2022-06-21

Park Tower S. Co. LLC v. Simons

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Park Tower S. Co. LLC v Simons
2022 NY Slip Op 22192
Decided on June 21, 2022
Civil Court Of The City Of New York, New York County
Bacdayan, J.
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Decided on June 21, 2022

Civil Court of the City of New York, New York County

Park Tower South Company LLC, Petitioner,

against

Cody Simons,
Respondent,
JOHN DOE, JANE DOE
Respondent-undertenants.

Index No. 302220/2020

Pelican Management, Inc. (Hal David Wiener, Esq.), fort the petitioner

Vernon & Ginsberg (Yoram Silagy, Esq.), for the respondent-Cody Simons

Karen May Bacdayan, J.

Recitation, as required by CPLR 2219 (a) of the papers considered in review of this motion by NYSCEF Doc No: 10-17 (motion sequence 1), 18- 20 (motion sequence 2 and supporting affidavits), 21-22 (respondent's attorney's affirmation in opposition), 23 (respondent's attorney's memorandum of law in support of opposition), 24 (petitioner's reply affirmation).

PROCEDURAL HISTORY AND BACKGROUND

This is a licensee holdover proceeding commenced by petitioner against respondents Cody Simons, Jane Doe, and John Doe after the death of the tenant of record in this rent stabilized premises. Cody Simons ("respondent") has appeared by an attorney and interposed an answer asserting a claim of succession rights to the subject premises.

On January 17, 2022, after the expiration of the stay occasioned by respondent's filing of a hardship declaration (L 2021, ch 417, part C, subpart A), petitioner moved for discovery on respondent's succession defense. (NYSCEF Doc No. 10, motion sequence 1.) The court and the parties attempted to settle the discovery dispute, and, because a settlement seemed likely, the court marked the case off-calendar for resolution of the motion, with the caveat that if the parties were not able to reach an agreement, they could request that the motion be placed back on the court's calendar. Before the motion could be settled or re-calendared, respondent's attorney discovered that his client had applied for ERAP, triggering an automatic stay of the proceedings, and the case was placed on the court's administrative stay calendar. (NYSCEF Doc No. 21, respondent's attorney's affirmation ¶ 12; NYSCEF Doc No. 20, petitioner's attorney's affirmation ¶ 10.) The parties dispute who told whom about the ERAP application, *id*., but this is of no moment to the court. The parties do not dispute that respondent received a provisional approval for ERAP on November 16, 2021. (NYSCEF Doc No. 22, exhibit A of respondent's opposition.)

Petitioner now moves for sanctions against respondent's attorney for frivolous conduct in seeking an automatic stay of the proceedings in a futile attempt to delay litigation of the central issues herein, and vacatur of the ERAP stay on those grounds. (NYSCEF Doc No. 20, motion sequence 2.) Petitioner cites to a spate of recent cases granting a landlord's motion to lift the ERAP stay in licensee holdover proceedings for various reasons including futility of the stay, [*2]and the absurd result that would result from a stay. In opposition, Respondent cites to a number of cases which denied a landlord's motion to vacate an ERAP stay in licensee holdover proceedings.

Citing to the website of the agency charged with administering ERAP, the Office of Disability and Temporary Assistance ("OTDA"), respondent also argues that because respondent was *provisionally approved* for ERAP funds on November 16, 2021, the stay precludes continued litigation for one year after said approval. (NYSCEF Doc No. 22, exhibit A to respondent's attorney's affirmation in opposition; Respondent's memorandum of law at

3.)

The parties do not dispute whether the court has the authority to consider a motion to vacate an ERAP stay. Nor is it disputed that respondent has received a provisional approval for ERAP funds for the reason that the landlord has plainly stated that it will not participate in the program, or accept any ERAP funding. (NYSCEF Doc No. 19 ¶¶ 5-6, affidavit of Franscesa Furkayg.)

Whether or not the stay applies to a licensee who claims succession rights, is not germane to the court's analysis. The only questions before the court are whether sanctions against respondent's attorney are appropriate, and whether a "provisional approval" has the same effect of dissolving the stay as a "determination of eligibility."

For the following reasons, petitioner's motion to vacate the ERAP stay is granted, and that branch of petitioner's motion seeking sanctions is denied.

