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Kidd v. Williams

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Kidd v Williams
2021 NY Slip Op 51113(U)
Decided on November 23, 2021
Civil Court Of The City Of New York, Kings County
Stoller, J.
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Decided on November 23, 2021

Civil Court of the City of New York, Kings County

<p>Angela Kidd, Petitioner,</p> <p>against</p> <p>Dylan Williams et al., Respondent.</p>

Index No. 78602/2019

For Petitioner: Michael Pontone

For Respondent: Arthur Edwards

Jack Stoller, J.

Angela Kidd, the petitioner in this proceeding ("Petitioner"), commenced this holdover proceeding against Dylan Williams, the respondent in this proceeding ("Respondent"), [\[EN1\]](#) seeking possession of 1166 Nostrand Avenue, Apt. 2B, Brooklyn, New York ("the subject

premises") on the ground of termination of an unregulated tenancy. The parties stipulated to a final judgment that permitted the issuance of a warrant of eviction. Respondent interposed a hardship declaration. Petitioner challenged the hardship declaration. The Court held a hearing on the motion on November 16, 2021.

Background

On October 30, 2020, the parties, both represented by counsel, stipulated to a final judgment of possession, permitted a forthwith issuance of a warrant of eviction, and stayed execution of the warrant through February 28, 2021. Respondent then interposed a hardship declaration pursuant to the COVID 19 Emergency Eviction and Foreclosure Prevention Act of 2020 ("CEEFFPA"), L. 2020, c. 381, as amended by L. 2021, c. 417, claiming both a loss of income and health-related hardships. Petitioner moved to challenge the hardship declaration pursuant to L. 2021, c. 417, Part C, Subpart A, § 10 (a).

The trial record

Petitioner testified that she lives in Florida; that she has owned the subject premises for thirty years; that Respondent moved into the subject premises in 2012; that Respondent owes \$31,000 in arrears; that Respondent agreed that he was going to move as of March of 2021; that Respondent told her that he is a real estate broker; that Respondent is also an appraiser and a [*2] notary; and that he sold and rented properties and he is in contract with properties.

Petitioner introduced into evidence Respondent's website, which includes his name, his logo, his credentials, and listings. The listings include rentals for \$1,650 and \$2,000 and sales for \$1,000,000, \$699,000, and \$547,000. Petitioner testified that Respondent is in San Diego on a real estate convention staying at a hotel that costs \$254 per night with a guest and that he has been there from November 10, 2021 through the date of the trial.

Petitioner testified on cross-examination that she did not know what commission Respondent earned from the apartments; that the million-dollar listing is in contract and therefore Respondent has not earned a commission yet; that Respondent has about six

employees; that she knows their names; that she does not know how they get paid, but they are real estate agents, so they probably get commissions; that she does not know about co-brokers; that she sees Respondent going to work every morning because she has a camera; that she does not know Respondent's income or medical records; and that Respondent was not affected by COVID.

Respondent testified on Petitioner's case that he is in San Diego at a real estate convention expo; that he left on November 10 to get there; that he has been staying at the Manchester Hyatt; that it is being sponsored by a loan officer named Raymond Malieri; that he is not paying for the room, but he is paying for food; that he does not know how much the flight cost; that the website that Petitioner introduced into evidence is indeed his website; that of the properties listed on his website, only one of them sold ("the Sold Property"), and on the Sold Property his commission was only one or two percent rather than five percent because he did not sell it; that he made 1.25% of \$551,000 on the sale of the Sold Property; that his website has a "sold listings" bar; that he does not remember if he sold another property listed on his website; that he got commissions for rentals; that an owner of one of those properties rented one herself and he did not make any money for that one; that the website says rented; that another rental listing was also rented by the landlord; that he has worked as an appraiser for twenty years; that this year the real estate market in New York has been some of the most active in New York history; that he has not done one closing; that he gets \$350 to \$550 per appraisal; that he is a notary public; that he did not buy a vehicle in 2019; that he paid with a credit card and the lender is reimbursing him; and that he has one credit card.

