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Frischer v. Goldner

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[*1]

Frischer v Goldner
2022 NY Slip Op 51060(U)
Decided on October 12, 2022
Civil Court of the City of New York, Kings County
Golden, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected in part through October 31, 2022; it will not be published in the printed Official Reports.

Decided on October 12, 2022

Civil Court of the City of New York, Kings County

<p>Muriel L. Frischer, Petitioner-Landlord,</p> <p>against</p> <p>Paul C. Goldner, Respondent-Tenant, "John Doe" and "Jane Doe," Respondents-Undertenants.</p>
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Index No. LT-300041-22/KI

Counsel for Petitioner: Daniel Patrick Phillips, Belkin Burden Goldman LLP

Counsel for Respondent: Stephanie Del Toro, Riseboro Community Partnership/LEAP

Tashanna B. Golden, J.

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

Papers Numbers

Petitioner's Notice of Motion, Affirmation in Support 9, 10

Respondent's Notice of Cross Motion 13

Respondent's Affidavits/Affirmations in Support and Exhibits 14-17

Petitioner's Affirmation in Opposition and Exhibits 18-20

Court File *passim*

Before this court is Petitioner's motion to vacate the Emergency Rental Assistance Program ("ERAP") stay and to restore the case to the calendar; and Respondent's Cross-Motion requesting a denial of Petitioner's motion to vacate the ERAP stay or in the alternative to dismiss based on Petitioner's alleged failure to properly serve the predicate notice.

Applicability of the ERAP Stay:

The Court must first deal with the Petitioner's request to vacate the ERAP stay. If the Court finds that it will not vacate the stay, the Cross-motion cannot be heard. Petitioner seeks to vacate the automatic stay on the grounds that a decision has been rendered and therefore the stay is no longer appropriate. 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, [*2]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 there is a provisional approval, [*See Park Tower South Company LLC. v Simons, 75 Misc 3d 1067*](#), 171 N.Y.S.3d 342, 2022 NY Misc. LEXIS 2706, 2022 NY Slip Op 22192, 2022 WL 2253641, so where, as here, there is a denial, the ERAP stay is no longer appropriate. However, in the Notice of Cross-Motion, the Respondent in his affidavit states that he has appealed the denial of the ERAP application. J. Marks Administrative Order 34/22 dated January 16, 2022 in Paragraph 5 states that "eviction matters where there is a pending ERAP application shall be stayed until a final determination of eligibility... including appeals." J. Marks AO/34/22. Respondent has failed to attach any proof of the appeal but states that it was filed over seven months ago, "on or about March 8, 2022." As there is no evidence of the remaining pendency of the appeal, Petitioner's motion to vacate the ERAP stay is granted.

Service Requirement for Notices Pursuant to RPL 226-c

Respondent moves to dismiss the instant action on the grounds that the Court lacks jurisdiction because there was no attempt at personal service of the predicate notice. *See Notice of Cross Motion*. Specifically, Respondent argues that prior to commencing a holdover proceeding, the Petitioner is required to serve notices of termination in accordance with the requirements of RPAPL § 735, CPLR § 2103 (a) and NY Real Prop. Law § 232(a). *Id.* At ¶

20. Petitioner argues that Respondent is incorrect, as the predicate notice terminating Respondent's Tenancy was not a "Notice of Termination" pursuant to RPL § 232-a, but instead a "Notice of Non-Renewal" pursuant to RPL § 226-c, which on its face does not incorporate the personal service requirement of RPAPL § 735. *See Affirmation in Further Support of Petitioner's Motion and In Opposition to Respondent's Cross-Motion to Dismiss* hereinafter "*Affirmation in Further Support*."

A landlord can elect to terminate a tenancy at the end of a lease term. Notice of such intent must be provided in order to begin eviction proceedings. *See 170 West 85th Street Tenants Ass'n v. Cruz*, 173 AD2d 338, 569 N.Y.S.2d 705, 1991 NY App. Div. LEXIS 7303 ("A valid notice of termination is a condition precedent to a summary holdover proceeding.") The Housing Security and Tenant Protection Act of 2019 "The HSTPA" provides two means by which a tenancy can be terminated, Section 226-c and Section 232-a.

