2022-05-25

The Park Cent. I LLC v. Price

Index No. 300011/20
New York Civil Court

The Park Cent. I LLC v. Price

2022 N.Y. Slip Op. 31909
Decided May 25, 2022

Index No. 300011/20

05-25-2022

THE PARK CENTRAL I LLC, Petitioner, v. CHARLENE PRICE, "JOHN" "DOE," "JANE" "DOE," Respondents.

Omer Shahid, J.H.C.

Unpublished Opinion

Present: Hon. OMER SHAHID Judge.

DECISION/ORDER

Omer Shahid, J.H.C.

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in the review of Petitioner's Order to Show Cause to Vacate the E.R.A.P. Stay (Motion #1 on N.Y.S.C.E.F.), Respondent's Cross-Motion to Dismiss the Proceeding or, in the Alternative, Leave to Interpose an Answer (Motion #2 on N.Y.S.C.E.F.), and Petitioner's Motion for Leave to Conduct Discovery and Directing Respondent to Pay Use and Occupancy *Pendente Lite* (Motion #3 on N.Y.S.C.E.F.):

Papers Numbered

Petitioner's Order to Show Cause to Vacate E.R.A.P. Stay (Motion #1 on N.Y.S.C.E.F.)……... 1

Respondent's Cross-Motion (Motion #2 on N.Y.S.C.E.F.)…… … 2

Affirmation and Affidavit in Opposition to Respondent's Cross-Motion (Entries 23 to 26 on N.Y.S.C.E.F.)…… 3

Affirmation in Reply in Support of Cross-Motion (Entry 35 on N.Y.S.C.E.F.)……... 4

Petitioner's Motion for Discovery and Use & Occupancy (Motion #3 on N.Y.S.C.E.F.)…….. 5

Affirmation and Affidavit in Opposition to Motion #3 (Entries 36 to 42 on N.Y.S.C.E.F.)…….... 6

Petitioner's Reply in Support of Motion #3 (Entry 43 on N.Y.S.C.E.F.)…… 7

Petitioner commenced this holdover proceeding seeking possession of 875 Morrison Avenue, Apt. 13H, Bronx, N.Y. 10473 (the "subject premises") from Respondents on the ground [*1] that any license given to Respondents to occupy the subject premises terminated in 2019 upon the death of Camella Price, the tenant of record. The subject premises is subject to the Rent Stabilization Law. The Notice of Petition and Petition were filed on N.Y.S.C.E.F. on September 8, 2020. Respondent Charlene Price ("Respondent"), the daughter of the deceased tenant of record, filed a hardship declaration, dated March 9, 2021 (Entry 8 on N.Y.S.C.E.F.). Respondent then obtained counsel and a Notice of Appearance was filed on N.Y.S.C.E.F. on June 25, 2021 (Entry 6 on N.Y.S.C.E.F.). Respondent filed an Emergency Rental Assistance Program ("E.R.A.P.") application on July 11, 2021 (Entry 7 on N.Y.S.C.E.F.).

The matter first appeared on the court's calendar on February 18, 2022 upon Petitioner's Order to Show Cause to vacate the E.R.A.P. stay which was made returnable on that date. Respondent filed the cross-motion on N.Y.S.C.E.F. on February 15, 2022. The cross-motion seeks an order dismissing the proceeding because Petitioner accepted E.R.A.P. payments or, in the alternative, for leave to interpose an answer. On that date, the matter was adjourned to March 11, 2022 by the court for the parties to discuss settlement. On March 11, 2022, the matter was adjourned to April 26, 2022 for a motion schedule. By the return date, Petitioner filed a motion for leave to conduct discovery and for Respondent to pay use and occupancy *pendente lite*. On April 26, 2022, the fully briefed motions were marked submitted for decision. The court addresses the three pending motions as follows.

Petitioner's Order to Show Cause to Vacate the E.R.A.P. Stay

Petitioner's Order to Show Cause seeks to re-argue the court's determination to place the matter on the E.R.A.P. Administrative Calendar and, after re-argument, restoring the matter on the court's active calendar and affixing a date by which Respondent must answer by.

