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"Harlem Congregations for Community Improvement, Inc. v. Swindell" (2022). *All Decisions*. 525.
https://ir.lawnet.fordham.edu/housing_court_all/525

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[*1]

Harlem Congregations for Community Improvement, Inc. v Swindell
2022 NY Slip Op 22215
Decided on July 14, 2022
Civil Court Of The City Of New York, New York County
Bacdayan, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the printed Official Reports.

Decided on July 14, 2022

Civil Court of the City of New York, New York County

Harlem Congregations for Community Improvement, Inc., Petitioner,

against

Denise Swindell,[FN1] Respondent,
SEAN JONES, "JOHN DOE", "JANE DOE" Respondent-Undertenants.

Index No. 58185/19

Karen May Bacdayan, J.

Papers considered on this motion: Respondent's motion to stay execution of the warrant, petitioner's cross motion to execute on the warrant.

Recitation, as required by CPLR 2219 (a) of the papers considered in review of this motion:
Papers Doc No.
Respondent's order to show cause to stay executionMotion sequence 2
Notice of discontinuance against Denise SwindellNYSCEF Doc No. 5
Petitioner's motion to restore, determine motion sequence 2
and cross-motion to execute on warrant (motion sequence 4)NYSCEF Doc Nos. 6-8
Motion to vacate ERAP stay (motion sequence 5)NYSCEF Doc Nos. 9-12

The decision and order of the court is as follows:

PROCEDURAL POSTURE

This is a holdover proceeding. According to petitioner, the premises is scatter-site housing and Denise Swindell was the "client" of petitioner. Swindell was allegedly violating house rules because she no longer resided in the premises, and was allowing Sean Jones ("Respondent") to reside in the premises without permission of the landlord. Summary judgment was granted in favor of petitioner as against Sean Jones by the Hon. Frances Ortiz on October 9, 2019. A warrant for Sean Jones' eviction issued thereafter. Ms. Swindell has since passed away.

Before the court are two motions: Motion sequence 2, pending since February 2020 is respondent's order to show cause to stay execution of the warrant and for the appointment of a guardian *ad litem*. Motion sequence 4 is petitioner's motion to restore to the case to the calendar, to determine motion sequence 2, and to thereafter allow execution of the warrant in compliance with court directives and administrative orders. Motion sequence 5 is petitioner's motion to vacate any stay associated with respondent's submission of an Emergency Rental Assistance [*2]Program ("ERAP") application.

On the last court appearance, June 28, 2022, respondent indicated that his ERAP application had been approved and approximately $15,476.55 had been issued by OTDA on June 23, 2022. This was confirmed by the court. Thus, the automatic stay had already been lifted as of the June 28, 2022 appearance, and whether that stay should be vacated or not is no longer an issue for the court to parse. Not wanting to be bound by the consequences of accepting approved ERAP monies — a 12-month stay on the eviction as opposed to a stay of the proceeding — petitioner indicated that it had "never received an ERAP application on behalf of Sean Jones" and that "in the event that [it] had . . . it would not have participated.: (NYSEC Doc No. 12, Henry affidavit ¶ 4.) In fact, nothing in the statute requires a landlord to participate in the application process or accept the monies [FN2]

DISCUSSION

The consequences to the landlord when it *accepts* ERAP monies as set forth in L 2021, c 56, part BB, § 9 (2) (d) are as follows in relevant part:

> "*Acceptance of payment* for rent or rental arrears from this program shall constitute agreement by the recipient landlord or property owner: (i) that the arrears covered

> by this payment are satisfied and will not be used as the basis for a non-payment eviction; (ii) to waive any late fees due on any rental arrears paid pursuant to this program; (iii) to not increase the monthly rent due for the dwelling unit such that it shall not be greater than the amount that was due at the time of application to the program for any and all months for which rental assistance is received and for one year after the first rental assistance payment is received; (iv) *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* (emphasis added)." (*Id.*)

On July 11, 2022, the parties were again before the court. Respondent still did not have counsel. By then, the ERAP checks had been negotiated and deposited in the account of petitioner's landlord, Northern Manhattan Equities ("NME"). The question then became whether the motion to execute the warrant should be denied without prejudice, and the 12-month stay on evicting respondent should commence. Petitioner acknowledges that the funds were negotiated, but states that it is not benefitting from these funds, nor does it desire to do so. Petitioner averred that it has "[not] received any funds from the Office of Temporary and Disability Assistance ("OTDA") or elsewhere on [respondent's] behalf." (NYSCEF Doc No. 12 at ¶ 3.) Petitioner is currently seeking that the monies be returned. (NYSCEF Doc No. 12 ¶ 8.)

While respondent is not in privity with NME, petitioner *is* in privity with NME, the recipient of ERAP funds issued on behalf of the occupant to whom petitioner leases the premises pursuant to a written rental agreement. If respondent owes rent, it follows that petitioner owes that same rent, or some equivalent, to NME, and petitioner has benefitted by the payment of [*3]ERAP funds to Northern Manhattan Equities, at least indirectly. ERAP monies would not have been paid to NME unless NME participated in the application process and attested that arrears for the apartment were owed to it by petitioner. Payment to NME, petitioner's landlord, is the result of OTDA rules regarding who should be named as the intended recipient by the ERAP application. For instance, in a sublease situation, the owner of the apartment, not the lessor, must be owed rent and be named as the landlord or owner of the premises in order for the sublessee's application to be processed. [FN3] If the sublessor has paid their landlord to date, then the sublessee will not be able to apply as OTDA will consider no arrears to be due.[FN4] This is the difficulty: OTDA has developed rules, some only published on its website or embedded in the ERAP application itself, that require the *property owner or manager* to complete the landlord portion of the ERAP application.[FN5] This leaves lessees with a right to possession as against their sublessee or licensee without any agency over whether funds are accepted.

