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3220 Parc Inc. v. Gavin

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART B

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3220 PARC INC.,

L&T Index No. 025450/19

Petitioner,

-against-

**DECISION/ORDER
(AFTER HEARING)**

VINCENT GAVIN,

Respondent.

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Present: Hon. OMER SHAHID
Judge, Housing Court

Recitation, as required by C.P.L.R. § 2219(a), of the papers considered in the review of
Petitioner’s Motion to Enter Judgment (Motion #3 on N.Y.S.C.E.F.):

Papers	Numbered
Notice of Motion (Motion #3 on N.Y.S.C.E.F.).....	<u>1</u>
Affirmation in Opposition (Entry #20 on N.Y.S.C.E.F.).....	<u>2</u>

This nonpayment proceeding was settled pursuant to a two-attorney stipulation on July 31, 2020. That stipulation provides that Petitioner is entitled to a forthwith money judgment in the amount of \$20,761.61, representing all rent due and owing through July 31, 2020. Respondent agreed to pay this amount along with the rent for August 2020 by August 31, 2020. In the event of default, the stipulation provides that Petitioner may move to enter a final judgment of possession against Respondent subject to Respondent’s defenses under the Tenant Safe Harbor Act (“T.S.H.A.”). Petitioner filed the instant motion on N.Y.S.C.E.F. on August 9, 2022. Respondent opposes the motion, invoking his defenses under T.S.H.A. against an entry of a possessory judgment. Pursuant to a decision on November 3, 2022, the court set the matter down for a hearing on Respondent’s T.S.H.A. defenses and held Petitioner’s motion in abeyance pending determination on whether Respondent has established a defense under that act.

Prior to the hearing, which was held on December 22, 2022, Respondent served and filed a Notice to Admit. See Entry #22 on N.Y.S.C.E.F. The Notice to Admit seeks the following admissions from Petitioner: (1) Petitioner received E.R.A.P. funds on behalf of Respondent in the amount of \$20,326.59 which were credited to Respondent’s account on September 7, 2021; and (2) Petitioner received or was aware of Respondent’s filing of a hardship declaration which was neither rebutted nor challenged at a hearing. Petitioner failed to respond to the notice and the court, at the beginning of the hearing, deemed that Petitioner consequently admitted to these facts. See C.P.L.R. § 3123(a); see also New Image Const., Inc. v. TDR Enterprises Inc., 74

A.D.3d 680 (1st Dep't 2010). The court then took judicial notice of both the Notice to Admit and the hardship declaration.

At the hearing, Respondent testified that he has resided at the subject premises for seven and a half years and resides there alone. In February 2019 he retired from his employment with N.Y.C.H.A. and his source of income has since been from social security and his pension. Prior to the onset of the pandemic, Respondent testified that his bills and expenses include ConEd, insurance, rent, child support, and groceries. He further asserted that his income did not change and remained the same from March 7, 2020 through January 15, 2022, the "covered period" for the purposes of T.S.H.A. Respondent testified that his expenses also remained the same, with no changes in the amount, except that he experienced an increase in grocery spending during the covered period. The only documentation that Respondent offered into evidence is his social security income from 2019 to 2022. Respondent also testified that he received one stimulus check from the federal government which he spent on his bills.

T.S.H.A. provides that a "court shall [not] issue a warrant of eviction or judgment of possession against a residential tenant or other lawful occupant that has suffered a financial hardship during the COVID-19 covered period for the non-payment of rent that accrues or becomes due during the COVID-19 covered period." L. 2020, Ch. 127, § 2(1). In determining whether Respondent has experienced a financial hardship during this period, the court shall consider the following factors, which are not exhaustive: "(i) the tenant's or lawful occupant's income prior to the COVID-19 period; (ii) the tenant's or lawful occupant's income during the COVID-19 covered period; (iii) the tenant's or lawful occupant's liquid assets; and (iv) the tenant's or lawful occupant's eligibility for and receipt of cash assistance, supplemental nutrition assistance program, supplemental security income, the New York State disability program, the home energy assistance program, or unemployment insurance or benefits under state or federal law." *Id.*, §2(2)(b).

The court must first determine whether Respondent's filing of the hardship declaration, dated February 3, 2021, creates a rebuttable presumption that Respondent experienced a financial hardship during the covered period. "Unless a court determines a tenant's hardship claim invalid..., a hardship declaration in which the tenant has selected the option indicating a financial hardship shall create a rebuttable presumption that the tenant is experiencing financial hardship,...for the purposes of establishing a defense under [T.S.H.A.]..." L. 2021, Ch. 417, Part C, Subpart A, § 9. Respondent did not select the financial hardship option in the hardship declaration. Respondent instead selected Option B which concerns a significant health risk in the event Respondent vacates the subject premises. Hence, Respondent's filing of the hardship declaration, though not invalidated, does not create a rebuttable presumption here that Respondent has experienced a financial hardship during the covered period for the purposes of establishing a defense under T.S.H.A. Respondent must then affirmatively establish that he experienced a financial hardship during the covered period through admissible evidence. *See 111-50 Realty Corp. v. Melgar*, 70 Misc. 3d 981 (Civ. Ct., Queens Co. 2020). The court determines that Respondent failed to establish such a defense under T.S.H.A. at the hearing.

