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Kessler v. Carbone

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Kessler v Carbone
2022 NY Slip Op 31824(U)
May 20, 2022
Civil Court of the City of New York, Richmond County
Docket Number: L&T Index No. 050533/20
Judge: Eleanora Ofshtein
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF RICHMOND: HOUSING PART Y
---X
LENKA KESSLER, MARK KESSLER,
ADOLF KESSLER AND HELEN KESSLER,

Petitioner(s),

L&T Index No. 050533/20
Motion Seq. No: 5&6

-against-

DECISION/ORDER

ASHLEY CARBONE aka ASHLEY
CARBONE SOBAG, GILL SOBAG,
JOHN DOE AND JANE DOE,

Respondent(s),

Premises: **11 Rupert Avenue, 1st Floor**
Staten Island, New York 10314
---X
Hon. ELEANORA OFSHTEIN,
Judge, Housing Court

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

Papers	NYSCEF Document
Respondent's OSC (seq 5)	#39
Petitioner's Cross-motion (seq 6) & opposition to OSC	#40-49

Decision/Order upon cited papers and after argument, is as follows:

Respondent, Ashley Carbone, brings this Order to Show Cause ("OSC") seeking to vacate the default judgment entered against all Respondents after inquest, and to stay eviction based on her ERAP filing. No other Respondent have appeared. Petitioner brings this cross-motion seeking the denial of the OSC and to set aside the ERAP stay.

This summary holdover proceeding commenced against Ashley Carbone, aka Ashley Carbone Sobag, Gill Sobag, John Doe and Jane Doe, for possession of this unregulated unit located at 11 Rupert Avenue, first floor, in Staten Island, New York 10314. The petition alleged that the Respondents had been tenants in possession pursuant to a prior rental agreement and that their tenancy was terminated by a 90-day Notice of Termination which was served in November 2019. The case was initially stayed due to the COVID-19 pandemic, and then further stayed when Respondent filed a hardship declaration. Although Respondent had retained an attorney

from Staten Island Legal Services, in January 2021, her attorney sought to be relieved due to Respondent's lack of communication with her attorney. By decision dated November 1, 2021, Respondent's attorney was relieved. Additionally, Petitioner had filed a motion to set aside the Hardship Declaration filed by Respondent, and after hearing, and on Respondent's default, the motion was granted, and the stay was set aside. The case was adjourned for trial and after Respondent's continued default, the Court's decision, after inquest, granted a judgment of possession against Respondents, and a money judgement in the amount of $36,400, due to Respondent's having initially appeared in the case (see decision dated December 15, 2021).

After issuance of the warrant and service of the eviction notice, Respondent filed this OSC (seq 5) seeking to vacate the default judgment and to stay the case due to her filing of an ERAP application in February 2022 (confirmation: 0BAA1). Petitioner filed its cross-motion (seq 6) seeking the denial of Respondent's OSC, and to vacate/set aside the ERAP stay. Respondent failed to appear on the return date despite the Court having specifically stated on the OSC that she must appear timely.

A review of the ERAP filing confirmation indicates that Respondent had applied on the eve of her eviction, and that the application was still 'pending'. Other than providing the ERAP information, Respondent's OSC is devoid of any meritorious defense to this summary holdover proceeding. Petitioner's cross-motion seeks to set aside the ERAP stay arguing that Petitioner has repeatedly informed Respondent that Petitioner is only interested in retrieving possession of the subject premises. Petitioner's affidavit in opposition states that she notified Respondent by certified letter "back when the ERAP program came out that I won't cooperate with the program, I just want her to move out." (See NYSCEF document #42, paragraph 8, affidavit of Lenka Kessler, dated February 8, 2022). Petitioner provides a copy of her undated letter, refusing ERAP and seeking only possession of the subject premises (see Exhibit B, NYSCEF document #45). In addition to this affidavit, Petitioner's daughter avers that Respondent's behavior in the subject premises has been objectionable (see NYSCEF document # 43).

The ERAP statute"[1] established a program for the distribution of federal funds for rent relief, implemented and administered by the Office of Temporary and Disability Assistance

[1] L. 2021, c. 56, Part BB, Subpart A, Section 8, as amended by L. 2021, c. 417, Part A, Section 4. See also, Administrative Order # AO 34/22, dated January 16, 2022, of New York State Chief Administrative Judge Lawrence K. Marks.

