2022-07-07

5th & 106th St. Assoc. LP v. Hunt

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5th & 106th St. Assoc. LP v Hunt
2022 NY Slip Op 22205
Decided on July 7, 2022
Civil Court Of The City Of New York, New York County
Bacdayan, J.
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Decided on July 7, 2022

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

5th and 106th Street Associates LP, Petitioner,

against

Martha Hunt, Respondent, "JANE DOE" "JOHN DOE" Respondent-undertenants.

Index No. LT-054735-19/NY

Rose & Rose (Paul Coppe, Esq.), for the petitioner

Outerbridge Law Altagracia Pierre-Outerbridge, Esq.), for the respondent-Martha Hunt

Karen May Bacdayan, J.

Recitation, as required by CPLR 2219 (a) of the papers considered in review of this motion by NYSCEF Doc No:

Papers **NYSCEF Doc No.**
Notice of Appearance 16
Notice of ERAP filing 17
Order to Show Cause and supporting documents (motion seq 3) 16-28

Cross-motion, affirmation in opposition to motion sequence 3,
and supporting documents (seq 4) 29-43
Appellate Term CPLR 5704 (b) order 45
Attorney affirmation in further support (motion seq 3) 46-49

PROCEDURAL HISTORY AND BACKGROUND

This is a holdover proceeding based on respondent's failure to complete the required annual recertification process for her apartment which is located in a HUD subsidized project-based Section 8 premises. Respondent is a 72-year old retired school teacher who lives alone, and is on a "fixed income." (NYCEF Doc No. 20, Hunt affidavit ¶ 4, NYSCEF Doc No. 31 ¶ 8; NYSCEF Doc No. 46, respondent's attorney's affirmation in opposition at 7.) Respondent contends that she is a rent stabilized tenant who is not subject to the HUD rules and regulations. (NYSCEF Doc No. 19, memorandum of law in support of order to show cause at 4; NYSCEF Doc No. 31 ¶ 4.)

On September 11, 2019, the Hon. Frances Ortiz granted summary judgment in favor of [*2]petitioner on its claims holding that "there is no basis in law" to support respondent's argument that she is entitled to a rent stabilized lease. (NYSCEF Doc No. 8 at 4.) The court entered a judgment in favor of petitioner, and stayed issuance of the warrant for 30 days to enable respondent to cure her breach and recertify. (*Id*. at 4-5.) A warrant issued but execution was stayed due to altered court procedures occasioned by the COVID-19 pandemic, and then due to a stay on the proceedings administratively placed as a result of the respondent having filed a hardship declaration pursuant to the COVID Emergency Eviction and Foreclosure Prevention Act ("CEEFPA".) (L 2021, c 417, part C, subpart A § 4.) When the hardship declaration stay expired, Petitioner filed a motion to execute on the warrant, which motion was granted, after argument on April 26, 2022 by the Hon. Judge Finkelstein. [FN1] The order stayed execution of the warrant through May 31, 2022. (NYSCEF Doc No. 15.) Thereafter, on May 12, 2022, Outerbridge Law appeared for respondent, and on June 6, 2022 respondent alerted the court that she had filed an Emergency Rental Assistance Program ("ERAP") application which had the effect of further staying this proceeding. (L 2021, c 56, part BB, subpart A, § 8.)

On June 9, 2022, respondent filed a proposed order to show cause with the court. (NYSCEF Doc No. 18.) On June 14, 2022 this court signed the order to show cause but struck respondent's request to reargue the September 11, 2019 decision and judgment of Judge Ortiz, and respondent's request to vacate the April 26, 2022 order of Judge Finkelstein

allowing for execution of the warrant. Pursuant to CPLR 5704 (b), respondent appealed this court's striking of the two aforementioned requests for relief to the Appellate Term, and the Appellate Term returned the order to show cause to this court for consideration of the relief that had been stricken. (NYSCEF Doc No. 45 at 1.) Also on June 14, 2022, respondent filed a notice of appeal of the April 26, 2022 order of this court. (NYSEF Doc No.24.)

Petitioner has now cross-moved to vacate the ERAP stay and for sanctions against respondent for filing an ERAP application, and against her attorney for advising respondent, an ineligible individual, to file the ERAP application. Oral argument was held on the record on June 28, 2022 and June 29, 2022.

