2022-07-12

MH RENTAL LLC v. ZANI

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

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MH RENTAL LLC — Index No. 301400/2020

Petitioner,

-against- — DECISION/ORDER

MICHAEL ZANI — Mot. seq. no. 2

Respondents.

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BACDAYAN, J.:

The following e-filed documents listed by NYSCEF document numbers were read on this motion for a default judgment: 20 (respondent's order to show cause); 21 (petitioner's opposition).

After argument, respondent's order to show cause is granted to the following extent:

This is respondent's order to show cause filed post-eviction seeking to be restored to the subject premises. Until now, respondent had not appeared in this proceeding. A default judgment was entered on May 17, 2022 in this nonpayment proceeding. The warrant executed and respondent was evicted. Respondent filed an order to show cause to be restored to possession, and on the hearing date, was able to obtain advice and counsel from Mark Hess, Esq. of the New York Legal Assistance Group.

At the time of the eviction, respondent had a pending ERAP application which had been filed on or about March 18, 2022. Submission of an application for ERAP, has the effect of staying "all proceedings... pending a determination of eligibility." (L 2021, c 56, part BB, subpart A, § 8, as amended by L 2021, c 417, part A, § 4.)

Petitioner does not dispute that it knew about the application but did not inform the court as required by Administrative Order 245/21. (Admin Order of Chief Admin Judge of Cts AO 34/22 ¶ 5.) AO/245/21 requires that "effective immediately, petitioners with pending eviction proceedings who have . . . been notified of a pending application for emergency rental assistance by respondent-tenant . . .shall submit notice . . . to the court where such eviction proceeding is pending."

Petitioner neither argues nor disputes that it knew about the application but did not inform the court as required by Administrative Order 245/21. Nor does petitioner dispute that it

knew about the application but did not inform the marshal who evicted respondent that there was a pending ERAP application.

While the court cannot infer the marshal's thought process, the court notes that a Department of Investigation ("DOI") Advisement to New York City Marshals dated January 26, 2022, that

> Eviction protections provided by ERAP remain in full effect. Where there is a pending ERAP application, eviction proceedings, including execution of warrants, are stayed until a final determination of eligibility for rental assistance is issued by the Office of Temporary and Disability Assistance. This includes cases under appeal. Microsoft Word - Advisement AO-34-22 DRP-221-222 Clean (1) (nyc.gov) (last accessed July 11, 2022).

Had the marshal known about the pending ERAP application, the marshal would have been hard-pressed to interpret the DOI Advisement as permitting execution of the warrant.

As stated above, in addition to not informing the marshal prior to execution of the warrant, petitioner also disregarded AO/34/22 which mandates compliance with AO245/21 AO/245/21, in turn, requires that "effective immediately, petitioners with pending eviction proceedings who have . . . been notified of a pending application for emergency rental assistance by respondent-tenant . . .shall submit notice . . . to the court where such eviction proceeding is pending."

Petitioner's argument for not informing either the court or the marshal is that it made the determination, on its own, that respondent is not eligible for the ERAP program and, therefore, not eligible for the stay. Upon reading the OTDA website (a copy of the relevant page is attached to petitioner's opposition), and presumably the statute, Petitioner argues that respondent has already been approved for the maximum amount of arrears for one applicant (15 months of rental arrears), and will most certainly be rejected. (L 2021, c 56, part BB, subpart A, § 8.)

However, as stated in *Sea Park East L.P.v Foster*, the automatic stay is one thing, eligibility is another. "Had the legislature intended that only eligible applicants be granted a stay, pending determination, the statute would have so stated. The plain language of the statute clearly indicates that any pending ERAP application stays a proceeding until an eligibility determination is made." (74 Misc. 3d 213 [Civ Ct, Kings County 2021].)

Certainly, the Office of Temporary and Disability Assistance ("OTDA") has the authority to determine an applicant's eligibility. Moreover, the court takes judicial notice that landlords

are well-aware move the court for a determination as to whether the statute was intended to benefit a tenant, or whether the tenant is eligible for ERAP. However, there is no authority, anywhere, prescribing that an individual landlord may make the determination *unilaterally*.

Instead, when faced with the specter of an automatic stay based on a tenant's application for funds the landlords have the following options: 1) The landlord can wait for an approval of funds in which case they will be foreclosed from suing for nonpayment for the covered months, and from evicting the tenant by reason of an expired lease or holdover tenancy for twelve months from the date of first payment; 2) the landlord can refuse to participate in the program, and when a provision approval is granted, the stay will be lifted; or 3) the landlord can make a motion to the court to vacate the ERAP stay. (*Park Tower S. Co. LLC v Simons*, --- Misc 3d ---, 2022 NY Slip Op 22192 [Civ Ct, New York Count 2022].)

Respondent claims that he, in good faith, submitted another ERAP application because he was confused by the website and thought that the announcement that additional funds were available for distribution meant that he could receive another grant. Petitioner argues that respondent's filing of a second ERAP application was a blatant "attempt to avoid eviction and for no valid, legal reason." (NYSCEF Doc No. 21, petitioner's affirmation in opposition to order to show cause ¶ 20.)

Regardless of whether respondent's application was made in good faith, at this juncture that is not the inquiry. The court cannot condone that petitioner took matters out of the hands of OTDA and the courts, and into its own. (*See Lafayette Boynston Hsg. Corp. v Pickkett*, 135 AD3d 518, 524 [1st Dep't 2016], *concurring op of Saxe, J.* ["The finding of an error in the allegations supporting the issuance of a warrant of eviction certainly justified vacating that warrant and restoring the tenant to possession"].) Here, petitioner's "error" in believing it could itself make the determination that the automatic stay should not be enforced and proceed to cause the marshal to evict respondent warrants respondent's restoration to full possession of the premises. Moreover, petitioner's failure to adhere to AO 34/22, failure to alert the marshal, and failure to follow the now well-established practice of seeking vacatur of the stay from the court, warrants respondent's restoration to possession without awarding any costs, fees, or marshal's charges.

Accordingly it is

ORDERED that the court exercises its discretion to restore respondent to possession of the premises, and petitioner is ordered to restore Respondent to full possession of the premises *forthwith*; and it is further

ORDERED that the judgment and warrant remain in full force and effect, as no reason to vacate same has been averred or argued; and it is further

ORDERED that execution of the warrant is stayed pursuant to L 2021, c 56, part BB, subpart A, § 8, as amended by L 2021, c 417, part A, § 4; and it is further

ORDERED that petitioner shall immediately file the notice required by AO 34/22; and it is further

ORDERED that the stay will be lifted when respondent is either determined to be either eligible or provisionally approved for ERAP, or when the court, upon a proper motion to vacate the stay determines that respondent should not benefit from the stay.

This constitutes the Decision and Order of the court.

So Ordered:

Dated: July 12, 2022
New York, New York

Hon. Karen May Bacdayan
Hon. Karen May Bacdayan, JHC