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Gurevitch v. Robinson

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART Q
---X
MENACHEM GUREVITCH,

Petitioner,

Index No. 72639/2018

-against-

IDA ROBINSON, et al.,

DECISION/ORDER

Respondents.
---X
Present: Hon. Jack Stoller
Judge, Housing Court

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

Pages	numbered
Order To Show Cause and Supplemental Affirmations Annexed	1, 2, 3
Affirmation In Opposition	4
Affirmation In Support	5
Affirmation In Reply To Affirmation In Support	6

Upon the foregoing papers, the Decision and Order on this motion are as follows:

Menachem Gurevitch, the petitioner in this proceeding ("Petitioner"), commenced this holdover proceeding against Ida Robinson ("Respondent"), Helen Robinson and Ali Torain ("Co-Respondents"), and Sherease Torain, who the petition designates as "Sherease Robinson" ("Movant"), the respondents in this proceeding (collectively, "Respondents"), seeking possession of 964 Park Place, Brooklyn, New York ("the subject premises") on the basis of a termination of an unregulated tenancy. Petitioner obtained a judgment of possession after trial and a warrant of eviction issued and executed. Movant now moves for relief from the execution of the warrant.

Background

By an order dated January 15, 2020, the Court awarded Petitioner a final judgment of possession against Respondents and a money judgment for $279,000 against Respondent and Co-Respondents for arrears in use and occupancy. A warrant of eviction issued on February 19, 2020. Various stays occasioned by the COVID-19 pandemic ensued. Petitioner moved for permission to execute the warrant pursuant to DRP-213. The Court granted the motion by an order dated May 3, 2021. An exhibit annexed to the papers ("the Exhibit") shows that Movant applied for assistance according to the Emergency Rent Application Program ("ERAP") on August 17, 2021. The Exhibit states that Petitioner's information and documentation had been verified and that the application was denied. The warrant executed on February 8, 2022. Movant's counsel represents in his affirmation in support of the motion that Movant appealed ERAP's denial. Petitioner disputes this representation.

Respondent has a guardian for her property appointed pursuant to Article 81 of the Mental Hygiene Law. Counsel for Respondent's guardian represented to the Court on oral argument that he intends to move in Supreme Court for relief pursuant to two prior actions that resolved with the transfer of title of the subject premises from Respondent to a predecessor-in-interest of Petitioner. Respondent's guardian's counsel had submitted an affirmation in support of the order to show cause explaining his view of the merits of Respondent's cause of action.

Discussion

Movant argues that the warrant of eviction does not comply with the COVID-19 Emergency Eviction and Foreclosure Prevention Act ("CEEFPA") or CEEFPA's successor statute. However, that statute expired on January 15, 2022. DRP-221 at ¶V makes clear that

requirements for warrants imposed by CEEFPA or its successor statute are no longer in effect. Accordingly, there was no defect in the warrant at the time of its execution.

Movant argues that the pendency of her appeal for ERAP rendered a stay in effect at the time of the eviction. Petitioner argues that the denial of ERAP effectuated a vacatur of the stay and that Movant has not proven that an appeal has been pending.

Section 8 of subpart A of part BB of chapter 56 of the laws of 2021, as amended by Section 4 of part A of chapter 417 of the laws of 2021, stays eviction proceedings upon an ERAP application pending a determination of eligibility. On January 16, 2022, Chief Administrative Judge Lawrence Marks promulgated Administrative Order 34/22 ("AO 34/22").[1] AO 34/22 provides, *inter alia*, that "[e]viction matters where there is a pending ERAP application shall be stayed until a final determination of eligibility for rental assistance is issued by the Office of Temporary and Disability Assistance (OTDA) including appeals."

AO 34/22 also states, "Landlords shall continue to submit notice of a known ERAP application to the court where the eviction proceeding is pending in accordance with Administrative Order AO/244/21 …." AO 244/21, dated August 13, 2021, before Movant's ERAP application, states that "petitioners with pending eviction proceedings who have either (1) been notified of a pending application for [ERAP] by respondent-tenant, (2) applied for [ERAP] on behalf of respondent-tenant and the application is pending, or (3) received emergency rental assistance on behalf of respondent-tenant, shall submit notice, in the form attached as Exhibit 1 ['the ERAP Notice Form'], to the court where the eviction proceeding is pending."