Respondent testified on his own case that no one lives with him now; that he has lived in the subject premises since 2011; that his monthly rent is \$1,075.00; that he is not current in his rent; that he is a real estate broker; that he is self-employed; that he is now in San Diego for a convention; that the convention is for continuing education; that he is responsible for his airfare and his food; that he does not have employees in his business; that he was the co-broker for the sale of the Sold Property; that being a "co-broker" means that his office has the listing and another agency sells the property; that another agent sold the Sold Property; that the selling broker could be different from the listing broker and they have to share the commission; that he earned about 1.25% on the sale of the Sold Property; that the Sold Property closed around April of 2021; that he was involved in a property that closed in August of 2020; that the commission that he earned was 1%, which amounted to about

\$4,000; that he did not have to share that commission; that those were the only two closings he had; that he has not yet earned a commission for the properties currently listed for \$1,000,000 and \$699,000; that at one point he was the listing broker for another sale, but they went to contract; that the buyer could not get a mortgage and the seller blamed him and went to another broker; that Respondent's counsel was [*3]the attorney on that closing; that he is a licensed real estate appraiser; that he has done about ten appraisals in the last year; that he gets paid between \$350 and \$550 for an appraisal and \$400 for a condominium; that he did not normally do appraisals; that the COVID 19 pandemic slowed down his business; that he has earned \$50 a week from his work as a notary public; that his car payment is \$787 per month; that his car payments are not current; that his car was repossessed because he could not make the payments; that he borrowed money from someone; that he has a cell phone; that it was disconnected several times in the past year for nonpayment; that he has high blood pressure, high cholesterol, and diabetes; that he settled this case last year; that he does not remember how much money he owed; that arrears accrued prior to the onset of the pandemic; that he intended to move; that he wanted a lease, but he was not given a lease; that he did not start looking for a place to move to; that the notation "sold" on his website means that it closed; that the notation "sold" does not necessarily mean that he got the commission; that he is obligated to update the listing if it sells; and that he did not pay use and occupancy because he had to live

Respondent testified on cross examination that he did not take a payroll protection loan; that he did not take any aid from the government because he has bad credit and he was not eligible for the loan; that his medical conditions existed prior to the pandemic; that he was taken to Court for nonpayment before the pandemic; that his car was returned to him a week after it was repossessed because he paid a month of the arrears that he owed; that his flight to San Diego was about \$500 although he is not sure; that he has a debit card, not a credit card; that his card gives him the option of debit or credit; that there is no credit limit; and that he could purchase something without having the money in his bank account to cover it.

Discussion

For the purposes of Petitioner's challenge to Respondent's claim that he suffers from a hardship, a "hardship" means an inability to pay rent or move due to, *inter alia*, a significant

loss of household income during the COVID-19 pandemic, L. 2021, c. 417, Part C, Subpart A, §§ 5 (a) (i) and 5 (a) (vi), moving expenses and related difficulty in securing alternative housing, L. 2021, c. 417, Part C, Subpart A, § 5 (a) (v), or an inability to vacate the premises because doing so would pose a significant risk of severe illness or death from COVID 19 that a tenant would face due to, *inter alia*, an underlying medical condition. L. 2021, c. 417, Part C, Subpart A, § 5 (b).

Evidence of a loss in Respondent's income—much less the "significant loss" the statute requires a showing of—attributable to the COVID-19 pandemic necessarily entails a comparison of Respondent's income before and after the pandemic. The trial record does not contain any evidence of Respondent's pre pandemic income. This omission raises the question as to the burden of proof on such a hearing, i.e., whether Petitioner bears the burden of proving that Respondent has not suffered a hardship or whether Respondent bears the burden of proving that he has suffered a hardship.

The prior incarnation of the applicable statute, CEEFPA, did not explicitly provide for a challenge to a hardship declaration. The U.S. Supreme Court found that the stay triggered by a unilateral filing of a hardship declaration without such a means for a challenge violated the Due Process Clause. *Chrysafis v Marks*, 141 S. Ct. 2482 (2021). The Legislature provided for a mechanism for a challenge to a hardship declaration with express reference to the U.S. Supreme Court ruling. L. 2021 c. 417, § 2. This background provides useful context to an assessment of which party bears the burden.

