2022-11-07

Atkinson v. Fendenson

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Atkinson v Fendenson
2022 NY Slip Op 51093(U)
Decided on November 7, 2022
Civil Court Of The City Of New York, Queens County
Kuzniewski, J.
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Decided on November 7, 2022

Civil Court of the City of New York, Queens County

Kathleen Atkinson, Petitioner-Landlord,

against

Natasha K. Rose Fendenson, Odette Bennett, John Doe & Jane Doe, Respondent-Tenants.

Index No: L & T 308586/21

For Petitioner: David S. Harris

For Respondent: Queens Legal Aid Society by Atusa Mozaffari

Jeannine Baer Kuzniewski, J.

Recitation, as required by CPLR 2219(A), of the papers considered in the review of this Notice of Motion:

PAPERS	NUMBERED
ORDER TO SHOW CAUSE, AFFIDAVITS & AFFIRMATION ANNEXED	1
ANSWER AFFIRMATION	2
REPLYING AFFIRMATION	
EXHIBITS	

STIPULATIONS
OTHER

Upon the foregoing cited papers, the Decision/Order on the petitioner's Order to Show Cause in this holdover proceeding seeking an Order to lift the ERAP stay is as follows:

The petitioner commenced this holdover proceeding seeking possession of 255-10 148 Drive, 2nd floor, Rosedale, NY 11422 of this two-family house. The petitioner purportedly terminated the month-to-month tenancy by means of a **90 Day Notice Terminating Tenancy** with a termination date of November 30, 2021. The proceeding appeared on the court calendar on January 26, 2022. The respondents were referred to counsel and the Legal Aid Society filed a Notice of Appearance on February 11, 2022. On March 15, 2022 the respondent, Natasha Rose-Fenderson, applied for ERAP. The ERAP application has been "Tenant Provisionally Approved, Landlord Pending."

The petitioner moves to lift the stay resulting from the ERAP application. The sworn affidavit submitted in support of the motion represents:

> "11. Your affiant has no intention of participating in the ERAP program, with respect to the respondent's occupancy in the subject premises, as I am desirous of regaining legal possession. I am willing to waive the one hundred and eighty (180) day period allowed [*2]under the program for the submission of documents.
>
> 12. The Petitioner cannot accept said payment, since the acceptance of the payment will bar the Petitioner from regaining possession of the subject premises for the foreseeable future.
>
> 13. I do not want the respondents to remain in possession of the subject premises, and will not complete the ERAP application process. I understand that this will prevent me from receiving/collecting some, or all of the arrears, which were sought in the petition, and any monies that I would be entitled to receive from the program are expressly waived."

The respondents oppose the motion arguing that the statements made in the above cited affidavit are in direct conflict with the actions of the petitioner. It is argued that:

> "30. However, there is no way that the ERAP application could have been processed and approved without Petitioner agent completing the owner's portion of the application and submitting the above-listed documents.
>
> 31. If Petitioner did in fact refuse to participate in the ERAP program, OTDA would have merely issued a determination of provisional eligibility, not a provisional approval, and set aside the funds for 180 days, pursuant to the above-

stated policy. [emphasis added]

32. These statements contradict Petitioner's actions, past and present. Petitioner clearly already provided the relevant information, submitted documentation, and actively took steps to participate in the ERAP program. In fact, Petitioner did so months prior to the submission of their affidavit in support of Petitioner's Order to Show Cause.

33. As Petitioner's portion of the application has been completed and all information and documentation has been verified by OTDA, the 180 days for compliance is not applicable. Thus, Petitioner's statement that they are willing to waive the 180-day period for compliance is irrelevant."

"Disposition of this motion requires an analysis of whether a provisional approval for ERAP funds payable to a landlord who declines to participate in the program, either by completing the application process or refusing to accept funds, has the same effect on the ERAP stay as a determination of eligibility and acceptance of approved funds by the landlord. While the consequences to the landlord are different in each instance, for the following reasons, the court holds that the effect of a provisional approval is the same as a determination of approval in one important aspect: the stay is simply dissolved."[FN1]

The respondent submits a letter allegedly signed by the petitioner which represents that she did not authorize the application to lift the stay and that she wishes to continue the landlord tenant relationship on a month-to-month basis. Additionally, they submit a receipt for a payment made in October. The letter is not notarized or witnessed.

The Court finds the argument in opposition to the Order to Show Cause to be unpersuasive. The Affirmation In Opposition argues that the petitioner participated in her portion of the ERAP application was fully completed. It is this Court's understanding that a "Provisional Approval, Landlord Pending", means that OTDA has approved the application, based upon the information that was provided by the applicant, however, OTDA is waiting for the landlord to submit and complete their information. Since OTDA cannot force a landlord to participate in the [*3]program, the statute provides that the approval triggers an affirmative defense for the applicant in the event the landlord seeks a monetary judgment for the rent/use and occupancy that was approved by the state.

"(c) If a payment cannot be made directly to a landlord or owner after the outreach efforts described in paragraph (b) of this subdivision, funds in the amount approved for rental assistance to an otherwise eligible applicant shall be available for a period of 180 days; extension may be provided upon determination by the commissioner of good cause. When possible, both landlord or owner and tenant shall be notified of the provisional determination of eligibility and the landlord or

owner shall have a final opportunity to participate. If the landlord or owner does not provide necessary information or documentation to effectuate payment as directed before 180 days, the commissioner may reallocate the set aside funds to serve other rental assistance program applicants. The tenant may use such provisional determination as an affirmative defense in any proceeding seeking a monetary judgment or eviction brought by a landlord for the non-payment of rent accrued during the same time period covered by the provisional payment for a period of twelve months from the determination of provisional eligibility. If the landlord has not accepted such provisional payment within twelve months of the determination the landlord shall be deemed to have waived the amount of rent covered by such provisional payment, and shall be prevented from initiating a monetary action or proceeding, or collecting a judgment premised on the nonpayment of the amount of rent covered by such provisional payment." L 2021, ch 156, part BB, § 9 [2] [c])

The Court must question to legitimacy of the allegation that the landlord has fully complied with the ERAP application, in light of the fact that there was an email sent from respondent's counsel on August 30, 2022 which states:

> "I just wanted to inform you that Ms. Fendenson was provisionally approved. See attached. I called the ERAP helpline earlier today and they said the landlord has still not completed their portion of the application and until they do so a payment will not be made. Please advise."[FN2]

This email supports this Court's understanding that the Provisional Approval is based on the information as submitted by the applicant. If the landlord and the applicant had submitted all their necessary documents, a provisional approval would not be necessary as there could simply be an approval without conditions.

