2022-11-09

Bay Park Two-LLC v. Pearson

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Bay Park Two-LLC v Pearson
2022 NY Slip Op 22346
Decided on November 9, 2022
Civil Court Of The City Of New York, Kings County
Slade, J.
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Decided on November 9, 2022

Civil Court of the City of New York, Kings County

Bay Park Two-LLC, Petitioner,

against

Tekecia Pearson, Miguel Pearson, Respondents.

L&T Index No. 82404/19

Petitioner Attorney: Gutman, Mintz, Baker & Sonnenfeldt

Respondent Attorney: RiseBoro Community Partnership/Legal Empowerment & Assistance Program

Kimberley Slade, J.

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in the review of petitioner's motion to vacate an ERAP stay *inter alia*.

The papers considered in these motions are contained on NYSCEF and are numbered 47 to end and various documents and exhibits as may be referenced herein.

Petitioner moves by order to show cause to restore this matter to the court calendar for a

conference and to vacate the ERAP stay, and to then allow the previously issued warrant of eviction to execute. Respondent, a Section 8 voucher recipient in this non-payment proceeding opposes the motion.

This proceeding first appeared on the court's calendar on November 13, 2019 when a possessory judgment was entered in the amount of $15,869.00 representing the respondent's share of arrears then due. Shortly thereafter, as the arrears grew, petitioner sought to evict, and this court entered orders staying execution of the warrant to allow respondent, a long-term tenant, further time to pay and to preserve her tenancy. In each of her pre-pandemic applications to stay the warrant respondent represented she was waiting for HRA to pay. (NYSCEF 19, 25) The last pre-pandemic order extended respondent's time to pay through March 23, 2020.

In May of 2020, petitioner sought to restore the matter under the pandemic rules in effect at the time and, following various appearances, the court connected respondent with a legal service provider. Ultimately, the matter settled with respondent's acknowledgement that $31,934.50 was owed through April 2021 and her agreement that this would be paid by June 30, 2021. Respondent again represented that she was seeking arrears from Public Assistance and asserted that she was in the process of recertifying her subsidy with NYCHA section 8. (NYSCEF 43)

No payments were made but shortly after, respondent filed a hardship declaration (NYSCEF 31) and later, an ERAP application (No. UVVH4 — See copy of ERAP status attached [*2]to this decision indicating tenant portion is incomplete) each of which stayed this proceeding. This motion then ensued. Petitioner asserts respondent owes approximately thirty months of rent as of June 24th 2022 at a rate of $1,094.00 per month.

Petitioner argues that the stay should not apply to this proceeding as respondent's status as a Section 8 recipient places her within a group or class of people whose applications may never be paid pursuant to both the ERAP statute's own language and guidance provided by the Office of Temporary Disability Insurance's website (OTDA). Additionally, petitioner argues that even if the ERAP policy magically changed and fifteen months of arrears were eligible to be paid, the ERAP monies would not satisfy either the judgment already in place prior to the onset of the pandemic or the additional and subsequently accrued arrears. Consequently, petitioner argues that the matter should be allowed to proceed, in the very least, for the non-ERAP monies. Finally, petitioner argues that not vacating the stay will "unfairly prejudice the Petitioner, who is unjustifiably stayed from seeking arrears that are

rightfully owed to it, and which are, indisputably, never going to be paid by ERAP as they exceed the full award amount." (Affirmation in Support, Par. 15)

Respondent asserts that the only forum in which this question may be decided is in Supreme Court via an Article 78 proceeding, that petitioner has not served the New York State Attorney General in this matter, that equitable considerations require that the matter be stayed and that CPLR 3211(a)(10) precludes this court from granting the relief sought as petitioner failed to join the Commissioner of OTDA in this proceeding as a necessary party. Respondent argues in the alternative that since petitioner has not established or asserted respondent's ineligibility for ERAP and has failed to indicate it will waive the monies requested from ERAP to be allowed to proceed, the motion must be denied and the stay remain intact.

Virtually all case law addressing whether an ERAP stay may be vacated starts with the straightforward proposition that Section 8 of subpart A of part BB of chapter 56 of the laws of 2021, as amended by Section 4 of part A of chapter 417 of the laws of 2021 (ERAP) stays both holdover and nonpayment proceedings upon the filing of an ERAP application for all or part of the arrears claimed by a petitioner pending a determination of eligibility. Case law is less straightforward when the question is whether a case *must* remain stayed upon an application to vacate a specific stay and whether the sole authority to assess an ERAP application is vested with the Commissioner of OTDA. *May vacate*: *Laporte v. Garcia*, 75 Misc 3d 557, 168 NYS3d, *Karan Realty Associates v. Perez*, 75 Misc 3d 499, 2986 *Briggs LLC v Evans*, 74 Misc 3d 1224(A), *Papandrea-Zavaglia v. Arroyave*, 168 NYS3d 789, *Zheng v. Guieseppone*, 74 Misc 3d 1231(A), 165 NYS3d 274 (Table), *Actie v. Gregory*, 74 Misc 3d 1213(A); *May vacate and assess eligibility*: *5th and 106th Street Associates LP v. Hunt*, 76 Misc 3d 338, 172 NYS3d 354 and *Harmony Mills West, LLC, d/b/a the Lofts at Harmony Mills v. Constantine*, 75 Misc 3d 594, 169 NYS3d 594, *Abuelafiya v. Orena*, 73 Misc 3d 576, 155 NYS3d 715, 2021 NY Slip Op 21247 ; *May not vacate: Savy Properties 26 Corp. v. James,* 76 Misc 3d 1214(A), 174 NYS3d 824 (Table), *560-66 Hudson, LLC v. Hillman*, 2022 WL 1003480, 2022 NY Slip. Op. 30718(U).Currently, there is no appellate guidance on this issue.