(OTDA). The ERAP statute was amended September 2, 2021, with the following sections[2], as relevant to this motion:

> **Restrictions on eviction:** (Subpart A, §8, amended by L. 2021, c. 417, Part A, §4) Except as provided in 9-a, as added by the amendments, "any pending eviction proceeding", which includes holdover or nonpayment cases, "all proceedings shall be stayed pending a determination of eligibility."
>
> **Eligibility:** (L. 2021, c. 56, Part BB, Subpart A, §5) ERAP eligibility standards and priorities to be established by OTDA, including four itemized eligibility criteria, including the requirement that a household be found eligible if it is a "tenant or occupant obligated to pay rent in their primary residence in the State of New York including both tenants and occupants of dwelling units".
>
> **Definitions**: (L. 2021, c. 56, Part BB, Subpart A, §2[7]) "Rent": as defined in Real Property Actions and Proceedings Law (RPAPL) §702 as "the monthly or weekly amount charged in consideration for the use and occupation of a dwelling pursuant to a written or oral rental agreement".

The ERAP statute stays "any pending eviction proceeding", which includes holdover or nonpayment cases, since it states that "all proceedings shall be stayed pending a determination of eligibility". However, the Court's interpretation of the ERAP statute must include its plain language as well as its intent since "it is appropriate to examine the legislative history even though the language of (the statute) is clear". Riley v County of Broome, 95 NY2d 455 (2000).

As cited by New York State Bankers Assn v Albright, 38 NY2d 430, 436 (1975), the Supreme Court, in United States v American Trucking Assns, 310 US 534, 543 (1940), states:

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'. The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered

[2] See, Briggs LLC v Evans, 74 Misc 3d 1224(A) (Civ Ct, Bronx Co, 2022).

> by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion.

The original ERAP statute stated that its purpose was "to establish a COVID-19 emergency rental assistance program". The September 2021 amendment, as it relates to ERAP, states the Legislative Intent as follows:

> To date, technical and administrative challenges, low public awareness of the program, and the slow pace of implementation have hampered the program's effectiveness ***in covering the cost of rent arrears and providing widespread eviction protection***. (Emphasis added)

> (The Legislature was) especially cognizant of the ongoing risks posed by residential ***evictions stemming from non-payment of rent*** during the height of the public health emergency, and its recovery period…(Emphasis added)

A further example of the intent of the Legislature is the language in the amended bill:

> This legislation also extends eviction protections, ***subject to certain limitations***... It will also ensure that applicants for assistance are protected by permitting OTDA to share data with the court system ***to help courts determine whether litigants applied and are entitled to eviction protections.*** (Emphasis added)

The amended statute, written under exigent and emergency circumstances to provide needed rental assistance during a crisis, has been soundly analyzed in a number of recent decisions. Some of these decisions found that the Court must leave the determination of eligibility to OTDA. Others, finding Respondents eligible for ERAP coverage, left the stay in place. Many noted the Court's inherent authority to determine eligibility for purposes of the stay, and their concern when factors indicated a lack of fairness, credible allegations of fraud, or bad faith. (See Isidoro v Team Props LLC, 2021 NY Slip Op 32626[U] [NY Sup Ct, New York Co]; 255 Skyline Drive Ventures LLC v Ryant, L&T# 50014-20 [Civ Ct, Richmond Co, Oct 13, 2021]; Harbor Tech LLC v Correa, 73 Misc 3d 1211[A] [Civ Ct, Kings Co, 2021]; Gurevitch v Robinson, L&T# 72639-18 [Civ Ct, Kings Co, Feb 28, 2022]; Sea Park E LP v Foster, 74 Misc 3d 213 [Civ Ct, New York Co, 2021]; 560-566 Hudson LLC v Hillman, 2022 NY Slip Op 30718[U] [Civ Ct, New York Co]; 204 W 55th St LLC v Mackler, 2021 NY Slip Op 32901[U] [Civ Ct, New York Co]; Kristiansen v Serating, 2022 NY Slip Op 22097 [NY Dist Ct, Suffolk

Co]; Carousel Props v Valle, 74 Misc 3d 1217[A] [NY Dist Ct, Suffolk Co, 2022]; and Hudson Avenue Housing Assoc LLC v Howard, 2022 NY Slip Op 22078 [NY City Ct, Warren Co]).

Other Courts have recently found Respondents ineligible for the stay, and have allowed the vacatur of the ERAP stay to avoid inequity, fraud, and a result which may be absurd or futile. (See, Ami v Ronen, 2022 NY Slip Op 22098 [Civ Ct, Kings Co]; Actie v Gregory, 74 Misc 3d 1213[A] [Civ Ct, Kings Co, 2022]; Kelly v Doe No 1, 2022 NY Slip Op 22077 [Civ Ct, Kings Co]; Papandrea-Zavaglia v Arroyave, L&T# 303636-21 [Civ Ct, Kings Co, April 7, 2022]; 2986 Briggs LLC v Evans, 74 Misc 3d 1224[A] [Civ Ct, Bronx Co, 2022]; Karen Realty Assoc LLC v Perez, 2022 NY Slip Op 22093 [Civ Ct, Queens Co]; US Bank Trust, NA v Alston, 2022 NY Slip Op 22051 [Justice Ct, Dutchess Co]; and Abuelafiya v Orena, 73 Misc 3d 576 [NY Dist Ct, Suffolk Co, 2021]).

