

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

[All Decisions](#)

[Housing Court Decisions Project](#)

2022-08-05

McAuliffe v. Edison

Follow this and additional works at: https://ir.lawnet.fordham.edu/housing_court_all

Recommended Citation

"McAuliffe v. Edison" (2022). *All Decisions*. 520.

https://ir.lawnet.fordham.edu/housing_court_all/520

This Housing Court Decision is brought to you for free and open access by the Housing Court Decisions Project at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in All Decisions by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

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

-----X
Audrey McAuliffe,

Petitioner,

-against-

Mathew Edison
"John Doe" and "Jane Doe"

Respondents.

Subject premises: 315 77th Street, Basement Apt.
Brooklyn, NY 11209
-----X

Index No. 083565/2019

Mot. seq. no. 5

DECISION/ORDER

Hon. Elizabeth Donoghue
Judge, Housing Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion to vacate the ERAP stay:

**Papers
Numbered**

Order to Show Cause and Affidavit Annexed	1
Affidavit or Affirmation In Opposition	2
Affidavit or Affirmation In Reply	3
Court File contained on NYSCEF.....	Documents 1 to 45

Upon the foregoing cited papers, Petitioner's moves for an order vacating the stay of this proceeding imposed pursuant to L. 2021, Chapter 56, Part BB, Subpart A, Section 8, as amended by L. 2021, Chapter. 417, Part A, Section 4.

Petitioner commenced this holdover proceeding on November 6, 2019 seeking to recover possession of the basement apartment at 315 77th Street, Brooklyn NY 11209. The petition states that respondent Mathew Edison is month-to-month, that the tenancy

terminated effective October 31, 2019 after service of a notice “terminating the tenancy”, and that the subject premises are located in a two-family house. After the entry of a default judgment in December 2019 post inquest, various orders and directives due to the COVID-19 pandemic prohibited petitioner from moving forward with execution on the warrant.

This matter was placed on the court calendar to be heard in February 2022. Respondent appeared through counsel, and the respondent informed the court about his pending Emergency Rental Assistance Program (ERAP) application (Application number 05UNN)¹, triggering an automatic stay of the proceeding. Petitioner filed the instant Order to Show Cause seeking to lift the ERAP stay. Respondent opposes.

Petitioner’s attorney argues in support of its motion that respondent is not eligible for ERAP because respondent does not have a lease or a rental obligation, is not a lawful tenant in the premises, and because the premises are located in a two-family house. Petitioner’s attorney states in his affirmation in support of the instant motion, “respondent is fully aware that his ERAP application can not be granted but is counting on how long it takes to determine the ERAP application to get free time to stay where he does not have a legal right to be without paying any rent...”. Petitioner’s attorney continues, stating in his affirmation, “despite filing for the ERAP to take advantage of the stay even though he is not eligible for ERAP clearly his application is fraudulent and should be set aside by the court.” Petitioner also challenges the stay provision of Part BB of Chapter 56 of the Laws of 2021, as amended by Part A of Chapter 417, arguing that it mirrors the previously invalidated

¹ As of August 4, 2022, the ERAP application status is “under review” as per the ERAP Application Status website.

automatic stay triggered by the filing of a hardship declaration as decided in *Chrysafts v Marks*, 2021 WL 3560766 [8/12/21].

The ERAP automatic stay is not like the stay in the original CEEFPA statute that was enjoined by the Supreme Court in *Chrysafts*, where tenants were allowed to self-certify financial hardship without providing any sort of opportunity for the landlord to challenge that self-certification. The ERAP statute does not allow a respondent to self certify, the statute provides that a case is stayed where a respondent “applied or subsequently applies for benefits under [the ERAP] program...to cover all or part of the arrears claimed by the petitioner...pending a determination of eligibility.” See the Laws of 2021, as amended by Part A, Chapter 417, Section 4. In *Harbor Tech LLC v Correa*, the court stated, “[s]taying or otherwise restricting litigation to resolve a dispute by alternative means do[es] not deny due process...”. 2021 NY Slip Op 50995[U], 73 Misc3d 1211[A][Civ Ct Kings Co 2021]. The court found that the ERAP stay is different than the original CEEFPA statute, and that the ERAP statute’s provision does not violate the due process rights of landlords.