DISCUSSION

Petitioner's Motion to Vacate the ERAP Stay

Petitioner has moved to vacate the automatic ERAP stay on the following bases: Respondent's application is frivolous and intended only to delay the proceeding; respondent is not income-eligible for ERAP (specifically respondent's reported 2018 income of $143,113 from New York State pension and Social Security is above 120% of the Area Median Income maximum for eligibility in New York County); respondent has been paying what she believes to be her legal monthly rent each month and there is nothing now for ERAP to pay unless respondent believes her rent is higher than $1,255.00 per month; respondent's tenancy has been terminated and so she no longer has an obligation to pay rent; and the application is futile because it she lives in subsidized housing which is a last priority under the statute even if the ERAP program were currently funded. (NYSCEF Doc No. 30 ¶¶ 5 15, 16.)

Respondent opposes petitioner's motion and argues that the "ERAP legislation does not provide a mechanism for challenging an ERAP stay." (NYSCEF Doc No. 46, respondent's memorandum of law in support of motion sequence 3 at 1-3.) Respondent's attorney states that respondent is a "tenant" obligated to pay "rent" as defined by the ERAP statute and that respondent has continued to pay, and petitioner has continued to demand, payment of rent. (*Id*. at 5-7.) Respondent's attorney argues that respondent need not be eligible under all the eligibility criteria and that respondent is specifically eligible under "bullet point three."[FN2] (*Id*.) Without addressing whether respondent's annual income is still $143,113 per year, respondent's attorney states that petitioner's speculation as to what her income is now as opposed to what it was in 2018 "is tone-deaf to the struggles people on a fixed income are

facing." (*Id*. at 7.) Regarding sanctions, respondent's attorney cites to this court's decision in *Park Tower S. Co. LLC v Simons*, for the proposition that an attorney who makes a good faith argument that the automatic stay provisions apply to their client, should not be sanctioned. (2022 NY Slip Op 22192, — Misc 3d — [Civ Ct, New York County 2022].)

Respondent's Eligibility for ERAP and the Automatic Stay

The court has the authority to consider whether or not to vacate an ERAP stay. (*See e.g. Laporte v Garcia*, 2022 NY Slip Op 22126, *1 [Civ Ct, Bronx County 2022], *citing 2986 Briggs LLC v Evans*, 2022 NY Slip Op. 50215 [U] [Civ Ct, Bronx County 2022].) Indeed, to find otherwise would raise constitutional issues analogous to those at issue in *Chrysafis v Marks*, 594 — US —, 141 S Ct 2482 (2021). In *Chrysafis*, the Covid Emergency Eviction and Foreclosure Prevention Act ("CEEFPA") was enjoined because it did not allow a landlord to challenge a tenant's self-certified experience of a hardship which resulted in an automatic stay of proceedings. CEEFPA as modified by the L 2021, c 417, passed just three weeks after the decision in *Chrysafis*, addressed the Supreme Court's due process concerns and allowed for a motion to be made before the court to determine whether the tenant was, in fact, entitled to the continuation of an automatic stay occasioned by the filing of a hardship declaration.

Similarly, in the context of ERAP, the tenant "self-attest[s]" to eligibility for ERAP funding and receives the benefit of an automatic stay on proceedings as a result. (L 2021, c 56, part BB, subpart A, § 6 [6].) Thus, when a landlord challenges the automatic ERAP stay, the court must determine whether the tenant has made a showing that it is so entitled, or risk infringing on petitioner's due process rights.

The facts herein are unlike those in the decisions in which courts have either granted or denied a petitioner's motion to vacate an ERAP stay based on the courts' varying interpretations of whether the legislature intended the stay to benefit an "occupant," or a "holdover" tenant in an unregulated tenancy, a superintendent in residence only as an incident to their employment, or a person against whom a warrant has already issued. Petitioner's argument is not based on "absurd results" of continuing the stay herein, or the "futility" of finding respondent eligible for the stay because an occupant's eviction in inevitable. Rather, petitioner argues that respondent is not eligible because she receives income in excess of what a single household can earn to be eligible [*3]under the statute, and that she has already paid what she claims to be the maximum legal rent for each month that ERAP funds would be dispersed, unless she now agrees that her rent should be higher, which she does not.