[1] The order and all attached orders can be found here: https://nycourts.gov/whatsnew/pdf/ExhibitA-AO34-22.pdf .

As noted above, the Exhibit states that OTDA verified Petitioner's information and documentation pursuant to Movant's ERAP application, compelling the conclusion that Petitioner knew of the pendency of Movant's ERAP application. The record on this motion practice shows no evidence that Petitioner submitted the ERAP Notice Form to the Court and Petitioner's responsive papers do not dispute that Petitioner did not notify the Court of Movant's ERAP application.

Petitioner argues that he did not have to inform the Court of Movant's ERAP application, as Movant did not inform Petitioner of her ERAP application. AO 244/21 requires a landlord to notify the Court if a landlord has "been notified of a pending application for [ERAP] by respondent-tenant…." Petitioner argues that the Court should construe this language to mean that a landlord must notify the Court only if a respondent-tenant notifies a landlord of a pending application for ERAP, not if a landlord learns of a pending ERAP application by some other means.[2]

While an administrative order is not a regulation, the Court finds instructive that regulations are generally subject to same canons of construction as statutes, ATM One, LLC v. Landaverde, 2 N.Y.3d 472, 477 (2004), Matter of Cty. of Oneida v. Zucker, 147 A.D.3d 1338 (4th Dept. 2017), and applies those canons to the Administrative Order. AO 244/21 did not use the active voice. If it did, on Petitioner's interpretation of the order, it would have required landlords to notify the Court when respondent-tenants notify landlords. Instead, AO 244/21 used the passive voice, requiring landlords to notify the Court when landlords have "been notified."

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[2] The statute provides that OTDA shall undertake reasonable efforts to obtain cooperation of landlords by a variety of methods, including phone, text, mail, and email, L. 2021, c. 56, Part BB, Subpart A, §9(2)(b), thus providing a means by which a landlord may learn of an ERAP application other than being notified by a tenant.

As the use of the passive voice can omit a subject from a sentence, a drafter's choice to use the passive voice reveals an intent to cover situations potentially applying to multiple subjects. See Norman v. Hynes, 20 A.D.3d 125, 135 (2nd Dept. 2005). Applying this construction to the sentence in question would obligate landlords to notify the Court when they have been notified of an ERAP application from any source, not just from respondent-tenants.

Petitioner in effect argues that the prepositional phrase "by respondent-tenant" supplies the subject of the sentence in AO 244/21, such that the Court should read AO 244/21 to mean that landlords shall notify the Court when they have "been notified" "by respondent-tenant." However, the prepositional phrase "of a pending application [for ERAP]" intervenes in the sentence in between "been notified" and "by respondent-tenant." Relative or qualifying words or clauses in a statute ordinarily apply to words or phrases immediately preceding them, Barnhart v. Thomas, 540 U.S. 20, 26, 124 S. Ct. 376, 380 (2003), not to others more remote. Matter of T-Mobile Ne., LLC v. DeBellis, 32 N.Y.3d 594, 608 (2018). If the Court construes the phrase "by respondent-tenant" to apply to the immediate antecedent "of a pending application for [ERAP]," the sentence would mean that anytime a landlord learns of an ERAP application made "by a tenant," the landlord must notify the Court of the application, a construction consistent with the fact that parties other than tenants, i.e. landlords, can file ERAP applications. L. 2021, c. 56, part BB, §6(3), L. 2021, c. 56, part BB, §6(5).

Other indicia of meaning can potentially overcome the immediate antecedent rule. Barnhart, supra, 540 U.S. at 26, 124 S. Ct. at 380. Petitioner argues that Social Services Law §136(4) militates in favor of a construction of AO 244/21 that landlords may only notify the Court of an ERAP application if a respondent-tenant notifies a landlord. Social Services Law §136(4) proscribes any person from disclosing any information relating to any applicant for or

recipient of public assistance for commercial or political purposes. To the extent that an application for public assistance should be confidential, so goes the argument, a landlord should only notify the Court of an ERAP application if the applicants themselves notified the landlord of it, with the notification being deemed a kind of waiver of confidentiality.