Section 226-c was an addition to the Real Property Law ("RPL") and reads in pertinent part,

Notice of rent increase or non-renewal of residential tenancy. 1. (a) Whenever a landlord does not intend to renew the tenancy, the landlord shall provide written notice as required in subdivision two of this section. If the landlord fails to provide timely notice, the occupant's lawful tenancy shall continue under the existing terms of the tenancy from the date on which the landlord gave actual written notice until the notice period has expired, notwithstanding any provision of a lease or other tenancy agreement to the contrary. [\[FN1\]](#)

Section 232-a modifies already existing RPL Section 232-a and reads in pertinent part:

Notice to terminate monthly tenancy or tenancy from month to month in the city of New York. No monthly tenant, or tenant from month to month, shall hereafter be removed [*3] from any lands or buildings in the city of New York on the grounds of holding over the tenant's terms unless pursuant to the notice period require by subdivision two of section two hundred twenty-six-c of this article, the landlord or the landlord's agent serve upon the tenant, ***in the same manner in which a notice of petition in summary proceedings is now allowed to be served by law***, a notice in writing to the effect that the landlord elects to terminate the tenancy
Emphasis added.

Though often read together, 226-c and 232-a are not necessarily meant to be conjunctive. 226-c speaks to the termination of a tenancy at the end of a lease term, whereas 232-a is explicit that it applies to the termination of a month-to-month tenancy. Furthermore, though it is an addition to the RPL, 226-c is silent as to the service requirements of the

notices, whereas 232-a is explicit that notices must be served "in the same manner in which a notice of petition in summary proceedings is now allowed to be served by law", essentially incorporating RPAPL § 735's mandate of personal service. This silence, coupled with the distinction between the two tenancies at the time of termination, lead this court to find that the requirements of RPAPL § 735 are not triggered here. *See Matter of Albano v. Kirby*, 36 NY2d 526, 530, 330 NE2d 615, 369 NYS2d 655 (1975) (when different terms are used in various parts of a statute or rule, it is reasonable to assume that a distinction between them is intended). *See also McKinney's Cons Laws of NY, Book 1, Statutes § 74.*

It is well settled that a landlord and tenant may, by the terms of their lease, agree to a specific manner of service of notices, and that those terms are generally enforceable. *See Miller v. MMT Corp.*, 182 Misc 2d 670, 700 N.Y.S.2d 388, 1999 N.Y.Misc. LEXIS 518, citing *Chumley's Bar & Rest. Corp. v. Bedford Ct. Assocs.*, 174 AD2s 398, 400 (1st Dept 1991); *Milltown Park v. American Felt & Filter Co.*, 180 AD2d 235 (3d Dept 1992); *et al.* Since the face of 226-c is silent on the issue of service of the termination notice, if a landlord opts to serve a 226-c notice of termination at the end of a written lease, we must look to the terms of the lease for guidance around service.

Here, the *90 Day Notice of Intent not to Renew Tenancy Pursuant to Real Property Law §226-c* ("90 Day Notice") was dated August 24, 2021 and states that the tenancy was set to expire on November 30, 2021. *See Petition.* There is an "Affidavit of service by Mail" which states that on August 24, 2021 the 90 Day Notice was served "by regular mail (with a certificate of mailing), certified mail and certified mail, return receipt requested by giving the same in a post-pad, properly addressed envelope " *Id.* This notice was served in accordance with Paragraph seventeen (17) of the lease which states that notices served from the landlord to the tenant shall be served by certified mail. *See Affirmation in Further Support at Exhibit 1, Lease.* As such, the notice was properly served.

For the forgoing reasons, Respondent's cross-motion to dismiss is denied in its entirety. Petitioner's motion to Restore is granted.

The foregoing is the Decision/Order of this court.

Dated: October 12, 2022
Brooklyn, New York
HON. TASHANNA B. GOLDEN
JUDGE, HOUSING COURT

Footnotes

Footnote 1: Subdivision two outlines the notice requirement based on the length of the tenancy, with 30, 60, and 90 day mandates.

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