Respondent's filing of the hardship declaration gives rise to a rebuttable presumption that he has endured a hardship. L. 2021, c. 417, Part C, Subpart A, § 9. However, upon a showing of a good faith belief that a tenant has not suffered a hardship, the Court shall grant a hearing to determine the validity of the hardship claim. L. 2021, c. 417, Part C, Subpart A, § 10 (a). While intuitively, it is the movant who bears the burden of proving its case, a proposition only bolstered by the statutory rebuttable presumption, due process means, in part, a hearing provided in a "meaningful manner." *Brock v Roadway Express, Inc*, 481 U.S. 252, 261, 107 S. Ct. 1740, 1747 (1987), *Proctor v LeClaire*, 846 F.3d 597, 609 (2nd Cir. 2017), *LaCorte Elec. Constr. & Maint., Inc. v Cnty. of Rensselaer*, 80 NY2d 232, 237 (1992), *Matter of State of NY v Farnsworth*, 75 AD3d 14, 20 (4th Dept. 2010). A hearing which would have put the burden on Petitioner to prove Respondent's pre-pandemic income and his income during the pandemic, information that is peculiarly within Respondent's knowledge, does not seem so

"meaningful." Rather, the proof that Petitioner adduced on her case, of the listings on Respondent's website, was sufficient to both show a good-faith belief that Respondent has not suffered a hardship and to shift the burden to Respondent to prove that he has

Aside from the absence of evidence as to Respondent's pre pandemic income, the Court considers the implications of the evidence in the trial record for Respondent's claim that he has suffered a hardship. The trial record shows that Respondent has grossed between \$12,987 50 and \$14,987 50 in the twelve month period preceding the hearing date [FN2]. This amount of income raises the question as to why Respondent spent approximately \$500 for airfare, even if it was for continuing education. The pandemic has occasioned widespread use of meetings over video-conferencing platforms that would relieve a real estate broker with an income as low as Respondent's from having to spend his finite resources on airfare. Furthermore, continuing education requirements for real estate brokers entail training on law specific to New York, RPL §441(3)(a), and the Court draws the inference that the out-of-state training that Respondent attended would not include such material.

Respondent's willingness to spend that kind of money on the kind of income Respondent purports to have earned gives rise to questions about the nature of Respondent's income stream. Significantly, the trial record shows that Respondent has two properties in contract right now, one a commercial property selling for \$1 million and one a residential property for \$699,000. Respondent's testimony indicated that his typical fee would be five percent. If Respondent earned that kind of commission on those two sales, Respondent would receive \$84,950.00. If the means by which someone who is self-employed receives income is uneven, with dry periods punctuated by discreet intervals with payoffs, then Respondent's willingness to spend \$500 in airfare appears more consistent with the way by which Respondent may have typically lived, whether before or during the pandemic. But either way these questions demonstrate that this trial record is insufficient to prove that the pandemic has caused a significant loss of Respondent's income.

Given that Respondent is a real estate broker who lists rentals as well as sales, the preponderance of the evidence also did not support the proposition that Respondent would have difficulty procuring alternative housing. If a real estate broker who presumably has the connections in the industry to conduct business cannot find alternative housing, then the [*4] statutory definition of "hardship" may as well be deemed to include everyone.

While Respondent also testified that he has high blood pressure, high cholesterol, and diabetes. As the statute defines "hardship" to not include health conditions by themselves, but to mean that an inability to vacate the premises would pose a significant risk of severe illness or death from COVID-19, the record as developed at the hearing is insufficient to establish that nexus.

Accordingly, the preponderance of the evidence does not show that Respondent has suffered a hardship as defined by the statute, and it is therefore ordered that the Court grants Petitioner's motion to the extent of vacating all stays. It is further ordered that Petitioner is entitled to a forthwith issuance of the warrant of eviction, and that the warrant shall state that Respondent is ineligible for a stay because the hardship declaration has been deemed to be invalid.

This order is without prejudice to a motion for a stay, which the Court would consider according to the criteria as established by RPAPL §§749(1), 749(3), 753(1), and 753(2).

Given the novel procedural issues presented by this statute, this order is also without prejudice to a motion by Respondent to submit new evidence regarding the status of his claim to have suffered a hardship.

This constitutes the decision and order of the Court.

Dated: November 23, 2021

Brooklyn, New York

HON. JACK STOLLER

J.H.C.

Footnotes

Footnote 1: Other respondents were named in the notice of petition, but Respondent represented in a stipulation that he is the only occupant of the subject premises.

Footnote 2: The variable is how much Respondent received for ten appraisals.

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