Petitioner's Order to Show Cause is denied as moot due to a determination being already made on Respondent's E.R.A.P. application. Respondent received an E.R.A.P. Approval Letter, dated January 5, 2022, and a payment in the amount of $11,738.02 issued to Petitioner pursuant to that program. Hence, any stay associated with the E.R.A.P. application expired upon such determination and the proceeding is hereby restored to the court's active calendar.

Respondent's Cross-Motion to Dismiss or, in the Alternative, Leave to Interpose an Answer

The court next addresses Respondent's cross-motion. This motion seeks the following relief: (a) dismissing the proceeding pursuant to L. 2021, Ch. 56, Part BB, Subpart A, § 9(2)(d) without prejudice to Respondent's succession claim; or, in the alternative, (b) granting Respondent leave to interpose an answer, deeming the answer annexed to the motion served and filed *nunc pro tunc*; and, (c) granting such other relief as the court deems appropriate, including costs and attorneys' fees.

Respondent seeks a dismissal of the instant proceeding on the ground that Petitioner participated in the E.R.A.P. program which resulted in an approval of Respondent's application and checks issuing to Petitioner pursuant to its participation. Respondent argues that because Petitioner participated in the program and accepted the E.R.A.P. payment that was issued to it, the statute provides for the dismissal of the proceeding.

Petitioner denies participating in the E.R.A.P. program but acknowledges that it received a check in the amount of $11,738.02 which is currently being held in the escrow account of Petitioner's attorneys. Thus, Petitioner maintains that it has not accepted the payment. *2

Petitioner argues that the restriction on eviction after accepting an E.R.A.P. payment only applies to holdover proceedings that are based upon termination or expiration of lease agreements. Since this is a licensee holdover proceeding, Petitioner argues that it is not restricted by the E.R.A.P. statute to proceed with this proceeding. Even if this proceeding is covered by the E.R.A.P. statute and Petitioner is found to have accepted the payment, Petitioner maintains that the proceeding should not be dismissed but instead the statute provides that Petitioner agrees not to evict Respondent for twelve months after the acceptance of the payment.

The E.R.A.P. statute provides that "[a]cceptance of payment for rent or rental arrears from this program or any local program administering federal emergency rental assistance program funds shall constitute agreement by the recipient landlord or property owner…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, unless the dwelling unit that is the subject of the lease or rental agreement is located in a building that contains 4 or fewer units, in which case the landlord may decline to extend the lease or tenancy if the landlord intends to immediately occupy the unit for the landlord's personal use as a primary residence or the use of an immediate family member as a primary residence." L. 2021, Ch. 56, Part BB, Subpart A, § 9(2)(d)(iv) as amended by L. 2021, Ch. 417, Part A, § 5.

The court finds Petitioner's argument that the restriction on eviction only applies to holdover proceedings based upon termination or expiration of lease agreements as unavailing. The Legislature left determination of eligibility for E.R.A.P. funds to the New York State Office of Temporary and Disability Assistance ("O.T.D.A."). Here, O.T.D.A. determined that Respondent was eligible for E.R.A.P. funds and it would defeat the purpose of the statute to find that Respondent is eligible for the program but, however, is not protected when it comes to the restrictions on evictions set forth in the statute if Petitioner accepts the funds. Such a holding by this court would contravene the legislative intent to "provid[e] widespread eviction protections" through the program, as stated in Chapter 417 of the Laws of 2021 which amended key provisions of the E.R.A.P. statute. *See* L. 2021, Ch. 417, § 2. "In the construction of statutory provisions, the legislative intent is the great and controlling principle." *Matter of Albano v. Kirby*, 36 N.Y.2d 526, 529-30 (1975). One must be mindful of the spirit and purpose of the statute along with the objectives of the enactors when interpreting a statute. *See id.* at 530-31. For a respondent, who is found to be eligible for the program by O.T.D.A., to not be protected under the same program while a petitioner benefits and obtains the funds would fall short of the legislative intent. In such a scenario, a respondent would not reap the benefit of the program if a petitioner accepts the funds. Furthermore, the statute only provides exceptions to the restriction in eviction in nuisance proceedings and in situations where the unit sought to be recovered is in a building which contains four or less units and a petitioner is seeking to recover such unit for immediate, personal use. *See* L. 2021, Ch. 56, Part BB, Subpart A, §§ 9 & 9-A. The Legislature did not explicitly carve out an exception to the restriction in eviction for a licensee who alleges a colorable succession claim, as is the case here, and who may potentially become a tenant of record based upon that defense. Hence, the court finds that Respondent will have the protections of the statute if it is determined that Petitioner has accepted the E.R.A.P. funds.