The statute sets forth the eligibility factors for ERAP. (L 2021, c 56, part BB, subpart A, § 5 [1] [a] [i] — [iv].) A "household shall be eligible if it:

> (i) is a tenant or occupant obligated to pay rent in their primary residence in the state of New York . . . provided however that occupants of federal or state funded subsidized public housing authorities or other federal or state funded subsidized housing that limits the household's share of the rent to a set percentage of income shall only be eligible to the extent that funds are remaining after serving all other eligible populations;
>
> (ii) includes 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;
>
> (iii) demonstrates a risk of experiencing homelessness or housing instability; *and* (emphasis added)
>
> (iv) has a household income at or below 80% of the area median income, adjusted for household size.

Thus far, courts have construed the meaning and intent of the first factor — whether an application is a "occupant obligated to pay rent" — with varying results. However, it follows that if courts have the authority to parse whether an applicant is eligible under one factor of the statute, then courts have the authority to analyze eligibility under the other itemized factors. This is especially true here, where the ERAP eligibility factors are not mutually exclusive, contradictory, or stated in the disjunctive. To the contrary, the ERAP eligibility factors are set forth in the conjunctive: A household is eligible for ERAP if (i), (ii), (iii) ". . . *and* . . ." (iv) (emphasis added). (L 2021, c 56, part BB, subpart A, § 5 [1] [a] [i] — [iv].) In other words, a "household" must be "a tenant or occupant obligated to pay rent in their primary residence," which also "includes" the three continuative subsequent factors. (*Id.*)

Respondent has not denied that she reported to petitioner that her income in 2018 was $143,113, and or that she is on a "fixed income." (NYSCEF Doc No. 46, respondent's memorandum of law in support of motion sequence 3 at 7.) Thus, the court can assume that there has been no change in her income since 2018.[FN3] Respondent implies through her attorney that she has faced hardship because she is on a fixed income and asks the court to surmise that said hardship is "due directly, or indirectly, from the COVID-19 outbreak." (L 2021, c 56, part BB, subpart A, § 5 [1] [a] [ii]. However, nowhere in either respondent's or her attorney's submissions is it stated that there was a reduction in her fixed income, or that she has had difficulty paying [*4]rent from March 13, 2020 as a result of the COVID-19

pandemic. (*Id.*) [FN4] Regardless, any such statement is repudiated by the undisputed rent ledger proffered by petitioner which reflects that respondent has paid $1,255.00 per month, every month including June 2022, since March 2020. (NYSEF Doc No. 32 at 1-2.) Nor has respondent averred that her income is at or below either the 80% of area median income ("AMI"), as is required by the original statute,[FN5] or even 120% of the AMI, as required for eligibility for state funded ERAP approval. Regardless of which program for which respondent applied, the court takes judicial notice that 120% of the AMI for single households in New York County in 2022 is $112,080.00.[FN6] ,[FN7]

The court also takes judicial notice of the OTDA website which, on June 24, 2022, posted an "important update for ERAP applicants."[FN8] The update states in relevant part, "The following applications submitted to the ERAP portal will be denied: Households that have income over 80 percent of area median income." (*Id.*) The notice further states in relevant part, "the state-funded program serving households with income over 80 percent and up to 120 percent of area median income closed to new applications on February 14, 2022." (*Id.*) Finally, the notice cautions as follows: "IMPORTANT NOTE: Applications from subsidized housing tenants whose rent is limited to a certain percentage of income . . . are not currently able to be paid . . . . Therefore, at this time, none of the subsidized housing applications can be paid regardless of the date their application was submitted." While not the foundation for this decision, this recently updated posting on the OTDA website augments petitioner's argument that respondent's application is futile.

On a motion to challenge the ERAP stay, as with CEEFPA hardship declaration challenges, it is respondent's burden to show entitlement to the protections of the stay. (*See Harbor Tech LLC v Correa*, 73 Misc 3d 1211 [A] [Civ Ct, Kings County 2021] [stating that a judge has the discretion to deviate from the general rules of presentation of evidence regarding a tenant's personal financial situation where the tenant's experience of hardship must be determined.) "When the facts required to resolve an issue are within the exclusive knowledge and control of a respondent, it is generally inappropriate to place the burden of proof with respect to that issue on a petitioner." (*Pappas v Corfian Enterprises, Ltd.*, 22 Misc 3d 1113 [A], *aff'd*, 76 AD3d 679 [2d Dept 2010] [internal quotations and citations omitted; *Johnson v City of New York*, 302 AD2d 463, 464 [2d Dept 2003] ["it is generally inappropriate to place the burden of proof on a party in the case where the facts governing the resolution of the controversy are [*5]within the exclusive knowledge of the opposing party"].)

