bronx, New York
May 10, 2021



HON. HOWARD BAUM,
J.H.C.

HON. HOWARD J. BAUM