The first problem with Petitioner's construction is that a landlord informing the Court of an ERAP application is not disclosing information for commercial or political purposes, rendering the prohibition inapplicable to such a landlord. Matter of Citizens for a Better Maspeth, Inc. v. City of N.Y., 2017 N.Y. Slip Op. 32024(U), ¶¶ 8-10 (S. Ct. Queens Co.). The second problem with Petitioner's construction is that AO 244/21 obligates a landlord to disclose to the Court a landlord's receipt of ERAP funds, which is not consistent with a purported deference to confidentiality concerns.

The third problem with Petitioner's construction is that the ERAP statute, as amended, specifically provides for use of information of an ERAP application "by the New York State Office of Court Administration so a Court may determine whether a litigant in a proceeding has applied for or been granted assistance from [ERAP] for the purposes of ensuring the availability for the eviction protections provided by this part." L. 2021, c. 56, Part BB, Subpart A, §6(4)(b)(II), as amended by L. 2021, c. 417, §3. A general statute, particularly a prior general statute, yields to a later specific or special statute. People v. Zephrin, 14 N.Y.3d 296, 301 (2010), Dutchess Cty. Dep't of Soc. Servs. ex rel. Day v. Day, 96 N.Y.2d 149, 153 (2001). Even assuming *arguendo* the applicability of any section of Social Services Law §136 to Petitioner, that general statute would not apply in the specific instance provided for in the statute establishing ERAP, i.e., that disclosure of an ERAP application be made to the Court.

The fourth problem with Petitioner's construction is that AO 244/21 never actually states that it is balancing a landlord's reporting requirements against confidentiality interests. Rather, Petitioner asks the Court to draw an inference that AO 244/21 does so. In contrast with the absence of textual support for Petitioner's construction of the Administrative Order, AO 34/22 unambiguously states that eviction matters shall be stayed pending not only ERAP applications, but appeals, and that landlords "shall" continue to submit notice of "a known ERAP application" to the Court in accordance with AO 244/21. The obvious intent of the two Administrative Orders, read in pari materia, is to prioritize compliance with the statutory stay, which outweighs any ostensible interest in confidentiality. Accordingly, AO 244/21 and AO 34/22 required Petitioner to notify the Court of Movant's ERAP application, a requirement that Petitioner defaulted on.

The Court takes judicial notice that upon notification of an ERAP application, the clerk places the case on a calendar designated for ERAP cases, which enables the Court to exercise oversight over such cases and to assure that stays remain in effect as required by the statute and by the Administrative Orders. A scenario where a landlord could disregard the requirement to notify the Court and where a landlord, an interested party, could unilaterally determine that the ERAP stay has expired, particularly without an easy reference like the ERAP portal to determine the pendency of an ERAP appeal, would thus impermissibly render the Administrative Orders without effect. Giving effect to the Administrative Orders entails affording the Court the ability to determine the pendency of an ERAP appeal while the stay remains in effect, which compels a determination that the stay pursuant to Movant's ERAP application has remained in effect through this writing and therefore at the time of the eviction. When a tenant is evicted while a

stay is in effect, restoration to possession is an appropriate remedy. See 201 W 136 St Realty MNGMNT LLC v. Roman, 36 Misc.3d 1215(A)(Civ. Ct. N.Y. Co. 2012).

The Court parenthetically acknowledges some criticism of ERAP stays, particularly when used by occupants who are licensees and when arrears are not an issue. Significantly, this matter is predicated on a termination of a tenancy, there is a judgment for unpaid use and occupancy, and Petitioner has repeatedly cited substantial arrears in use and occupancy throughout the motion practice in this proceeding. The Legislature designed ERAP to address the very kind of nonpayment of arrears that aggrieves Petitioner in this matter, demonstrated by the statute's stay of holdover proceedings against a tenant as well as nonpayment proceedings. L. 2021, c. 56, Part BB, Subpart A, §8, as amended by L. 2021, c. 417, Part A, §4.

