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2022-07-13

### Chan v. Fong

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

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BOK NGEE CHAN,

Petitioner-Landlord,

L&T Index No.: 59028/20

-against-

DECISION/ORDER

YUEN PING FONG

Respondent-Tenant,

“JOHN DOE’ AND/OR JANE DOE

Respondents-Undertenants

Address: 2053 71<sup>st</sup> STREET  
APARTMENT NO. 1 REAR  
BROOKLYN, NEW YORK 11204

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Recitation, as required by CPLR § 2219(a), of the papers considered solely in the review of Petitioner’s motion to vacate the stay emanating from a pending ERAP application.

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PAPERS

NYSEF Documents 8 through 15

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Upon the foregoing cited papers, the Decision and Order is as follows:

This is a holdover proceeding commenced after the expiration of a nonregulated lease. It first appeared in the conference part in mid-2021 and was adjourned there on several occasions. Subsequently the proceeding was referred to this Trial Part for trial in March 2022. Since then respondent has filed an ERAP application and petitioner has now moved to lift the stay associated with that application.

ERAP (Part BB of Chapter 56, Laws of 2021), in pertinent part states as follows:

“Eviction proceedings for a holdover or expired lease, or nonpayment of rent or utilities that would be eligible for coverage under this program shall not be commenced against a household who has applied for this program unless or until a determination of ineligibility is made. If such eviction proceedings are commenced against a household who subsequently applies for benefits under this program, all proceedings shall be stayed pending a determination of eligibility...”

ERAP, in pertinent part also states:

Acceptance of payment for rent or rental arrears from this program shall constitute agreement by the recipient landlord or property owner:

.....(iv) not to evict for reason of expired lease or holdover tenancy any household on behalf of whom rental assistance payment is received for 12 months after the first rental assistance payment is received....”

Petitioner has made it crystal clear that he will not accept any money from the ERAP program and seeks to proceed to trial (see paragraph “12” of the Chan Affidavit in Support). As noted by Judge Kim Slade in *Actie v Gregory* 2022 NY Slip Op 50117(U) the inherent problem with ERAP is that:

“An occupant may file an ERAP application, whether eligible or not, an intended beneficiary of the program or not, in good faith or bad, and significantly where the outcome will not result in the preservation of a tenancy. In this scenario the occupant will have unilaterally invoked a stay while precluding the petitioner in the action from engagement or participation in the process to which they are a party.”

Furthermore, while petitioner does not challenge ERAP on constitutional grounds (which would have required notification to the NYS Attorney general under CPLR §1012) this Court notes, as did Judge Slade, that such an issue exists. In *Pantelis Chrysafis, et al v Lawrence K. Marks*, 594 U.S. \_\_\_\_\_ (2021); 2021 US LEXIS 3635, 2021 WL 3560766 [August 12, 2021], in addressing the automatic stay appurtenant to the filing of a Covid Hardship Declaration, the Supreme Court of the United States enjoined enforcement of the provisions Part A of the CEEFPA upon a finding that it deprived Owners/Landlords of Due Process.

As noted therein “This order enjoins the enforcement of only Part A of the Covid Emergency Eviction and Foreclosure Prevention Act (CEEFPA), 2020 N.Y. Laws ch,381.”. This holding essentially invalidated any stays resulting from the filing of the Covid Declaration, which was only subsequently addressed in Chapter 417, Laws of 2021. The basis for the holding was that similar to the ERAP stay, no mechanism existed to challenge the stay’s application. As noted in *Actie, supra*, “here, with ERAP, there is no substantive or meaningful distinction in the mechanics or logistics of how ERAP works and how CEFFPA worked prior to the *Chrysafis* decision”<sup>1</sup>.

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<sup>1</sup> The Court also notes that ERAP holds that a failure of a landlord to accept monies under the ERAP conditions results in a waiver of the landlords claim for rent/use and occupancy for the period represented. This too raises an issue of constitutionality in this Court’s opinion regarding the forced waiver of a party’s right to compensation unless they accept a forced alienation of their property for a year.

In *Silverstein v Huebner*, 2022 NY Slip Op 31051(U), Judge Stoller lifted the ERAP stay in a coop sublease Holdover and noted:

“...when an ERAP application has no relevance to the resolution of the dispute before the Court or when the equities are so out of balance as to warrant an exception to the statute, Courts have vacated stays occasioned by ERAP applications (numerous citations omitted).”


“The Court must interpret a statute so as to avoid an unreasonable or absurd application of the law. *People v Schneider*, 37 N.Y.3d 187,196 (2021).”

Many Jurists have decided to not blanketly apply the ERAP stay where it is clear that a tenancy will not be preserved, see *Immacolata Papandrea-Zavaglia v Jose Arroyave et al*, Index 303636/21 (Civ Ct. Kings Co, J. Scheckowitz) (court vacated the ERAP stay in a similar termination of a nonregulated tenancy) “...a stay under the ERAP statute is appropriate only when the benefit provided could potentially resolve litigation”; *Kelly v Doe*, 2022 NY Slip Op 22077 (Civ Ct. Kings Co, J. Cohen) (Court vacated a stay in a post-foreclosure holdover; *2986 Briggs LLC v Evans, et al*, 2022 NY Slip Op. 50215(U)(Civ Ct. Bronx Co., J. Lutwak) (court vacated ERAP stay in a licensee holdover proceeding). In that decision Judge Lutwak stated:

“..the ERAP law ...does not include any provisions preventing landlords from challenging such a stay in a pending court proceeding and raising whatever cogent legal arguments they may have, including that ERAP may be irrelevant to a particular case, or that occupants of a particular residence clearly do not meet one or more of the program’s fundamental eligibility criteria.”

Even if ERAP could pay the full arrears which it wont (maximum of 15 months under ERAP and petitioner asserts no payments since March 2020) it does not resolve the underlying proceeding where the tenancy has been terminated by petitioner with no desire on petitioner’s part to extend it. Accordingly, the Court grants petitioner’s motion. The ERAP stay is lifted forthwith. The proceeding is rescheduled for pre-trial conference on August 10, 2022, at 12PM. The parties may appear either virtually or in person for the pre-trial conference only. This constitutes the Decision and Order of the Court.

DATED  
July 13, 2022

SO- ORDERED  
  
KENNETH T. BARANY  
J.H.C