Petitioner’s attorney asserts in support of its motion that the court has the inherent power to determine the tenant’s eligibility for an ERAP stay, that respondent has failed to complete the ERAP application, that respondent is getting the benefit of the stay without showing that respondent meets the basic requirements set forth in the ERAP statute, and that without respondent showing a completed ERAP application the respondent is unilaterally staying his eviction violating the petitioner’s rights. Petitioner states in support that respondent harasses and scares her family, and that she is seeking possession of the premises for her son and his family.

Respondent's attorney states in opposition that petitioner offers no credible evidence that respondent is not the lawful occupant under a rental agreement to pay by virtue of his month-to-month status, who is experiencing housing instability or financial hardship and therefore not eligible to apply for ERAP. Respondent's attorney argues that because the petition sought unpaid use and occupancy at a rate of \$2,000.00 per month, respondent does fall under the protections of the ERAP statute, given this obligation to pay. Respondent's attorney argues that ERAP covers any pending eviction proceeding, including holdovers, and that both tenants and occupants, including those without a lease, come under the protection of the ERAP statute, "as long as the applicant is at risk of homelessness or housing instability, and has a household income below 80 percent of the area median income" citing Subpart A, Section 5(1)(a) of the ERAP statute. Respondent's attorney continues stating that petitioner does not provide police reports, dates, times, text messages, emails, or anything to support petitioner's claims of respondent's alleged harassing behavior.

In reply, petitioner's attorney repeats the arguments in support of the motion; Respondent is not eligible for ERAP, that respondent does not have a right to occupy the premises and that mere occupants without tenancy rights are not eligible for ERAP assistance. Petitioner introduced a new argument in reply: that the DOB issued a partial vacate order for parts of the building. Petitioner states that the DOB issued a vacate order for the basement apartment occupied by respondent. Petitioner states that on March 15, 2022 a DOB inspector found the basement to be illegal, issued a violation, and ordered that the respondent vacate the basement. Petitioner argues that ERAP monies cannot be paid for an illegal apartment.

THE LAW AND ITS APPLICATION

Petitioner's argument that the respondent is not eligible for ERAP and that the court can determine whether respondent is eligible for ERAP or not, is incorrect, as the determination of ERAP eligibility rests with the Office of Temporary and Disability Assistance ("O.T.D.A."). In this case, respondent has an application number, an application date, and the overall status is, "Under Review". Except for an allegation of nuisance/intentional damage, the ERAP statute provides that a summary proceeding is automatically stayed upon an application for benefits pending an eligibility of determination by O.T.D.A. L.2021, C.56, Part BB, Subpart A, Section 8, as amended by L.2021, Chapter 417, Part A, Section 4. The court does not determine ERAP eligibility.

Petitioner does state in its motion that an order should be made finding respondent is not eligible for an ERAP stay. While there is an automatic stay when an ERAP application is under review, courts of concurrent jurisdiction have ruled on whether the automatic stay imposed by the filing of an ERAP application can be lifted by the court, and, if so, under what circumstances. Some courts have vacated the automatic stay imposed by an ERAP application where there is no contractual obligation for the respondent to pay rent or use and occupancy, or where the ERAP applicant has since vacated the premises. *See e.g. Actie v. Gregory*, 2022 NY Slip Op 50117[U], 74 Misc 3d 1213[A] [Civ Ct Kings Co, J. Slade]. (court vacated an ERAP stay in a holdover proceeding where Petitioner sought to recover possession of an apartment in a building with less than four units for his own personal use and the ERAP applicant had already vacated the premises), *Kelly v Doe*, 2022 NY Slip Op 22077 [Civ Ct Kings Co, J. Cohen] [court vacated a stay in a post-foreclosure holdover proceeding finding that respondent had no contractual obligation to pay rent to

landlord], *Abuelafiya v Orena*, 73 Misc 3d 576, [Dist Ct 3rd Dist, Suffolk Co, 2021] (court vacated stay when it was determined that applicant had second home), *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 where there was no contractual obligation for respondent to pay rent or use and occupancy, respondent was a super), *Ben Ami v Ronen, et al.*, 2022 N.Y. Misc. LEXIS 1203[Civ Ct Kings Co, March 23, 2022, Barany, J., index no. 59050/20], (court vacated ERAP stay in a holdover proceeding where Petitioner sought to recover the premises, an unregulated apartment, with fewer than four-units, for his own personal use).