DISUCUSSION

Sanctions

22 NYCRR 130-1.1 states in relevant part that sanctions are appropriate where an attorney's conduct "is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," or an attorney's conduct "is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." (*Id*. at [c] [1], [2].) In this time of uncertainty and divergent judicial interpretations of a sometimes inscrutable statute, sanctioning respondent's attorney, who has a good faith belief that he is correctly interpreting the statute to continue the stay, is wholly unwarranted. Such is a matter that is appropriately resolved by this motion before the court. Moreover, the ERAP stay is administratively placed by the court. Moving for sanctions against respondent's attorney for honoring the automatic stay is specious at best. Petitioner's motion for sanctions is denied.

The Effects of a Provisional Approval for ERAP Funds

Submission of an application for ERAP, has the effect of staying "all proceedings pending a *determination of eligibility* (emphasis added)." (L 2021, c 56, part BB, subpart A, § 8, as amended by L 2021, c 417, part A, § 4.) A *provisional approval* is issued to a tenant when their eligibility for ERAP has been determined, but payment has not been effectuated

because the landlord has either implicitly or expressly refused such payment. (L 2021, ch 156, part BB, § 9 [2] [c].)

Disposition of this motion requires an analysis of whether a provisional approval for ERAP funds payable to a landlord who declines to participate in the program, either by [*3]completing the application process or refusing to accept funds, has the same effect on the ERAP stay as a determination of eligibility and acceptance of approved funds by the landlord. While the consequences to the landlord are different in each instance, for the following reasons, the court holds that the effect of a provisional approval is the same as a determination of approval in one important aspect: the stay is simply dissolved.

The ERAP statute provides that the Office of Temporary and Disability Assistance ("OTDA") shall undertake reasonable efforts to obtain cooperation of a landlord in the application and approval process using a variety of methods over a period of time, including phone, text, mail, and email. (L 2021, ch 156, part BB, § 9 [2] [b].)

Next, the statute draws a distinction between the consequences of 1) a *determination of eligibility for set-aside funds that are not accepted* by the landlord (L 2021, ch 156, part BB, § 9 [2] [c]); and 2) a *determination of eligibility and acceptance of approved funds*. (L 2021, ch 156, part BB, § 9 [2] [d].)

If payment of the approved monies cannot be made but for the landlord's *refusal to participate in the program* after outreach efforts have failed, the statute provides:

> "If a payment cannot be made directly to a landlord or owner after the outreach efforts described in paragraph (b) of this subdivision, funds in the amount *approved for rental assistance* to an *otherwise eligible applicant* shall be available for a period of 180 days . . . . *If the landlord or owner does not provide necessary information or documentation to effectuate payment* as directed before 180 days, the commissioner may reallocate the set aside funds to serve other rental assistance program applicants. *The tenant may use such provisional determination as an affirmative defense in any proceeding seeking a monetary judgment or eviction brought by a landlord for the non-payment of rent accrued during the same time period covered by the provisional payment for a period of twelve months from the determination of provisional eligibility*. If the landlord has not accepted such provisional payment within twelve months of the determination the *landlord shall be deemed to have waived the amount of rent covered by such provisional payment, and shall be prevented from initiating a monetary action or proceeding, or collecting a judgment premised on the nonpayment of the amount of rent covered by such provisional payment*." (*Id*. § 9 [2] [c].)

By contrast, the consequences to the landlord when it *accepts* ERAP monies as set forth in L 2021, ch 156, part BB, § 9 (2) (d).

"*Acceptance of payment* for rent or rental arrears from this program shall constitute agreement by the recipient landlord or property owner: (i) that the arrears covered by this payment are satisfied and will not be used as the basis for a non-payment eviction; (ii) to waive any late fees due on any rental arrears paid pursuant to this program; (iii) to not increase the monthly rent due for the dwelling unit such that it shall not be greater than the amount that was due at the time of application to the program for any and all months for which rental assistance is received and for one year after the first rental assistance payment is received; (iv) *not to evict for reason of expired lease or holdover tenancy any household on behalf of whom rental assistance is received for 12 months after the first rental assistance payment is received* (emphasis added)." (*Id*.)

