2022-07-26

Awaly LLC v. Pena

[*1]

Awaly LLC v Pena
2022 NY Slip Op 50673(U) [75 Misc 3d 1227(A)]
Decided on July 26, 2022
Civil Court Of The City Of New York, Bronx County
Ibrahim, J.
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Decided on July 26, 2022

Civil Court of the City of New York, Bronx County

Awaly LLC, Petitioner,

against

Luis Manuel Mercado Pena, Respondent-Tenant,
MARIA RODRIGUEZ, DIANIRA COTTO,
"JOHN DOE" and "JANE DOE," Respondent(s)-Undertenant(s).

L & T Index No. 311587-2021

Lazarus Karp LLP, Attorneys for Petitioner (by Lawrence McCourt, Esq.)

Bronx Legal Services, Attorneys for Respondent (by Heather McLinn, Esq.)

Shorab Ibrahim, J.

RECITATION, AS REQUIRED BY CPLR 2219(A), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION BY THE PETITIONER TO VACATE THE "ERAP" STAY: NYSCEF Documents No. 12 through 30.

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS AS FOLLOWS:

RELEVANT FACTS & PROCEDURAL POSTURE

In this proceeding, Awaly LLC (petitioner) alleges that its tenant, Luis Manuel Mercado Pena (tenant-of-record), illegally sublet the subject apartment to Dianira Cotto (respondent), among others.

Due to an Emergency Rental Assistance Program (ERAP) application, the case has been stayed. (*see* NYSCEF Doc. 11).

Petitioner now moves to vacate the ERAP stay arguing that respondent, an alleged illegal sublessor, is not a person intended to be protected by the stay. Petitioner's argument largely rests on the fact that respondent is not its "tenant" and has no obligation to pay rent to *this* petitioner. Petitioner's agent avers it will not participate in the program or accept any funds paid on behalf of respondent. (*see* NYSCEF Doc. 30 at p. 10).

Respondent argues that she qualifies for ERAP's stay protection because she occupies the premises with the tenant-of-record's consent, to whom she has a rent obligation. (*see* L. 2021, c. 56, Part BB, Subpart A, § 2(7)). Indeed, petitioner's cause of action concedes these criteria. (*see* Notice of Termination at NYSCEF Doc. 1; *see also EQR-Hudson Crossing, LLC v Magana*, — NYS3d —, 2022 NY Slip Op 22178 [Civ Ct, New York County 2022] (denying motion to vacate stay in illegal sublet holdover because the occupant met these criteria)).

DISCUSSION

Initially, the court notes its authority to lift the ERAP stay. (s*ee 2986 Briggs LLC v Evans*, 74 Misc 3d 1224(A), *4, 2022 NY Slip Op 50215(U) [Civ Ct, Bronx County 2022]); *Zheng v Guiseppone*, 74 Misc 3d 1231(A), *4, 2022 NY Slip Op 50271(U) [Civ Ct, Richmond County 2022] ("[I]n 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 question is whether the particular facts of this case warrant the court exercising such authority.

Where a tenancy will not be preserved or, more to the point, there is *no* tenancy to reinstate or preserve, maintaining the stay is an exercise in futility. That is the situation here and, as such, the stay is vacated.

With petitioner stating affirmatively that it will not participate, respondent may eventually receive a provisional approval. The effects of a provisional approval are noted in the statute:

> "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." (*see* L 2021, ch 156, part BB, § 9 [2] [d]).

Respondent is not petitioner's tenant. There is no contract between them; respondent has no "rent" obligation to petitioner. (*see* L 2021, c. 56, Part BB, Subpart A, § 2(7) which notes "rent" is defined under RPAPL§ 702; *see also* RPAPL § 702 ["'rent'" shall mean the monthly or weekly amount charged in consideration for the use and occupation of a dwelling pursuant to a written or oral rental agreement."]). Petitioner, in turn, may not maintain a non-payment proceeding against respondent. (*see Strand Hill Associates v Gassenbauer*, 41 Misc 3d 53, 54, 975 NYS2d 526 [App Term, 2nd Dept 2013]; *Fishbein v Mackay*, 36 Misc 3d 1228(A), *2, 2012 NY Slip Op 51529(U) [Civ Ct, New York County 2012]).