Respondent argues that by Petitioner accepting the funds, the statute provides that the proceeding shall be dismissed with prejudice. The court disagrees. The dismissal language only appears in § 9-A of the statute which concerns proceedings based upon nuisance or objectionable conduct. See L. 2021, Ch. 56, Part BB, Subpart A, § 9-A(5). If the Legislature had intended for non-nuisance proceedings to be dismissed if a petitioner accepts the E.R.A.P. funds, it would 3 *3 have explicitly stated so as it did in § 9-A. It did not. Accordingly, if Petitioner is determined to have accepted the E.R.A.P. funds, then it has agreed to not evict Respondent for at least twelve months since the acceptance of the payment. Such an arrangement - where Petitioner agrees to accept funds in exchange of Respondent receiving a temporary reprieve from an eviction - furthers the purpose of the statute which seeks to prevent a flood of evictions at a time when the State is seeking to control the effects of a pandemic that has claimed the lives of over one million Americans. Thus, Petitioner may maintain the proceeding but may not actually evict Respondent for twelve months if it is determined it accepted the E.R.A.P. payment.

The next question raised by the papers is whether Petitioner, who denies having participated in the program, is deemed to have accepted the E.R.A.P. payment that issued on Respondent's behalf and which was sent to Petitioner. The court determines that there is a "presumption" that Petitioner has accepted the payment and has agreed to not evict Respondent for at least twelve months after receiving the payment. The O.T.D.A. Website provides that determination will only be made if *both* parties participate in the application process and for the checks to be issued. *See* O.T.D.A., Emergency Rental Assistance Program, Frequently Asked Questions, Question #24, *http://otda.ny.gov/programs/emergency-rental-assistance/faq.asp#faq-other-q24* . Since an E.R.A.P. payment issued here and was sent to Petitioner, who acknowledges receiving it, there is a presumption that Petitioner participated in the program and agreed to accept the payment. The burden is upon Petitioner to demonstrate that it did not participate in the program and that it did not intend to be bound by the condition of accepting the payment. Such can be done by subpoenaing O.T.D.A. to determine who provided documents on Petitioner's behalf.

Accordingly, the branch of Respondent's cross-motion which seeks to dismiss the proceeding is denied.

The remaining branch of Respondent's motion seeks, in the alternative, an order granting Respondent leave to interpose an answer and, upon granting such relief, deeming the annexed verified answer to be served and filed *nunc pro tunc*. The verified answer is attached to Respondent's motion as "Exhibit H."

In a holdover proceeding, a respondent may answer "at the time when the petition is to be heard." R.P.A.P.L. § 743. The time to answer is extended upon adjournment of the proceeding unless a contrary arrangement has been made. *See Gluck v. Wiroslaw*, 113 Misc.2d 499 (Civ. Ct., Kings Co. 1982). *See also Crotona Parkway Apts. H.D.F.C. v. Depass*, 68 Misc.3d 1226(A) (Civ. Ct., Bronx Co. 2020).

The matter herein has been adjourned, partly, for briefing of a motion schedule. At no time did the court set a deadline for Respondent to file an answer. Petitioner does not demonstrate any prejudice that may result by granting Respondent's request to interpose an answer. Hence, the court grants Respondent leave to interpose the answer. The verified answer annexed as "Exhibit H" is deemed to be served and filed *nunc pro tunc*.

Petitioner's Motion for Discovery and Use and Occupancy

Petitioner also moves for leave to conduct discovery and for an order directing Respondent to pay use and occupancy *pendente lite*. Respondent opposes the motion.