Here, at the outset, the petition states that petitioner served respondents a notice "terminating the tenancy"; the petition states that respondent is a person in possession of said premises on a month- to-month basis, and that, "(T)he Petitioner is entitled to the fair value of use and occupancy at \$2,000.00 per month from 11/1/2019 to 11/30/2019 totaling \$2,000 with interest from 11/1/2019 for an amount to be set by the Court as well as future use and occupancy." In its prayer for relief the petition states, "WHEREFORE Petitioner requests a final judgment against respondent(s) for possession...as well as a judgment for rent arrears and/or use and occupancy against respondent(s) and use and occupancy to be set."

Petitioner continued to ask for rent/use and occupancy re-affirming that rent/use and occupancy was being sought, and very much a part of the resolution of this holdover proceeding. By notice of motion dated October 12, 2020, petitioner moved to allow issuance and execution of the warrant as required by the Administrative Orders and Directives. In support of the motion to issue and execute the warrant, petitioner's attorney states in paragraph 11, "Respondents currently owe \$22,000 in rent/use and occupancy. Annexed

thereto as **Exhibit 3** is a copy of a rent ledger for the subject premises.” Petitioner states in support of the same motion in paragraph 8, “I have provided my attorneys with a copy of the rent ledger for the subject premises. Respondent(s) currently owe \$22,000 in rent use and occupancy. **Exhibit 3.**” It is only recently, in this motion, that petitioner has indicated that he does not wish to accept money from ERAP.

Petitioner states that the respondent is not a lawful tenant and therefore is not eligible for ERAP. Section 8 of the ERAP statute states that a proceeding shall be stayed pending determination of eligibility if a “household” applies for the program funds to pay for all or part of the arrears claimed by petitioner. Section 5(1)(a)(i) of the ERAP statute states a “household” is eligible for the program if it is a “tenant or occupant obligated to pay rent in their primary residence in the State of New York.” Furthermore, Section 2(9) of the ERAP Statute defines “rent” the same as RPAPL 702 which defines it, in pertinent part, as: “the monthly or weekly amount charged in consideration for the use and occupancy of a dwelling pursuant to a written or oral rental agreement.” Finally, Section 2(10) of the ERAP statute defines “rental arrears” as unpaid rent accruing on or after March 13, 2020. The fact that petitioner does not want to participate in the program is not fatal to an ERAP stay. See *LaPorte v Garcia*, 75 Misc3d 557, 2022 NY Slip OP 22126 [Civ Ct, Bronx Co 2022]. To hold that the ERAP stay would be vitiated solely upon petitioner’s recent representation that he is only interested in possession would make an ERAP stay inapplicable to most holdovers, this result is unsupported by the plain reading of the statute. See *Garcia*.

Moreover if the court were to consider arguments raised for the first time in reply, the argument as to the vacate order petitioner introduced in his reply, in support of his argument of “futility”, fails. Petitioner produced a partial vacate order, for the cellar, not the

basement and it does not clearly identify whether respondent's unit is included in the partial vacate order or not. Additionally, the partial vacate order states that there a 3 or more additional dwelling units than legally authorized.

In petitioner's affidavit in support of the motion, petitioner states that he is seeking possession for his family and that respondent does not qualify for ERAP funds. Petitioner says that respondent does not have a lease for the basement and has not paid rent since he purchased the subject premises. ERAP requires a landlord accepting ERAP money in an holdover, to forego for one year an eviction action against a tenant for expiration of a lease. There is an exception in the ERAP statute in "a dwelling unit that contains 4 or fewer units, in which case the landlord intends to immediately occupy the unit for the landlord's use as a primary residence or the use of an immediate family member as a primary residence". Here, the court is unclear as to how many units are in this building, or if there are fewer than 4 units.

Accordingly, petitioner's motion to lift the automatic stay imposed by the filing of an ERAP application, is denied.

Date: August 5, 2022

Brooklyn, NY



Hon. Elizabeth Donoghue, JHC