The court is troubled by the silence of respondent's affidavit in support regarding salient issues. Respondent does not address why she believes in good faith that she is income eligible for ERAP, or that her annual income is not in fact "fixed" at $143,113.00, or that she suffered financial hardship directly or indirectly as a result of the COVID-19 pandemic. (*See e.g. Noce v Kaufman*, 2 NY2d 347, 353 [1957] [". . .where an adversary withholds evidence in his possession or control that would be likely to support his version of the case, the strongest inferences may be drawn against him which the opposing evidence in the record permits" [internal citations omitted].) Respondent's suggestion that she may have a Fifth Amendment privilege against self-incrimination is perplexing, though it could explain the absence of statements supporting respondent's good faith belief as to her eligibility for ERAP. (NYSCEF Doc No. 20, Martha Hunt affidavit in support of motion sequence 3 ¶ 10.)

Here, one is left to speculate as to what hardships befell respondent as a result of the COVID-19 pandemic. The evidence before the court, supports the conclusion that respondent has a stable income of $143,113 per year and has been able to afford to pay rent in the amount of $1,255.00 unfailingly during the entire COVID period. Respondent, who is in the best position demonstrate eligibility for ERAP, has submitted no sworn statements to refute petitioner's submissions.

Finally, without addressing petitioner's contention that she will not experience housing instability or homelessness, L 2021, c 56, part BB, subpart A, § 5 (1) (a) (iii), respondent states that she has "health issues that make moving a burden on me and put my life in danger . . . In fact, I have a microvalve prolapse (heart condition) that puts me at risk; vacating during the pandemic as a senior citizen may be deadly to me." (NYSCEF Doc No. 20, Martha Hunt affidavit in support of motion sequence 3 ¶¶ 6, 7.) However, respondent has conflated the definition of hardship under L 2021 c 417, part C subpart A § 1 (4) (b), and the eligibility factors for ERAP.

The expired hardship declarations states in relevant part: "If you have lost income or had increased costs during the COVID-19 pandemic, *or moving would pose a significant health risk for you or a member of your household due to an increased risk for severe illness or death from COVID-19 due to an underlying medical condition*, and you sign and deliver this hardship declaration form to your landlord, you may be protected from eviction until at least January 15, 2022 for nonpayment of rent or for holding over after the expiration of your lease (emphasis added)." (*Id*.) Unlike the qualifications for a hardship declaration stay, medical conditions and health risks are not part of the calculus regarding eligibility for ERAP.

Respondent's attorney states that she did not advise her client to apply for ERAP but, having informed her that she "may be eligible" for the program, respondent "believing that she met [the] criteria, took it upon herself to file for ERAP." (NYSCEF Doc No. 46 at 9.) Respondent's attorney states: "To be clear, [respondent] may qualify for ERAP under the third bullet point [of the eligibility criteria]."[FN9] However, to be equally clear, as stated before, nothing in the record supports respondent's contentions that she is eligible for ERAP on the basis that she "experienced a reduction in household income, incurred significant costs, or experienced other financial hardship due, directly or indirectly, to the COVID—19 outbreak," and that her income is [*6]less than 80%, or even 120% of the AMI. (L 2021, c 56, part BB, subpart A, § 5 [1] [a] [ii], [iv].) Neither does respondent support that she is at risk of homelessness, or housing instability, *id*. at (iii), only that she has a medical condition that will "make moving a burden" and that relocating could be "deadly." (NYSCEF Doc No. 20 ¶¶ 6-7.)

Respondents Motions to Reargue the September 11, 2019 Decision and Order and Vacate the April 26, 2022 Decision and Order

Respondent's request to reargue the September 11, 2019 decision and order is a motion that should properly be made before the issuing judge, Judge Ortiz. Respondent's motion to reargue Judge Ortiz's decision before this judge is denied. (CPLR 2221 [d].)

