

Fordham Law School

## FLASH: The Fordham Law Archive of Scholarship and History

---

All Decisions

Housing Court Decisions Project

---

2022-10-18

### Cenat v. Ishmael

Follow this and additional works at: [https://ir.lawnet.fordham.edu/housing\\_court\\_all](https://ir.lawnet.fordham.edu/housing_court_all)

---

#### Recommended Citation

"Cenat v. Ishmael" (2022). *All Decisions*. 651.

[https://ir.lawnet.fordham.edu/housing\\_court\\_all/651](https://ir.lawnet.fordham.edu/housing_court_all/651)

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](mailto:tmelnick@law.fordham.edu).

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF KINGS, HOUSING PART A

-----X

Ruth Cenat,  
Petitioner-Landlord,

Index No. LT-309084-21/KI

DECISION/ORDER  
Tashanna B. Golden, J.H.C.

-against-

Motion Seq # 1, 2

Kyle Ishmael  
720 Elton Street, Apt #1  
Brooklyn, NY 11208

Respondent-Tenant,

"John Doe" and "Jane Doe",  
Respondents-Undertenants

-----X

Present: Hon. Tashanna B. Golden

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this petitioner's motion:

<u>Papers:</u>	<u>Numbers</u>
Petitioner's Notice of Motion, Affirmation and Affidavit in Support.....	11-13
Exhibits.....	14-19
Notice of Cross Motion, Affidavit in Support.....	21,22
Court File.....	<i>passim</i>

Before this court is Petitioner's motion to 1) vacate the Emergency Rental Assistance Program ("ERAP") stay and to restore the case to the calendar; and Respondent's Affirmation in Opposition to Petitioner's motion and Notice of Cross Motions seeking to 1) deny Petitioner's motion to restore; and alternatively, 2) dismiss the case pursuant to CPLR § 3211(a)(8) for lack of personal jurisdiction because the notice of petition was not served using "due diligence".

**Applicability of the ERAP Stay:**

The Court must first deal with the Petitioner's request to vacate the ERAP stay. Petitioner seeks to vacate the automatic stay on the grounds that the ERAP application 091UA was denied and therefore the stay is no longer appropriate.<sup>1</sup> Respondent, in its Opposition and Cross-Motion assert that ERAP application 091UA was submitted by Respondent, but due to a technical problem with Respondent's

<sup>1</sup> See Notice of Motion and Affirmation in support of motion (NYSCEF document 11 and 12)

application, a second ERAP application, 0VUYU was filed and is currently "provisionally approved."<sup>2</sup> Submission of an application for ERAP has the effect of staying "all proceedings pending a *determination of eligibility*" (emphasis added). L 2021, c56, part BB, subpart A, § 8, as amended by L 2021, c 417, part A, § 4). Courts have found it appropriate to set aside an ERAP stay where, as here, there is a provisional approval. See *Park Tower South Company LLC, v Simons*, 75 Misc. 3d 1067, 171 N.Y.S.3d 342, 2022 N.Y. Misc. LEXIS 2706, 2022 NY Slip Op 22192, 2022 WL 2253641. Therefore, the motion to set aside the ERAP stay is granted.

### **Respondent's Motion to Dismiss**

Respondent seeks to dismiss the instant holdover pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction arguing that the notice of petitioner was not served using "due diligence" as required by the Covid-19 Emergency Eviction and Foreclosure Prevention Act ("CEEFP").<sup>3</sup> Respondent points to the fact that the Notice of Petition, Petition and accompanying documents were served by conspicuous place service and mail on October 26, 2021.<sup>4</sup> The Affidavit alleges three daytime attempts at personal service, two of which were during regular working hours: one on Saturday, October 23, 2021, at 2:14 pm, one on Monday, October 25, 2021 at 1:27 pm, and one on Tuesday, October 26, 2021 at 11:58 am before resorting to conspicuous place service.<sup>5</sup> Respondent further states that the Affidavit does not contain any allegations that genuine inquiries were made about the Respondent's whereabouts.<sup>6</sup>

In support of its argument Petitioner cites to cases where the lack of due diligence was found under CPLR 308. However, CPLR 308 is inapplicable in summary proceedings to recover real property. See *O'Donnell v. O'Donnell*, LT-311391/21 (Civ. King. May 11, 2022) (Finding that CPLR § 308 is inapplicable to summary proceedings as the language mandates attempt at service at a person's place of business, which could violate the Housing Maintenance Code; that CPLR § 308 allows for

---

<sup>2</sup> See Notice of Cross Motion and affirmation in support of motion (NYSCEF document 21 and 22)

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> Id.


<sup>6</sup> Id.

service on the secretary of state; and CPLR § 308 allows 120 days from filing of the summons for service). Furthermore, the “due diligence” requirement of CEEFPA specifically refers to the service of a Hardship Declaration. The statute did not alter or otherwise render inapplicable RPAPL § 735, which confers jurisdiction in summary proceedings such as holdovers and which requires “reasonable application” for service of papers.<sup>7</sup> The Respondent does not contest that service was effectuated, and under a RPAPL § 735 analysis, service is proper. Therefore, Respondent’s cross-motion is denied.

This matter is hereby restored to the calendar and scheduled for conference on October 31, 2022 10:30 am.

The foregoing is the Decision/Order of this court.

Dated: Brooklyn, New York  
October 18, 2022

 *so ordered*

HON. TASHANNA B. GOLDEN  
JUDGE, HOUSING COURT

---

<sup>7</sup> Id.