On cross-examination, Respondent admitted that his income and expenses remained the same since 2019 and that there was no lapse in his income since that time. On re-direct examination, Respondent stated that the only increased expense he experienced was in grocery spending during the covered period. Respondent testified that before the pandemic he was spending \$200.00 per month on grocery spending and during the covered period he spent more than \$200.00 per month. However, Respondent did not offer into evidence any receipts proving

such. The only documentary evidence offered was Respondent's social security income since 2019. Furthermore, Respondent testified that his other bill payments remained the same and that he continued to pay them. Comparing the income and expenses of Respondent before and during the covered period, both factors to be considered under the Act, only establish that Respondent's financial status remained the same prior to and during the covered period. Respondent admitted that he has paid his other expenses besides the rent and the evidence establishes that Respondent's last rental payment before the E.R.A.P. payment was in May 2019. Respondent did not testify as to the connection between his consistent financial situation and his failure to make rental payments besides the alleged increase in grocery spending which Respondent did not prove. Hence, the court determines that Respondent has not established a defense pursuant to T.S.H.A.

The fact that Petitioner received an E.R.A.P. payment in the amount of \$20,326.59, which was credited to Respondent's account on September 7, 2021, does not change the outcome. One of the eligibility requirements that O.T.D.A. must consider in determining whether an applicant is entitled to the E.R.A.P. program is whether, during the covered period, the applicant experienced a financial hardship related to the pandemic. See L. 2021, Ch. 56, Part BB, Subpart A, § 5(1)(a)(ii). However, the court determines that an E.R.A.P. payment, by itself, does not create a de facto presumption under T.S.H.A. that Respondent has experienced a financial hardship during the covered period. Instead, such a payment is to be considered as one of the relevant factors in determining whether Respondent experienced such a hardship in the T.S.H.A. context. The court does not know what documentation was attached to Respondent's E.R.A.P. application and submitted to O.T.D.A. to be approved for the program. This court can only make its finding as to financial hardship based upon the documentary evidence admitted and testimony elicited before it at the hearing.

Furthermore, the criteria of proof, while may appear similar at first glance, are in fact different when it comes to applying for E.R.A.P. assistance and an evidentiary hearing pursuant to T.S.H.A. For example, self-attestation of financial hardship is considered a sufficient and acceptable documentation to be approved for E.R.A.P. funds. See id., § 6(6). However, at a T.S.H.A. hearing, admissible documentary evidence must establish that a tenant has experienced hardship during the covered period. A self-attestation of financial hardship pursuant to a hardship declaration, while acceptable documentation, only creates a rebuttable presumption that a tenant has experienced such a hardship under T.S.H.A. and may then be challenged. Moreover, O.T.D.A. must decide whether an E.R.A.P. applicant has experienced a financial hardship "due" to the pandemic during the covered period. See id., § 5(1)(a)(ii). Under T.S.H.A., a tenant need only show that they experienced a financial hardship "during" the covered period. Such a hardship need not be related to the pandemic. Also, in determining whether an E.R.A.P. applicant has experienced a financial hardship, O.T.D.A.'s determination is limited to the covered period. See id., § 5(2). Under T.S.H.A., the court must also consider a tenant's income prior to 2020. Hence, an E.R.A.P. payment, by itself, is one of the relative factors to be considered for the purposes of finding whether Respondent has experienced a financial hardship under T.S.H.A., and not the determinative one in establishing a defense under the Act.

Accordingly, based upon Respondent's testimony and the documentary evidence admitted at the hearing, the court determines that Respondent has not established a defense under T.S.H.A.

Based upon the foregoing, Petitioner's motion is granted as follows. The court determines that Respondent has breached the terms of the parties' July 30, 2020 stipulation. Thus, Petitioner is awarded a final judgment of possession in its favor and against Respondent. Issuance of the warrant shall be forthwith. Execution of the warrant shall be stayed 5 days for Respondent to pay \$34,632.35, representing all rent due and owing through December 31, 2022. Upon default, the warrant shall execute upon service of a Marshal's notice. A notice of default shall be emailed to Respondent's attorney contemporaneously with the service of the Marshal's notice. The earliest eviction date shall be February 15, 2023. The money judgment entered pursuant to the July 31, 2020 stipulation shall remain in full force and effect. Also, Petitioner's motion satisfies the status conference requirement of A.O./158/22.

The foregoing constitutes the decision and order of the court.

Dated: February 6, 2023
Bronx, N.Y.

Omer Shahid, J.H.C.