The court further denies respondent's motion to "vacate" Judge Finkelstein's April 26, 2022 on the basis of CPLR 5015 (2). CPLR 5015 (2) states that a party may move the court to relieve it from a judgment or order on the ground that there is "newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404." Respondent presents no newly discovered evidence that would warrant a different result from that rendered by Judge Finkelstein when he decided her previous order to show cause, or that would require a "new trial." None of the arguments that respondent proposes are new or novel to this case. If they have any merit at all, they will be subsumed in respondent's motion before Judge Ortiz to reargue her September 11, 2019 decision and order.

As for respondent's argument pursuant to CPLR 5015 (4) that Judge Finkelstein's order should be vacated on the grounds that the court is without subject matter jurisdiction to render judgments or orders in this proceeding, respondent is also misguided. Any suggestion that this court lacks subject matter over this proceeding is without merit. Such is an outdated

view that has long been invalidated. The Civil Court is vested with subject matter jurisdiction over housing matters by statute. (NY City Civ Ct Act §§ 110, 204; *see also* 170 W. 85th St. Tenants Assn. v Cruz, 173 AD2d 338, 339 [1st Dept 1991]).

Respondent's Application for a Stay Pursuant to RPAPL 753 (1)

Under the facts and circumstances of this case, respondent's application for a discretionary stay on execution of the warrant is granted only to the extent that execution of the warrant is stayed 10 days. Upon expiration of the 10-day stay, petitioner may direct the marshal to serve a notice of eviction. APS shall be notified prior to execution.

Sanctions

The court, in its discretion, declines to award sanctions.

CONCLUSION

Accordingly, it is

ORDERED that petitioner's motion to vacate the ERAP stay is granted; and it is further

ORDERED that respondent's motion to reargue the September 19, 2019 decision and order of the Hon. Frances Ortiz is denied without prejudice to making a proper motion before Judge Ortiz; and it is further

ORDERED that respondent's motion to vacate the Hon. Marc Finkelstein's April 26, 2022 order is denied in its entirety; and it is further

ORDERED that petitioner's motion for sanctions is denied without prejudice.

This constitutes the decision and order of this court.

Dated: July 7, 2022
New York, NY

_____
HON. KAREN MAY BACDAYAN
Judge, Housing Part

Footnotes

Footnote 1: According to petitioner's counsel on the record on June 28, 2022 (the second appearance for oral argument), Thomas Donaldson, Esq. spoke on the record on behalf of respondent at the argument before Judge Finkelstein, but never made a formal appearance as counsel.

Footnote 2: The court notes that, based on the language quoted by respondent's attorney, she meant to say "bullet point" two of the statute as the language comes direction from L 2021 c 56, part BB, subpart A § 5 (1) (ii). If respondent's attorney was referring to the OTDA website eligibility page, the court defers to the statute instead. The eligibility criteria are more fully explicated below.

Footnote 3: In fact, the cost-of-living adjustment ("COLA") for recipients of Social Security benefits was 5.9% in 2022. Social Security Administration website, https://www.ssa.gov/cola/, (last accessed July 1, 2022). The COLA for a teacher's pension will be 3% commencing September 2022. New York State Teachers Retirement System website, https://www.nystrs.org/About-Us/Press-Room/Headlines/Eligible-Retirees-to-Receive-COLA-Increase (last accessed July 1, 2022.)

Footnote 4:ERAP will pay up to 15 months of rental arrears that accrued after March 13, 2020. L 2021, c 56, part BB, subpart A, § 9. "'Rental arrears' [are defined as] unpaid rent owed to the landlord that accrued on or after March 13, 2020." L 2021, c 56, part BB, subpart A, § (2) (10).

Footnote 5:L 2021, c 56, part BB, subpart A, § 5 [1] [a] [iv].)

Footnote 6: Department of Housing Preservation and Development, https://www1.nyc.gov/site/hpd/services-and-information/area-median-income.page, last accessed June 30, 2022.)

Footnote 7: This court has discretion to take judicial notice of the information contained on government websites. (*See Matter of LaSonde v Seabrook*, 89AD3d 132, 137 n 8 [1st Dept 2011], citing *Kingsbridge Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD 13 [2d Dept 2009].)

Footnote 8: OTDA website, https://otda.ny.gov/programs/emergency-rental-assistance/ (last accessed June 30, 2022).

Footnote 9: See n 2 above.

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