On September 1, 2021 the New York State legislature addressed the problems New York State had with its ERAP rollout in Section 2 of the statute where it provided "[t]he legislature is especially cognizant of the ongoing risks posed by residential evictions stemming from non-payment of rent during the height of the public health emergency, and its recovery period, such as the potential to exacerbate the resurgence of Covid-19, the damage significant

numbers of [*3]eviction would cause the state's economic recovery, and the deleterious social and public health effects of homelessness and housing stability." The law is currently set to expire on September 30, 2025. In part BB, Section 1, Subpart A, Section 5(I) the statute provides that a tenant or occupant is eligible to receive benefits "provided however that occupants of federal or state funded subsidized public housing authorities or other federal or state funded subsidized housing that limits the household's share of the rent to a set percentage of income shall only be eligible to the extent that funds are remaining after serving all other eligible populations." Currently the OTDA website provides:

> IMPORTANT NOTE: Applicants from subsidized housing tenants whose rent is limited to a certain percentage of income (including public housing, Section 8 and FHEPS) are not currently able to be paid. State law requires that these applications be paid after all other eligible occupants have been reviewed and paid. Therefore, at this time, none of the subsidized housing applications can be paid regardless of the date their application was submitted. Residents of public housing are urged to contact their public housing authority to determine if their rent can be adjusted retroactively based on a previous change in circumstances, including a reduction in income.

The stated purpose of the legislation per the New York State Senate Introducer's Memorandum in Support, Bill No. 55001 is that "[t]his critical legislation will extend and modify protections necessary to allow New Yorkers to stay in their homes, and provide landlords with funding for unpaid rent for tenants that have experienced financial hardship due to the COVID-19 pandemic."

Once the ERAP application is filed, a stay is triggered "pending a determination of eligibility." *id*. However, a court's power and authority to modify, vacate or condition a stay in matters over which it presides is a necessary and integral component of its powers and duties and necessary to the exercise of its judicial functions. In *Jones v. Allen*, 185 Misc 2d 443, Supreme Court, Appellate Term, 2nd Dep't. June 27, 2000 the Court, while noting the limited question before it, determined that RPAPL 747-a, which limited a court's discretion in *granting* a stay "impermissibly interfere[d] with the court's inherent judicial function." (all internal citations omitted). While the question addressed by the *Jones* court was limited to a specific statutory prohibition against extending a stay the principles espoused apply equally here. Courts have the ability and obligation to review, modify, vacate, alter or condition stays, whether from their own orders or from statutorily mandated stays, such as those triggered by the filing of an ERAP application. The body of case law addressing CPLR 5519 and 2201 for instance, as well as bankruptcy proceedings and other automatic stays demonstrates this power and authority. Additionally, the numerous lower court decisions addressing this issue

implicitly recognize this power.

In an analogous scenario the court in *Robo LLC v. Matos*, 75 Misc 3d 1211(A), 186 NYS3d 676, 2022 NY Slip. Op. 50468(U) addressed and denied a request to vacate a stay where the respondent owed arrears that accrued prior to and after the onset of the pandemic, where an ERAP application was pending for nearly a year at the time of writing and where the respondent was a Section 8 voucher recipient. In reluctantly declining to vacate the stay that court noted that "Respondent's argument that petitioner is not injured by the stay is disingenuous. [t]his encroaches upon petitioner's property rights and petitioner is prejudiced in not being able to seek redress in this court."

Similarly, in *Crotona Holdings LLC v. Santana*, 76 Misc 3d 1205 (A), 173 NYS3d 478, [*4]2022 NY Slip Op. 50828(U) the court was asked to vacate a stay where the tenancy commenced pursuant to a lease with a FHEPs voucher and where the tenant owed significant pre-pandemic arrears. In reviewing the motion to vacate the stay as a threshold issue to the case, the court noted that while "...ERAP...imposes a stay of eviction proceedings when an application is filed, 'pending a determination of eligibility'...[t]his stay is not absolute; courts have the authority to lift the ERAP stay in appropriate cases, depending on the specific facts and circumstances presented." The court also upheld the stay determining "here, in this nonpayment proceeding, the court is constrained to allow the ERAP stay to remain in place because [a]n approval by the ERAP program, although perhaps not satisfying the entire rental arrears owed by a respondent, would assist in preserving a tenancy." This court respectfully disagrees that the stay ought not be lifted in situations such as are present here, and that are similar to the facts in *Matos* and *Santana*, *id*. While acknowledging the legislative goals and purpose, as time passes and prejudice accrues, the likelihood that an ERAP payment will assist in resolving a case becomes attenuated and remote, and the prejudice of the unchecked stay more apparent.

