2022-05-19

178 BROADWAY REALTY CORP. v. Charles

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART G

178 BROADWAY REALTY CORP.
Petitioner(s),
vs.

NATHAN CHARLES
Respondent-Tenant
JOHN DOE, JANE DOE
Respondents-Undertenants
Address: 1233 Saint John's Place, Apt. 1C
Brooklyn, NY 11213

L&T Index No. 309793-21/KI

DECISION

Hon. Kimberley Slade
Judge, Housing Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of Petitioner's Order to Show Cause to restore the case to the calendar.

Papers	**Numbered**
Order to Show Cause…..…….....	1
Affirmation in Opposition.....	2
Affirmation in Reply.....	3
Court file contained on NYSCEF…….....	

Petitioner moves to vacate an ERAP stay imposed by Section 8 of the current ERAP law (Chapter 417, Laws of 2021 Part A) in this holdover proceeding where petitioner seeks possession of the subject unregulated premises following service of a 60 Day Notice terminating respondent's tenancy effective August 31, 2021. Respondent retained The Legal Aid Society in December 2021 and shortly thereafter the proceeding was stayed as the Court became aware of a pending ERAP Application (Application Number 0N1YV) and the case was then placed on the ERAP

Administrative Calendar pending a determination of Respondent's application. Petitioner then filed the instant motion by order to show cause (OSC).

Petitioner challenges the stay provision of Part BB of Chapter 56 of the Laws of 2021, as amended by Part A of Chapter 417 of the Laws of 2021, arguing that it mirrors the previously invalidated automatic stays triggered by the filing of hardship declarations decided in *Chrysafis v. Marks, 2021 WL 3560766 (8/12/21)*, and that CPLR 2201 grants courts in a civil action inherent power to control their own proceedings and stay or suspend cases in its discretion. The motion is supported by an affidavit from the managing agent of the petitioner-landlord. In the affidavit, the agent swears that even if ERAP is approved, no monies will be accepted… and that "no amount of money will make petitioner whole." (*See*, Affidavit Doc. No. 10 on NYSCEF paragraphs 5 through 7). In general, if a petitioner accepts an ERAP payment it must agree to a twelve month tenancy/occupancy or forego the payment of arrears that ERAP would otherwise have paid in order to continue a proceeding.

In response, respondent argues that petitioner's constitutional challenge to the ERAP stay is not properly before the court because petitioner's OSC did not provide for service on the New York Attorney General's Office. Instead, it appears that petitioner served the AG's Office with a copy of the OSC on a later date and once more after this Court issued an interim order on a similar case presently before this Court presenting the same issue and being litigated by the same attorneys. That order directed an additional form of service without determining that it was either necessary or required. As the Court does not see any prejudice to when and how a copy of the OSC was served on the AG's Office and no one from the AG's Office has appeared in any event, the matter will be decided on its merits. As discussed below, as the matter is decided upon other

grounds, it is unnecessary to address the constitutional questions raised by Petitioner, so they are not addressed.

Respondent argues that nothing in CPLR 2201 grants this court the authority to vacate the statutory stay that is triggered with the filing of an ERAP application and that the ERAP statute itself does not provide for the vacatur of its stay. However, respondent does partially concede that under "certain circumstances" the court has power to modify or vacate its own orders. In addition to arguing that the Court may not vacate the ERAP stay for this reason respondent further argues that ERAP helps landlords by enabling them to receive funds which in turn helps tenants avoid eviction and thus the stay must remain intact. While this position is unarguably true in most if not all instances where the parties are already in privity and arrears are the source of the claim, it is less true and fails to account for the variety of situations that arise in the context of holdover proceedings where not every petitioner and respondent desires a tenancy, where rent is neither owed nor claimed (as distinct from use and occupancy) and where that the payment of ERAP funds will not further the goal of preserving tenancies.

This argument fails to provide a rationale for continuing a stay where this goal cannot or will not be accomplished, as occurs in many instances. Noteworthily, again, the stay applies to occupants and respondents, not only to tenants, where there may be an approved application for ERAP funds but where the petitioner or landlord may elect not to participate in the ERAP program and thus, the goal of preserving tenancies will not be accomplished. Consequently, the ERAP stay is only fairly or rationally continued or maintained where a tenancy is the desired outcome of both sides or where the law may or will impose a tenancy on a landlord such as where a *prima facie* showing of succession by a licensee has been articulated.

