2022-06-16

Souffrant v. Jeninty

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: PART E

----------x

CHRISTINE SOUFFRANT

L&T Index No. 309377/21

Mot. Seq. No. 5,61

Petitioner,

DECISION AND ORDER

-against-
DANA JENINTY,
DAVID ZIQUE

Respondents.

----------x

HONORABLE DAVID A. HARRIS, J.H.C.:

Recitation, as required by CPLR 2219(a), of the papers considered in the review petitioner's order to show cause to restore for a hearing as to the ERAP stay, for an order lifting the stay, and for judgment, listed by NYSCEF Number:

10,11,12,13,14,15,16,17,18,19,20

Petitioner, after the expiration of a 90 (Ninety) Day Notice of Termination dated June 18, 2021 (Notice), commenced this summary proceeding to recover possession of the 2nd floor (Apartment) in the building located at 25 Paerdergat 9th Street, in Brooklyn (Building). On December 10, 2021, respondent Dana Jeanty (Jeanty), named herein as both Dana Jeinty and Dana Jeninty, appeared by counsel. On January 26, 2022, Jeanty filed notice of a pending Emergency Rental Assistance Program (ERAP) application, amending that filing on March 20, 2022.

The instant opposed order to show cause seeks a hearing as to whether the statute enacting ERAP (L. 2021, c. 56, Pt. BB, as amended by L. 2021, c. 417) (ERAP Statute) calls for a stay of this proceeding, a finding that it does not, the entry of judgment, and forthwith issuance of a warrant of eviction.

Petitioner, noting that the instant proceeding is a holdover rather than a nonpayment, characterizes the filing of an ERAP application as a "stall tactic." Petitioner further asserts that "[u]nder ERAP, any person who submits an ERAP application, whether eligible or not, is granted, upon submission of the ERAP application, a stay of any eviction proceeding, which lasts until the agency makes a determination of the ERAP application" (NYSCEF No. 9).

Petitioner urges that "[t]he regulatory scheme under ERAP ... presents the identical due process issues discussed by the court in *Chrysafis v Marks*, which struck down New York's prior eviction moratorium statute which allowed tenants a right to unilaterally grant themselves an indeterminate stay without requesting same from a court" (*Id.*). Petitioner further relies on *Actie v Gregory* (74 Misc 3d 1213 [A] [Civ Ct Kings County 2022]) to support the proposition that no stay is warranted here.

In opposition, Jeanty characterizes the stay as "statutory and mandatory" and argues that the ERAP statute confers on the Office of Temporary and Disability Assistance (OTDA) the authority to determine ERAP eligibility and this court is not vested with jurisdiction to do so. Jeanty further argues that petitioner has not properly asserted a constitutional challenge to the ERAP statute by failing to serve the Attorney General of the state in compliance with CPLR 1012 [b], and that even if such a challenge were properly before the

court, that the ERAP Statute does not offend due process considerations. Finally, Jeanty argues that petitioner's reliance on *Actie v Gregory* (74 Misc 3d 1213 [A] [Civ Ct Kings County 2022]) is misplaced.

Petitioner contests the assertion that respondent is a tenant with a rental obligation, noting the service and expiration of the Notice prior to commencement of the proceeding. Further, petitioner denies challenging the constitutionality of the ERAP statute but contests the applicability of its stay provisions, urging that a stay is futile because Petitioner will not accept ERAP funds. The court notes that the petition alleges that "Dana Jeinty and David Zique is [sic] the tenant of the subject premises under monthly hiring" (NYSCEF No. 1) and that RPAPL § 711 is entitled "grounds where landlord tenant relationship exists."

The ERAP statute vests authority with the commissioner of OTDA "to implement, as soon as practicable a program of rental and utility assistance for those eligible pursuant to section five of this act" (ERAP Statute § 3). Eligibility is defined to include households with:

> "a tenant or occupant obligated to pay rent in their primary residence in the state of New York [with] an individual who has qualified for unemployment or experienced a reduction in household income, incurred significant costs or experienced other financial hardship due, directly or indirectly, to the COVID-19 outbreak [and] demonstrates a risk of experiencing homelessness or housing instability."

(ERAP Statute, § 1[a][i-iii]).

The ERAP Statute further provides that "eviction proceedings for a holdover or

expired lease, or nonpayment of rent or utilities that would be eligible for this program shall not be commenced against a household that has applied for this program... unless or until a determination of ineligibility is made.... [I]n any pending eviction proceeding whether filed prior to, on, or after the effective date of this act, against a household who has applied or subsequently applies for benefits under this program ... all proceedings shall be stayed pending a determination of eligibility." (ERAP Statute § 8).

What petitioner seeks here is a peremptory determination that respondent is not qualified for a stay, but petitioner urges that this is so because respondent is not entitled to ERAP benefits and because petitioner has already determined that it will not accept ERAP benefits. The argument, however, does not present a substantive distinction between a determination of eligibility for benefits that petitioner concedes is to be made by OTDA (NYSCEF No 20), and determination of eligibility for a stay. The core of petitioner's argument is that no stay is warranted because respondent is not eligible for benefits. That determination is one for OTDA, rather than for this court, to make. To the extent that other court's may have found to the contrary (*See, e.g. Abuelafiya v Orena*, 73 Misc 3d 576 [Dist Court Suffolk County 2022]), this court declines to follow that holding. In any event, petitioner acknowledges that ERAP eligibility is to be determined by OTDA and not by this court.