Respondent's attorney's argument is that, as with approval and *acceptance* of ERAP [*4]funds, receiving a provisional approval for rent arrears protects the approved applicant from eviction in a holdover proceeding for one year from the date of the provisional approval. This argument disregards the plain language of the statute. Rather, respondent's attorney relies on information provided on the website of the Office of Temporary and Disability Assistance. Respondent notes that the Frequently Asked Questions page of the OTDA website page addressing the effect of a provisional approval for ERAP states in relevant part:[FN1]

> "If you are determined to be eligible to receive emergency rental assistance under ERAP, you will receive a notice indicating that you are provisionally approved to receive ERAP. This means that you have completed your portion of the application, but your Landlord has not yet submitted documents or information necessary for your landlord to complete your application and receive payment. *Once you have been provisionally approved to receive help under ERAP, you cannot be evicted because your lease has expired*, or because you did not pay rent during the COVID-19 Pandemic. If your landlord starts a proceeding in Court to evict you because your lease expired, you are a holdover tenant, or because you were unable to pay rent that would be eligible for coverage under ERAP, you should show the provisional approval notice to the Court. *Even if your landlord does not submit documents or information necessary to complete your application, you cannot be evicted during the year following the date of your provisional approval because your lease has expired*, or because you did not pay rent during the COVID-19 Pandemic.[FN2]

The court disagrees with OTDA's interpretation of the statute on its website. Clearly, a

landlord who *accepts payment* of approved ERAP funds agrees "not to evict for reason of expired lease or holdover tenancy any household on behalf of whom rental assistance is received for 12 months after the first rental assistance payment is received." L 2021, ch 156, part BB, § 9 (2) (d). There are limited exceptions to this restriction, not relevant here as Section 9 (2) (d) is not apropos the facts of this case.

However, a landlord who declines to accept provisionally approved monies, or whose occupant receives only a provisional approval because of the landlord's refusal to participate in the application process, faces different consequences under the statute. The provisionally approved applicant will, in that case, have a defense in any proceeding seeking a monetary judgment or eviction proceeding for nonpayment of rent for rents accruing during the time period for which a grant was provisionally approved. This affirmative defense is available for a period of 12 months from the provisional approval. If after the twelve months since provisional approval, the landlord still has not accepted the ERAP funds, then the landlord is deemed to have waived the rent covered by the provisional approval. These consequences are distinct from the 12-month bar on eviction after accepting an ERAP payment. (L 2021, ch 156, part BB, § 9 [2] [d].) Importantly, nothing in the ERAP statute requires a landlord to participate in the process or accept approved monies.

The plain language of the statute does not prevent petitioner from advancing this [*5]holdover proceeding. The proceeding was commenced in October 2020, and then stayed by the filing of a hardship declaration in February 2021. When the hardship declaration stay expired, the parties continued litigation. The case was again stayed when the court became aware that an ERAP application had been submitted. Now that the court has been made aware that a determination of eligibility has been made and ERAP funds for the respondent have been set aside, the stay can be vacated.

While courts most often defer to the governmental agency charged with administering a statute, "if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight." (*Kurcsics v Merchants Mut. Ins. Co.,* 49 N.2d 451, 459 [1980].)

Finally, if respondent has somehow detrimentally relied on erroneous website advice from OTDA, his claim, if any, is against that agency.

Accordingly, it is

ORDERED that petitioner's motion to vacate the ERAP stay is GRANTED, and it is further

ORDERED that the parties are to continue their attempts to settle petitioner's motion for discovery. If they cannot reach an agreement after good faith efforts and a reasonable time, they may contact the court by letter correspondence filed on NYSCEF setting forth the reasons that settlement negotiations were unsuccessful, and requesting a court date for oral argument on petitioner's motion for discovery.

This constitutes the decision and order of this court.

Dated: June 21, 2022
New York, NY

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HON. KAREN MAY BACDAYAN

Footnotes

Footnote 1:(https://otda.ny.gov/programs/emergency-rental-assistance/faq.asp#faq-tenant [last visited June 14, 2022].)

Footnote 2: The OTDA website also states that "OTDA makes every effort to post accurate and reliable information, however, it *does not guarantee* or warrant that the information on this [w]ebsite is complete*, accurate* or up-to-date (emphasis added)." (Disclaimer | OTDA (ny.gov), last visited June 17, 2022.)

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