Petitioner seeks leave to conduct discovery concerning Respondent's succession defense. The court finds that Petitioner has demonstrated ample need to conduct discovery as the documents demanded would be under the exclusive control and knowledge of Respondent and *4 are needed 4 to determine Respondent's succession defense. Petitioner's requests for documents and deposition satisfy the *Farkas* factors. *See New York University v. Farkas*, 121 Misc.2d 643 (Civ. Ct., N.Y. Co. 1983). However, the time period that Respondent shall provide documents for shall be from February 6, 2017 to February 6, 2019 as the tenant of record passed away on February 6, 2019. *See* 9 N.Y.C.R.R. § 2523.5(b)(1). Respondent shall provide the documents listed in "Exhibit C" of the motion within 45 days of the date of this decision and order and shall sit for deposition at least 30 days after the submission of the documents at an agreed upon location by the parties. The proceeding shall be marked off the calendar for this purpose and may be restored by either party by notice of motion after the completion of the discovery process or a breach of this order. If Respondent is unable to procure a

document, Respondent shall provide a sworn statement of the efforts made to obtain such. Accordingly, the court grants Petitioner's request for leave to conduct discovery to the foregoing extent.

Petitioner also moves for an order directing Respondent to pay use and occupancy *pendente lite*. For the following reasons, Petitioner denies this application, without prejudice, at this juncture.

R.P.A.P.L. § 745(2)(a) provides, in pertinent part, that "[i]n a summary proceeding upon the second of two adjournments granted solely at the request of the respondent, or, upon the sixtieth day after the first appearance of the parties in court less any days that the proceeding has been adjourned upon the request of the petitioner, counting only days attributable to adjournment requests made solely at the request of the respondent and not counting an initial adjournment requested by a respondent unrepresented by counsel for the purpose of securing counsel, whichever occurs sooner, the court may, upon consideration of the equities, direct that the respondent, upon a motion on notice made by the petitioner, deposit with the court sums of rent or use and occupancy that shall accrue subsequent to the date of the court's order." R.P.A.P.L. § 745(2)(a).

Although two adjournments attributable solely to Respondent have not been granted in this proceeding, the court determines that more than 60 days have elapsed since the first appearance of the parties on February 18, 2022. Since the first appearance, the matter has only been adjourned twice before the motion was marked submitted. The reasons for the adjournments were for the parties to discuss settlement and for motion practice. Hence, Petitioner may make an application to receive use and occupancy *pendente lite*.

However, R.P.A.P.L. § 745(2) goes on to provide that "[t]he court shall not order deposit or payment of use and occupancy where the respondent can establish, to the satisfaction of the court that respondent has properly interposed one of the following defenses or established the following grounds" which includes "a defense based upon the existence of hazardous or immediately hazardous violations of the housing maintenance code in the subject apartment or common areas." R.P.A.P.L. § 745(2)(a)(iv). Here, Respondent has properly interposed the defense of hazardous conditions at the subject premises which appears as the second affirmative defense in her answer. Respondent made complaints to D.H.P.D. on April 20, 2022 concerning these conditions and attaches pictures of mold in the ceilings and walls of the subject premises. *See* Entries 41 and 42 on N.Y.S.C.E.F. The statute requires that Respondent establish that hazardous conditions exist or, at the very least, properly interpose such a defense. The court finds that Respondent has properly interposed such a defense. Hence, Petitioner's request to direct Respondent to pay use and occupancy *pendente lite* is denied. *5

Conclusion

Based upon the foregoing, Petitioner's Order to Show to vacate the E.R.A.P. stay is denied as moot. The branch of Respondent's cross-motion which seeks to dismiss the proceeding is denied and the branch of the motion which seeks leave to interpose an answer is granted. The verified answer annexed to Respondent's cross-motion as "Exhibit H" is deemed served and filed *nunc pro tunc*. The branch of Petitioner's motion which seeks leave to conduct discovery is granted to the extent that Respondent shall provide documents listed in "Exhibit C" from the timeframe of February 6, 2017 to February 6, 2019 within 45 days of the date of this decision and order and shall sit for deposition within 30 days of submitting the documents at an agreed upon place. The proceeding shall be marked off the calendar for this purpose and may be restored by either party by notice of motion upon completion of the process or a breach of this order. The branch of

Petitioner's motion which seeks an order directing Respondent to pay use and occupancy *pendente lite* is denied.

This constitutes the decision and order of the court. *6