A distinction must first be made between the statute's authorization of an agency (OTDA) to dig through the weeds of each application to determine whether Respondents meet the criteria set up for the granting or denial of the application for rental assistance funds, and the Court's inherent and overarching analysis as to whether the statute, and its protective umbrella, covers the person seeking its protections. This Court agrees that in accordance with the ERAP statute and its intent, the Housing Court has the inherent power to review the circumstances of each case to assess whether the Respondent is covered by the statute and entitled to its protections.

The Emergency ***Rental*** Assistance Program provides that the intent of the protections is to reduce ***evictions stemming from non-payment of rent*** and provides restrictions on eviction for holdover or expired lease, or non-payment of rent, ***that would be eligible for coverage under this program***. In specifying that the intent of the statute stems from evictions caused by non-payment of rent, or other rental or financial obligations which could result in an eviction, a result the Legislature clearly sought to avoid, the Court has the inherent authority to analyze its cases and decide whether that condition precedent exists, thereby triggering the protective stay. Otherwise, the statute would not have specified coverage of a specific category of tenants/occupants, ones that are under the threat of eviction due to an obligation to pay rent.

The OTDA website corroborates this analysis and unequivocally states that "(t)enants in New York State may be eligible for ERAP ***if all the following apply***" and lists the criteria used for finding eligibility. This criteria includes household income; the receipt of unemployment

benefits, reduction of income, or financial hardship due to the pandemic; ***the applicant's obligation to pay rent*** at their primary residence for rent owed on or after March 13, 2020; and the ***risk of homelessness or housing instability demonstrated by having rental arrears.*** (Emphasis added) Additionally, the first topic under 'Frequently Asked Questions' states as follows:

> Benefits Available and Who is Eligible:
> What is the Emergency Rental Assistance Program and what help does it provide?
> The Emergency Rental Assistance Program (ERAP) is an ***economic relief program developed to help eligible households residing in at their primary residence in New York State request assistance for rental and utility arrears accumulated during the COVID-19 crisis***. The program will provide significant economic relief to low- and moderate-income tenants and will help landlords ***obtain rents due...***(Emphasis added)

The Court may, therefore, analyze each case to determine whether coverage by the ERAP statute is appropriate. In this case, an analysis of Petitioner's intent as to use and occupancy indicates some inconsistencies that must be noted. On the one hand, Petitioner clearly and unequivocally states that they are interested only in possession, and not arrears, and a letter to Respondent, and to OTDA, is provided to that effect, although the letter appears to be undated. On the other hand, in addition to a possessory judgment entered after inquest, the Court also entered a money judgment in the amount of $36,400 against Respondent due to her initial appearance in the case, and ultimate default at trial. Petitioner has not sought to vacate the money part of the judgment.

However, the Court also notes that in Petitioner's initial motion seeking to set aside the Hardship Declaration, a motion filed in September 2021, before the inquest was held, and long before Respondent filed the ERAP application, Petitioner's affidavit specifically indicates that Petitioner was not seeking a money judgment and was only seeking possession (see NYSCEF document #4, affidavit of Lenka Kessler dated September 3, 2021). Therefore, the Court's entry of a money judgment upon Respondent's default after inquest appears to have had little to do with possession, and payment of same would clearly fail to stop her eviction since this is a holdover predicated on termination of Respondent's tenancy, and not upon arrears due.

Additionally, although this limited record prevents the Court from a finding of bad faith, Respondent's affidavit in support of her OSC indicates no meritorious defense to this holdover proceeding, indicates that the ERAP application was filed on the eve of eviction, provides no

explanation as to why Respondent believed that a rental assistance program would be helpful where she was aware that Petitioner sought only possession, and is devoid of reasons as to why Respondent failed to either litigate her case or vacate the premises, despite having had knowledge of the instant matter for over two and a half years.

Therefore, this Court finds that Petitioner has sufficiently demonstrated that they are interested only in possession, that they have chosen not to participate in the OTDA program or accept funds for arrears, that they have provided Respondent of such notice, and that any such payment of arrears would fail to resolve the case and controversy. Respondent has failed to come forth with any evidence to the contrary.

Therefore, this Court finds in favor of Petitioner, grants its motion (seq 6) to vacate the ERAP stay and its protections, and denies Respondent's OSC (seq 5). Respondent has until May 31, 2022 to vacate the premises, and Petitioner may execute its warrant after service of the Marshal's notice of eviction, which may be remailed forthwith.

This constitutes the decision and order of this Court.

Dated: Richmond, New York
May 20, 2022

HON. ELEANORA OFSHTEIN
JHC

Petitioner's attorney: Nichole E Lee PC, nellie0903@gmail.com
Respondent: *pro se*.