In passing the ERAP legislation, the legislature intended to freeze as many cases as possible, with success, to allow the state to mobilize its distribution of monies made available to New Yorkers to avert evictions and pay landlords arrears that accrued as a result of pandemic related hardships. Presumably, in doing so the legislature understood that voucher recipients and those who have income-based portions of rent for subsidized units could demonstrate a change of circumstances to the agency issuing the voucher and have the share of rent for which they are responsible adjusted accordingly. Such adjustments would presumably incorporate loss of income, etc., due to a Covid related hardship. While this court does not agree with petitioner's essentially speculative assertion that monies will *never* be

paid on these cases, it does agree that the continued stay is prejudicial, particularly as the statute does not expire for close to three years. Ironically, by blanketly retaining a stay while arrears continue to accrue and, as subsidies do not get recertified, a subsidized tenant may wind up having a significantly greater risk of eviction as the arrears become insurmountable with recertifications years overdue. This would undoubtably be an unintended consequence of the legislative goals in such a scenario, but nonetheless a consequence to be considered.

Here, respondent is asserted to have not paid her share of the rent since 2018 and the current status of her subsidy is unclear. Also unclear is the status of One-Shot Deal applications which respondent claims to have submitted on three separate occasions. Respondent fails to cite any compelling authority to support the assertion that the question at the heart of petitioner's motion may only be raised in an Article 78 proceeding. While the commissioner of OTDA may permissively be joined in its discretion, or subpoenaed where appropriate, that office is not necessary to the disposition of this motion. CPLR Section 1001 provides, "Parties who should be joined. Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or might be inequitable affected by the judgment in the action shall be made plaintiffs or defendants." The question of the maintenance of a stay is not within the province of the Commissioner of OTDA who is charged with implementing the ERAP program *inter alia*. Neither the Commissioner of OTDA nor the office itself will be inequitably affected by this motion, nor are they necessary parties to a determination of rights between the parties.

This court and others have addressed the question of whether the New York State Attorney General must be served with a motion like the one that is the subject of this decision, [*5]see eg *Briggs LLC v Evans*, 74 Misc 3d 1224(A) and *178 Broadway Realty v. Charles*, 75 Misc 3d 937, 172 NYS3d 323, 2022 NY Slip Op. 22164 citing *Briggs*, all of which have answered in the negative. Here, petitioner has not asserted that respondent is *ineligible for ERAP monies* but instead that it is prejudiced by the inordinate delay occasioned by the blanket stay imposed by the ERAP filing. Respondent's contention that petitioner has not asserted it would waive ERAP "eligible" arrears in order to proceed, is not fully responsive to the arguments raised in petitioner's motion. Instead, the aforementioned is a case-law engrafted concept that has been utilized in holdovers — in essence to negate the idea that an ERAP payment would aid in preserving, protecting or creating a tenancy.

The legislature sought to protect all New Yorkers from the consequences of the pandemic. However, the stay ought not be employed in a manner that is so prejudicial to a petitioner that its effects cannot be ameliorated. While not referring to the type of factual

scenario present in this matter, the court in *Silverstein v. Huebner* observed "[h]owever, 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." 2022 WL 1243191 (NY City Civ. Ct.), 2022 NY Slip Op. 31051(U)(Trial Order). The court notes that respondent's ERAP application is incomplete and *assuming arguendo* that a theoretical possibility exists where this application is next in line to be reviewed by OTDA, it is unlikely to be approved. Based on the facts presented and history of the case, the equities appear to be significantly out of balance.

Consequently, petitioner's motion to vacate the stay of the proceeding is granted. Petitioner's motion to execute its warrant is also granted to the extent of staying execution through December 10, 2022 to allow respondent to pay *pre and post pandemic arrears.* The ERAP statute currently allows for a maximum of 12 months to be paid for rents accrued on or after March 13, 2020, and up to 3 months of additional rental assistance for future rent if the household spends 30 percent or more of its gross monthly income to pay for rent, a total of 15 months. Upon default in payment of the pre and post pandemic arrears, the warrant may execute after service of a marshal's notice. The earliest execution date is December 12, 2022. Upon payment of the outstanding arrears both before and after the "ERAP period" described above, respondent may move to re-instate the stay with proof of a completed ERAP application. This constitutes the Decision/Order of the court.

Dated: November 9, 2022
Brooklyn, NY
Kimberley Slade, JHC

Return to Decision List