The opposition further relies on a letter allegedly signed by the petitioner representing that she wishes to continue the relationship between the parties on a month-to-month basis and that she desires all past due rent. This letter is not witnessed or notarized, which is in contrast to the Affidavit in Support. The Court must afford greater weight to a sworn affidavit. As to the receipt for the payment made in October 2022, this was accepted outside the window period, therefore does not indicate a vitiation of the Notice of Termination.

The Affirmation in Support confidently argues that the landlord had fully provided all the required documentation to actively participate in the ERAP program months prior to her Affidavit In Support, which is notarized on September 28, 2022. However, there has been nothing submitted in support of this argument. The Court recognizes that the "Check Application [*4]Status" database represents that "All Landlord Information and

Documentation Verified" has been provided. However, there appears to be ambiguity and there have been multiple occasions when it has represented that documents and information have not been verified and yet both landlords and tenants have presented emails in open court indicating the opposite.

In Senate Bill 5001 the legislature specifically addressed the passage of the Emergency Rental Assistance Program.

> "In April 2021, the legislature passed the COVID-19 Emergency Rental Assistance Program ("CERAP"), funded with $2.6 billion for residential rent and utility assistance. To date, technical and administrative challenges, low public awareness of the program, and the slow pace of implementation have hampered the program's effectiveness in covering the cost of rent arrears and providing widespread eviction protections.
>
> * * *
>
> The 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 evictions would cause to the state's economic recovery, and the deleterious social and public health effects of homelessness and housing instability."

A reading of the legislation indicates a recognition that the funding for ERAP was to secure rent to the benefit of both the landlords and the occupants. It was not simply intended as a moratorium on evictions. There were numerous protections put in place specifically directed to pausing evictions.

> "The state has enacted a series of eviction moratorium measures found necessary to protect the public health, safety, and general welfare of the people of New York. These provisions extended the eviction moratoriums until January 15, 2022.
>
> These measures include:
>
> The Tenant Safe Harbor Act ("TSHA")
>
> The COVID-19 Emergency Eviction and Foreclosure Prevention Act ("CEEFPA")
>
> The COVID-19 Emergency Rental Assistance Program ("CERAP")"[FN3]

In the facts before this Court, a continuation of the stay would simply provide a moratorium on a potential eviction while doing nothing to preserve a tenancy. The sworn

affidavit submitted by the petitioner states that she is solely looking for possession of the apartment in this two-family house, she waives any of the outstanding arrears, she waives the 180 days hold on the ERAP funds and she will not participate in the program. In light of those representations, a stay would not serve the purpose of helping the economic recovery, paying rent arrears or to provide time for the implementation of the program. In fact, it would serve as a delay in allowing the government the chance to reallocate the money to another application that may in fact help both a landlord and the applicant in that case. Bear in mind that the provisional approval has also triggered the affirmative defense for Ms. Fenderson in the event the petitioner were to attempt to obtain a money judgment for the ERAP approved funds. In the event the petitioner were to seek the funds approved by ERAP after swearing that she would not, then she could be held accountable for orchestrating a fraud on this Court.

> "The ERAP statute, unlike CEEFPA, is not a measure designed to protect litigants where rent is not the basis for seeking possession. A stay under the ERAP statute is appropriate only when the benefit provided could potentially resolve litigation.
>
> The court must avoid an unreasonable or absurd application of a law when interpreting a statute. *People v. Schneider*, 37 NY3d 187, 196, 151 N.Y.S.3d 1, 173 N.E.3d 61 (2021). . . .
>
> The ERAP legislation was not intended to act as prophylactic statute and nor was it designed to create a barrier preventing small property owners from advancing litigation involving residential properties, where the tenancy is not subject to statutory control, landlord expresses its intent not to seek use and occupancy, and desires to pursue litigation where the tenancy has been property terminated."[FN4]

The Court is not insensitive to the fears and realities of a potential eviction and homelessness, however, it must also be balanced against the interests of a petitioner seeking possession of his or her property. This case was filed on December 10, 2021, a Notice of Appearance was filed February 11, 2022 and issue has yet to be joined. There is no imminent threat of eviction as despite the proceeding having been filed close to a year ago, it is still early in the litigation process.

Pursuant to the foregoing, the Order to Show Cause is granted, the stay is lifted. The proceeding is adjourned to December 16, 2022 at 9:30, room 401.

Dated: November 7, 2022
Hon. Jeannine Baer Kuzniewski, J.H.C.

Footnotes

Footnote 1: Park Tower S. Co. LLC v Simons, 75 Misc 3d 1067, 1070 [Civ Ct, New York County 2022]

Footnote 2:*See* NYSEF document 15.

Footnote 3:*See* www1.nyc.gov/site/finance/sheriff-courts/sheriff-evictions.page

Footnote 4: Papandrea-Zavaglia v Hernandez-Arroyave, 75 Misc 3d 541, 546 [Civ Ct, Kings County 2022]

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