Petitioner is the lessee of Northern Manhattan Equities, and the sublessor of the deceased tenant with whom it had an agreement. For 33 months, petitioner has had a warrant to evict the remaining occupant-licensee of the premises who has no written or oral agreement to reside in the premises and no obligation to pay rent. Petitioner is clearly in an untenable situation should the 12-month stay on an eviction be applied to it. To place the consequences of such a stay on petitioner would also be illogical.

However, the court need not rest on this absurdity alone. The plain language of the statute states that the "recipient" of approved rental arrears "agrees not to evict a household on behalf of whom rental assistance is received for 12 months after the first rental assistance payment is received." (L 2021, c 56, part BB, § 9 [2] [d] [emphasis added].) It is not disputed that the recipient of the ERAP rental arrears payment is NME, and, thus, NME cannot evict petitioner, who benefitted indirectly from the payment of ERAP funds to its landlord, for twelve months. But the plain language of the statute does not prevent petitioner from executing the warrant as against respondent.[FN6] Moreover, the court also notes, that unlike many other housing [*4]court cases which have not been litigated that may be affected by an ERAP-related stay, respondent here had a full and fair opportunity to litigate this proceeding, with the assistance of prior counsel, and a judgment and warrant were issued 33 months ago.

The Legislation

When passing the ERAP statute and its subsequent amendment, the stated goal was "to provid[e] widespread eviction protections." (L 2021, c 417, part C, subpart A, § 2.) This intent is distinct from what the legislature actually *contemplated* at the time the statute was enacted. It not difficult to fathom that, given the catastrophic circumstances during which the legislation was drafted, there was an urgency to accomplish whatever could be done to stem the tide of housing instability, uncertainty, and despair. As a result, the state swiftly "enacted a series of statutes that the legislature . . . found necessary to protect the public health, safety, and general welfare of the people of New York." (*Id.*)

However, as the grip of the pandemic wanes and vaccines are readily available, public safety health measures are progressively rolled back, repealed, and expiring. The positivity rate in New York City is approximately 50 cases per 100,000 people, compared to January 1, 2021, when the ERAP statute was amended, at which time the positivity rate was close to 500 per 100,000 people.[FN7] There is less urgency now than there was a year and a half ago. 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.

Accordingly, it is

ORDERED that respondent's motion to stay execution of the warrant is DENIED; and it is further

ORDERED that respondent's motion for a guardian *ad litem* is DENIED as respondent has appeared before the court on two occasions at length and was able to cogently articulate his ERAP defense and fully comprehended that he has been at risk of eviction for almost three years; and it is further

ORDERED that petitioner's motion to vacate any ERAP-related stay is GRANTED and petitioner is not stayed by the statute from executing on the warrant despite acceptance by Northern Manhattan Equities of approved ERAP funds; and it is further

ORDERED that petitioner's motion to execute the warrant is GRANTED and the warrant may execute after service of the marshal's notice as required by law, and expiration of said notice; and it is further

ORDERED that petitioner shall serve a copy of this decision and order with notice of entry on respondent by overnight mail, no signature required, *and* regular mail, with proof of service filed on NYSCEF.

This constitutes the decision and order of this court. If this result is unacceptable, it is for the legislature to remedy.

Dated: July 14, 2022
New York, NY
HON. KAREN MAY BACDAYAN
Judge, Housing Part

Footnotes

Footnote 1: The proceeding was discontinued as against Denise Swindell in June 2021 as she is deceased. NYSCEF Doc No. 5.

Footnote 2: Respondent previously relieved his lawyer, Andrew Goodman, Esq. of NMIC,

and also had the opportunity to connect with counsel in Part Z. As the provider of the day was not accepting cases due to capacity issues, the court adjourned the motions in order to allow respondent one more opportunity to retain an attorney. Respondent was provided with a list of legal providers and an Office of Court Justice referral was made by the court (which was rejected.)

Footnote 3: If a leaseholders sublessee applies for ERAP, "the property owner/property manager [not the sublessor] will be responsible for completing the landlord portion of the application." FAQ, Application Processing, question # 14. OTDA Website, https://otda.ny.gov/programs/emergency-rental-assistance/faq.asp#faq-application-q14 (last accessed July 14, 2022).

Footnote 4: Subletters are eligible to apply for ERAP assuming they meet other eligibility requirements . . . . However, arrears must be owed to the landlord to qualify for ERAP. FAQ, Benefits and Who is Eligible, No. 38. OTDA Website, https://otda.ny.gov/programs/emergency-rental-assistance/faq.asp#faq-benefits-q38 (last accessed July 14, 2022).

Footnote 5: The court notes that on several occasions, respondents have come to court seeking a stay on their second ERAP application. When asked by the court why there is a second ERAP application, the respondent states that the first was denied because, as a sublessee, they were told that to be eligible, they would have to make the owner of the building, not their sublessor, the designated recipient of any approved funds.

Footnote 6: Ironically, funds that respondent applied for now protect *petitioner* from eviction by NME for 12 months even though petitioner has not been brought to court for nonpayment of rent or for holding over. This is an absurd result which should be addressed if not for the only reason that it results in waste of limited and much needed ERAP funding.

Footnote 7: Positive Tests Over Time, by Region and County | Department of Health (ny.gov) (last accessed July 14,2022.)