In addition to, and perhaps [at least partially] because of the above axiom, numerous cases have held that if there is no rent obligation, the automatic stay occasioned by an ERAP application can be vacated. (s*ee 2986 Briggs LLC v Evans*, 74 Misc 3d 1224(A), 2022 NY Slip Op 50215(U) [Civ Ct, Bronx County 2022] (licensee holdover where no claim for "rent" made]); *Joute v Hinds*, — NYS3d —, 2022 NY Slip Op 22150, *3 [Civ Ct, Kings County 2022]; *Valsac 908 LLC v Crespo*, 75 Misc 3d 1213(A), 2022 NY Slip Op 50484(U) [Civ Ct, New York County 2022 (superintendent holdover); *West 49th Street, LLC v O'Neill*, 2022 NY Slip Op 22222, 2-3 [Civ Ct, New York County 2022] (possible successor without a current rent obligation)).

Respondent, though, cites to several cases wherein the court maintained the stay. They are addressed in turn.[FN1]

In *LaPorte v Garcia,* petitioner and respondent were roommates and, unlike here, the respondent established a rent obligation to the *petitioner*, the prime tenant. (75 Misc 3d 557,

560, [*2]168 NYS3d 794 [Civ Ct, Bronx County 2022]).[FN2] The *LaPorte* court's reasoning is sound: petitioners cannot broadly avoid the stay by simply claiming they would not participate in the program. (*id.* at 560-561). However, a court has the authority to lift the stay based on the facts before it. (*id.* at 559).

The holding in *560-566 Hudson LLC v Hillman* is not applicable as the court explicitly did not consider whether the lack of a rent obligation impacts the stay. (2022 NY Slip Op 30718(U), *2, 2022 NY LEXIS 1116 [Civ Ct, Kings County 2022]). To the extent that *Hillman* stands for the proposition that whether a rent obligation exists "does not bear on the validity of the stay but to his eligibility for assistance" [which must be determined by the Office of Temporary and Disability Services ("OTDA") and not the Court], this court disagrees. (*id.* at *3-4). While there are those decisions that similarly hold, (see *Souffrant v Jeninty* (Civ Ct, Kings County, June 16, 2022, Index. No. 309377/2021), many have subsequently disagreed. (s*ee 2986 Briggs LLC v Evans*, 74 Misc 3d 1224(A), *et.al.*).

EQR-Hudson Crossing, LLC v Magana is the matter most similar to this case. Both are illegal sublet holdovers, wherein the appearing subtenant has a rent obligation to the non-appearing tenant-of-record. Critically, however, the petitioner in *Magana* failed to submit any affidavit swearing it would not accept the ERAP funds. (*see* 2022 NY Slip Op 22178, *3). Still, the court held "the sublessee and undertenant of the premises who is obligated to Ms. Magana [the sublessor] for the payment of monthly rent, is entitled to the protections of the statute." (*id.*).

While the unambiguous language of the statute must be the most important consideration, the court cannot disregard the legislature's intent/purpose in enacting it. (s*ee Beekman Hill Ass'n, Inc. v Chin*, 274 AD2d 161, 166-167, 712 NYS2d 471 [1st Dept 2000] ("It is fundamental that a court, in interpreting a statute, should attempt effectuate the *intent* of the legislature, and where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used.") [citations omitted and emphasis added]).

In *Zheng v Guiseppone*, (74 Misc 3d 1231(A), *3), the court noted,

> 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.

(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].

To bind this petitioner, to whom respondent owes no "rent" is futile, considering petitioner's sworn statement it will not accept payment. (*see* NYSCEF Doc. 30 at p. 10). The stay, under these circumstances, does not further the Legislature's intent.

Rather, this court agrees with those cases finding that when payment of funds would not [*3]reinstate the landlord-tenant relationship, allowing a stay to continue is an exercise in futility or would otherwise render absurd results. (*see Actie v Gregory*, 2022 NY Slip Op 50117(U), 74 Misc 3d 1213(A) [Civ Ct, Kings County 2022]; *Kelly v Doe*, — NYS3d —, 2022 NY Slip Op 22077 [Civ Ct, Kings County 2022]; *Karan Realty Assoc LLC v Perez*, 75 Misc 3d 499, 166 NYS3d 492 [Civ Ct, Queens County 2022]).