Notwithstanding any arguments about defects in the execution of the warrant, Petitioner argues in his opposition that a restoration of Respondents to possession of the subject premises would be futile, as restoration of occupants is futile where ample evidence shows that a summary proceeding would result in the occupant's certain eviction, Soukouna v. 365 Canal Corp., 48 A.D.3d 359 (1st Dept. 2008), where occupants had stipulated to move a year-and-a-half before an appellate determination, Molinelli v. Goulbourne-Fontan, 70 Misc.3d 139(A)(App. Term 2nd Dept. 2021), Capital 2000, LLC v. Tatum, 52 Misc.3d 139(A)(App. Term 2nd Dept. 2016), where an occupant's only defense to an earlier eviction date was not a defense to an eviction by a later, since-passed date, Bornstein v. Goldberger, 59 Misc.3d 135(A)(App. Term 2nd Dept. 2018), where there is "overwhelming" proof that occupants were in breach of their lease, Parkview Apartments Corp. v. Pryce, 58 Misc.3d 155(A)(App. Term 2nd Dept. 2018), where occupants could be immediately re-evicted for failure to show an ability to pay funds as required by a Court order, 789 St. Marks Realty Corp. v. Waldron, 46 Misc.3d 138(A)(App. Term 2nd Dept. 2015),

where the occupants did not have the right to remain in the premises after the expiration of a lease, Bernstein v. Rozenbaum, 20 Misc.3d 138(A)(App. Term 2nd Dept. 2008), or where the occupants were, in essence, unauthorized subtenants. Cordova v. 1217 Bedford Realty LLC, 67 Misc.3d 1206(A)(Civ. Ct. Kings Co. 2020), Parkash 2125 LLC v. Galan, 61 Misc.3d 502, 511 (Civ. Ct. Bronx Co. 2018).[3]

As noted above, Respondent's guardian's counsel submitted an affirmation in support of Movant's order to show cause setting forth his view of the merits of Respondent's challenge to Petitioner's title in Supreme Court, which Petitioner of course disputes. Housing Court does not have the subject matter jurisdiction to entertain such a claim. Gouverneur Gardens Hous. Corp. v. Silverman, 26 Misc.3d 133(A)(App. Term 1st Dept. 2010), Mattis v. Brockington, 19 Misc.3d 133(A)(App. Term 1st Dept. 2008), Ferber v. Salon Moderne, Inc., 174 Misc. 2d 945, 946 (App. Term 1st Dept. 1997). Supreme Court is the Court to make a determination about the merits of Respondent's challenge, and in doing so Supreme Court would determine whether Respondent can show the requisite likelihood of success on the merits to warrant a stay of eviction proceedings. Thornton v. New York City Board/Dept. of Education, 125 A.D.3d 444, 445 (1st Dept. 2015). Depriving Respondents of the opportunity to make that showing to Supreme Court is not consistent with the proposition that Respondents' eviction would be "certain" or that the lack of merit of Respondents' cause of action is "overwhelming," the standard set by the authority cited above for a finding of futility. This Court, which does not have the subject matter jurisdiction to entertain Respondent's cause of action, is loath to exercise its discretion to de facto foreclose that cause of action by denying Movant's motion for restoration to possession.

[3] Petitioner also cites Gonzalez v. Nycha - Borinquen Plaza Houses, 71 Misc.3d 1213(A)(Civ. Ct. Kings Co. 2020), but that case is inapposite as the Court in that matter held that a petitioner in a lockout proceeding did not have standing because the petitioner was a licensee.

As the Court shall supervise the lifting of the ERAP stay as noted above, which requires judicial action, the provisions of AO 34/22 apply, particularly the extent to which AO 34/22 incorporates by reference the requirement of AO 245/21 at ¶2(b) that the Court must initiate a status conference prior to conducting further proceedings in any residential eviction matter commenced prior to March 17, 2020. The Court shall do so, particularly with regard to the controversy between the parties over the ERAP stay. The Court deems any conference the Court shall hold to satisfy any requirements of DRP-217 and the Court therefore does not reach the dispute between the parties over whether Petitioner had to make a motion pursuant to DRP-217 given the Court's prior order on Petitioner's motion for relief pursuant to DRP-213.

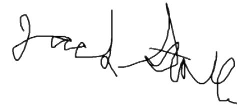
Accordingly, it is

ORDERED that the Court directs Petitioner to restore Respondents to possession of the subject premises forthwith, and it is further

ORDERED that the stay occasioned by Movant's ERAP application remains in effect pending a status conference between the parties and the Court, which the Court will initiate pursuant to AO 245/21 by email to counsel for the parties.

This constitutes the decision and order of the Court.

Dated: Brooklyn, New York
February 28, 2022



HON. JACK STOLLER
J.H.C.