A determination of eligibility carries with it consequences for a landlord, whether or not the landlord chooses to accept payment; the petitioner here has unequivocally stated that it will not. If a provisional approval is issued and the landlord does not provide information to effectuate payment within 180 days, the funds can be reallocated and that

approval can be used "as an affirmative defense in any proceeding seeking a monetary judgment" (ERAP Statute § 9[2][c]). The vacatur of a stay here could result in circumstances in which petitioner could seek use and occupancy before a determination of eligibility has been made, depriving respondent of an affirmative defense to the claim.

The existing statutory scheme does not leave an aggrieved landlord without a remedy. Either a landlord or an applicant can appeal a determination of eligibility (https://otda.ny.gov/programs/emergency-rental-assistance/appeals.asp [last accessed June 11, 2022]) and nothing precludes a party aggrieved by that determination from commencing a proceeding pursuant to CPLR Article 78.

In the instant proceeding, petitioner urges that the stay pursuant to the ERAP Statute presents "due process issues identical to those raised in *Chrysafis v Marks*" (_ US _, 141 S Ct 2482, 210 L ED 2d 1006 [2021]). That argument is without merit. By its express terms, *Chrysafis* "enjoins the enforcement of only Part A of the Covid[-19] Emergency Eviction and Foreclosure Prevention Act (CEEFPA)... If a tenant self-certifies financial hardship, Part A of CEEFPA generally precludes a landlord from contesting that certification and denies the landlord a hearing. This scheme violates the Court's longstanding teaching that ordinarily "no man can be a judge in his own case" consistent with the Due Process Clause." (*Id.*). The court's determination turned not on granting of a stay, but on the capacity of a tenant, without review or oversight, to unilaterally declare the existence of financial hardship. Under the ERAP statutes, applicants do not self-certify their eligibility. Rather, their eligibility is determined by OTDA. The stay addressed in *Chrysafis* was an end unto itself, effected by self-certification. The

stay under the ERAP Statute, while indeterminate in length, exists until OTDA determines ERAP eligibility, preserving the status quo and is subject to appeal. In contrast to the stay addressed in *Chrysafis*, there is no act of self-certification. Due process is not implicated by a stay under these circumstances (*See, e.g. Harbor Tech LLC v Correa*, 73 Misc 3d 1211[A] at 2 [Civ Ct Kings County 2022] ["Staying or otherwise restricting litigation to resolve a dispute by alternative means does not deny due process."]).

Petitioner's reliance on *Actie v Gregory* (74 Misc 3d 1213[A] [Civ Ct Kings County 2022]), is misplaced, as its underlying factual scenario is markedly different from that in the case at bar. In *Actie*, the court noted that Tawana Gregory, the tenant who had submitted an ERAP application, had vacated the unregulated apartment, and that the vacatur of the stay was opposed by Kawan Mack, an undertenant named in the proceeding (*Id.* at 1). The court found that "the remaining occupant, the undertenant, does not have succession rights to the premises nor any other independent possessory right or interest " (*Id.*, page 2) and that finding was particularly salient in the determination that a continuing stay would be futile. The fundamental factual differences between the instant proceeding and *Actie* undermine its relevance in the instant proceeding.

The legislature has determined that eligibility for ERAP is to be ascertained by OTDA and that a stay of either commencing or prosecuting a summary proceeding is warranted while OTDA makes that determination. The stay is indefinite but finite. It precludes tenants eligible for funds from being evicted before those funds can be issued and, when a landlord declines funds, establishes an affirmative defense to a future claim for payment when,

without a stay, that claim could be prosecuted to conclusion despite the potential affirmative defense afforded by the ERAP Statute. If the ERAP stay is lifted, petitioner could prosecute a claim for a money judgment to its conclusion, before a provisional approval of ERAP that could ripen into a complete defense to the issuance of a judgment. While judicial vacatur of a legislatively mandated stay undeniably would expedite the resolution of this summary proceeding, this court is not at liberty to substitute its judgment for that of the legislature. Vacatur of the stay would undermine the significance of a determination by OTDA and could work to deprive respondent of rights, among them the capacity to assert an affirmative defense to monetary claims by petitioner. The court notes that the petitioner here asserts $15,000 outstanding through March 2022.

For the foregoing reasons, petitioner's motion to vacate the stay under the ERAP Statute is denied.

This is the decision and order of the court.

Dated: Brooklyn, New York
June 16, 2022

David A. Harris, J.H.C.

Petitioner's attorneys:

Thomas & Spikes, Esqs.
111 Court Street, Suite 2R
Brooklyn, New York 11201
khspikes@aol.com

Respondent's attorneys:

The Legal Aid Society
Alicia M. Mason, Esq.
394 Hendrix Street
Brooklyn, NY 11207
amason@legal-aid.org