Here the absurdities include a respondent applying for arrears at $2,250 per month while her own rent obligation is $250 per week. (*see* NYSCEF Doc. 1 and NYSCEF Doc. 23 at 3). It is also absurd *and* futile to keep a stay in place for possible approval or payment of $33,750 (15 X $2,250) when there is over $60,000 owed to date [by the tenant-of-record], particularly when landlords are not required to accept approved ERAP funds, (*Carousel Properties v Valle*, 74 Misc 3d 1217(A), *2, 2022 NY Slip Op 50168(U) [Dist Ct, Suffolk County 2022]), nor are they required to accept partial payment of arrears. (*see 335 West 38th Street Cooperative Corp. v Anchev*, NYLJ, 12/17/97, p. 21, col. 3 [App Term, 1st Dept 1997]; *Ocean Gate, L.P. v Steele*, 56 Misc 3d 130(A), 2017 NY Slip Op 50863(U) [App Term, 2nd Dept 2017]).[FN3]

Payment, if accepted, would also forestall petitioner from taking lawful rent increases for a year, even as the tenant-of-record is entirely absent from these transactions, and even as respondent has stated her rent obligation is less than half of the contract rent.

Maintaining *this* stay serves no legitimate purpose other than to delay the proceeding. (*see Karan Realty Associates LLC v Perez*, 75 Misc 3d at 505 ("The court does not believe that it was the legislative intent in drafting the ERAP stay provisions to simply provide a mechanism to obtain a stay of the proceeding... " Rather, it was meant "to allow time for the ERAP application to be processed and allow a petitioner to obtain rent relief."); *see also 178 Broadway Realty Corp. v Charles*, — NYS3d —, 2022 NY Slip Op 22164, *2 [Civ Ct, Kings

County 2022] ("Where a landlord or owner of a non-regulated tenancy elects not to participate, agrees to forego the ERAP monies where required, articulates this in an appropriate context and moves to vacate the stay its blanket continuance will overly prejudice a landlord or owner while providing a tenant, occupant or applicant with a stay that does not further the legislative or policy goals of ERAP, has no individual merit and serves no end other than to prolong a case from being heard on its merits.")).[FN4]

CONCLUSION

Based on the above, petitioner's motion to vacate the stay is granted. Respondent shall file an answer no later than August 12, 2022. The matter is adjourned to August 25 at 12:35 for an in-person pre-trial conference.

This constitutes the Decision of the court. A copy will be posted on NYSCEF and emailed to counsel.

Dated: July 26, 2022
Bronx, NY
SO ORDERED,
/S/
SHORAB IBRAHIM, JHC

Footnotes

Footnote 1: Respondent cites to *Souffrant v Jeninty* (Civ Ct, Kings County, June 16, 2022, Index. No. 309377/2021), for the proposition that the stay is absolute while OTDA makes its determination. This court disagrees. In any event, the underlying facts in *Jeninty* are markedly different than those here.

Footnote 2: To the extent that respondent might be held liable for "use and occupancy," the court notes petitioner has not sought same, the petition's "WHEREFORE" clause notwithstanding. In any event, "use and occupancy" is not "rent." (*see LaPorte v Garcia*, 75 Misc 3d at 560 ["use and occupancy, by itself, would not trigger the ERAP stay"]).

Footnote 3: Respondent has yet to file an answer. There is no indication where the balance of the alleged arrears [owed by the tenant-of-record] would come from, particularly in absence of tenancy rights [for respondent].
As to these uncontemplated outcomes, this court joins with the court's suggestion in *Harlem Congregations for Community Improvement, Inc. v Swindell*, 2022 NY Slip Op 22215 [Civ Ct, New York County 2022] ("As more and more uncontemplated but complicated housing court scenarios unfold that make less and less sense in the context of ERAP, it is becoming

increasingly clear that it would be helpful for the legislature to revisit the language of the statute, in places inscrutable, to clarify inconsistencies and mitigate against arbitrary application.")).

Footnote 4: While the unit here is regulated, respondent, to date, has not alleged her "tenancy" is.

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