Where a landlord or owner of a non-regulated tenancy elects not to participate, agrees to forego the ERAP monies where required, articulates this in an appropriate context and moves to vacate the stay its blanket continuance will overly prejudice a landlord or owner while providing a tenant, occupant or applicant with a stay that does not further the legislative or policy goals of ERAP, has no individual merit and serves no end other than to prolong a case from being heard on its merits. ERAP only proves to be helpful in those circumstances where the landlord's participation and acceptance of its payment creates, prolongs or maintains a tenancy. Here, this is not the case as evidenced by petitioner's motion and supporting affidavit. Courts have vacated ERAP stays where "an ERAP application has no relevance to the resolution of the dispute before the court." See, *Silverstein v. Huebner* 72 Misc.3d 1212(A), 2021 N.Y. Slip Op. 50702(U) (Civ Ct. Kings Co. 2021) and *Kelly v Doe* 2022 NY Misc. LEXIS 937, 2022 NY Slip Op 22077 (Civ. Ct. Kings Co. 2022) *inter alia*.

Others, such as this Court, have relied on the legal principal of futility in *Actie v. Gregory*. See, *Actie v. Gregory*, 2022 NY Slip Op 501117[U] (Civ. Ct. Kings Co. 2022) and *2986 Briggs LLC v. Evans*, 74 Misc.3d 1224(A) (Civ Ct Bronx Co, 2022). In *Actie*, the ERAP stay was vacated in the context of a holdover where the landlord sought possession of an apartment for his own personal use in a building with fewer than four units. Since the landlord in *Actie* elected not to accept ERAP money, approval of the pending application would not have resulted in the protection or creation of a tenancy. Additionally, it is observed that in some instances such as in *Actie*, a landlord may properly *choose* to accept monies under the ERAP program while continuing to seek possession. Respondent argues that the facts in this case differ from *Actie* because the petitioner here has not argued how the ERAP stay uniquely impacts it. The Court disagrees that such an assertion is necessary. The petitioner has sworn to the fact that they will not accept ERAP money—

albeit without providing a specific reason as to why, but this is not required, and the outcome is the same. As there is currently no showing of a tenancy that may be imposed upon petitioner and petitioner may elect to not participate in the ERAP program so long as it is willing to accept the financial repercussions of declining ERAP, it is at liberty to do so and the maintenance of the stay at this juncture is prejudicial and serves no discernible legal purpose.

While respondent correctly argues that it is possible for petitioner to "change their mind" and accept the ERAP money after an approval this Court cannot decide this issue based upon the speculative hypothesis that a petitioner will engage in fraud, and even if a petitioner did engage in such behavior, there are other remedial options. A petitioner who has submitted an affidavit indicating that they are willing to forego the ERAP monies in favor of possession is presumably acting in good faith until it is demonstrated that they are not. It is further noted that the only question decided in this opinion is whether to maintain or vacate the automatic ERAP stay. Respondent continues to have significant process rights and has yet to interpose an answer. When and if the matter reaches a possessory judgment, the Court continues to retain discretionary stay powers pursuant to RPAPL 753. The sole issue here is whether the ERAP stay in this proceeding must be continued and that question is answered in the negative.

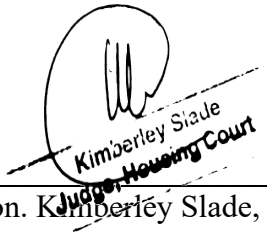
Finally, for the first time in this proceeding (no answer was filed in this case), respondent alleges that the subject premises may be rent stabilized. In support, respondent attaches a DHCR Order and Opinion denying the then owner of the subject premises' Petition for Administrative Review and upholding the decision of the Rent Administrator finding an overcharge despite the owner's substantial rehabilitation allegations and a DHCR Order from March 22, 1996, denying application because the then owner of the subject premises had failed to submit adequate evidence of substantial rehabilitation. (*See*, Respondent's Exhibits B and C – Doc. No(s). 18 and 19 on

NYSCEF). The documents attached pertain to apartments number 1A and 1D – not the one that is the subject of this holdover proceeding (Apt. 1C). Parenthetically, it would appear to be in the interests of all parties for this case to proceed so that the deregulation claim may be litigated should an answer be filed raising this issue. Assuming arguendo respondent prevails on this defense the current stay would again serve no discernible purpose as currently, there is no information gathering or any other activity moving this matter towards resolution of its legal issues and, at this juncture respondent's opposition is insufficient to overcome the futility of continuing this particular ERAP stay.

As such, petitioner's motion is granted to the extent of vacating the ERAP stay and scheduling the matter for a conference in anticipation of trial. Respondent is directed to file an answer and motion, if any, by June 6, 2022 on NYSCEF. This case will be heard on June 15 at 11:30am in Part G, Room 509. This constitutes the Decision/Order of the court.

Date: May 19, 2022

Brooklyn, New York



Hon. Kimberley Slade, JHC