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[*1]

First Hous. Co., Inc. v Tchiremu
2023 NY Slip Op 50263(U) [78 Misc 3d 1219(A)]
Decided on March 6, 2023
Civil Court Of The City Of New York, Queens County
Guthrie, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on March 6, 2023

Civil Court of the City of New York, Queens County

<p>First Housing Company, Inc., Petitioner,</p> <p>against</p> <p>Mensa Tchiremu, KRYSTAL RANDOLPH, ENEN TCHIREMU, "JOHN & JANE DOE", Respondents.</p>
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Index No. L&T 301912/21

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Clinton J. Guthrie, J.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of

petitioner's motion to vacate the ERAP stay, setting the matter down for a trial, and other relief:

Papers Numbered

Notice of Motion & Affirmation/Affidavit/Exhibits Annexed 1 (NYSCEF No.13-18)
Affirmation in Opposition & Exhibit Annexed 2 (NYSCEF #19-20)

Upon the foregoing cited papers, the decision and order on petitioner's motion is as follows:

PROCEDURAL HISTORY

This nonpayment proceeding was commenced in April 2021. Petitioner first moved for a default judgment in February 2022. Before the motion was heard, respondent Mensa Tchiremu (hereinafter "respondent") filed an ERAP (Emergency Rental Assistance Program) application. Petitioner then filed the instant motion to vacate the ERAP stay, to set the matter down for trial, [*2]and for other relief. Respondent, through counsel, submitted opposition papers and the court heard argument on the motion on November 29, 2022. Decision was reserved upon the conclusion of the argument.

DISCUSSION & CONCLUSION

Petitioner's motion asserts that the stay imposed by respondent's ERAP filing (*see* L 2021, ch 56, §1, Part BB, §1, Subpart A, Sec 1, § 8, as amended by L 2021, ch 417, Part A, Sec. 4) should be vacated because respondent will not be eligible for ERAP funds on account of the fact that she is a cooperative shareholder. The motion cites to FAQs on the OTDA (New York State Office of Temporary and Disability Assistance) ERAP website, one of which states that shareholders of low-income cooperatives are not eligible for ERAP. [\[FN1\]](#)

In opposition, respondent first argues that respondent has been "provisionally approved" for ERAP (and annexes proof from the ERAP website), so petitioner's assertion that respondent will not be eligible for the assistance lacks merit. Respondent secondarily asserts that the stay should endure because petitioner has not waived its participation in the ERAP program and, as a result, it has 180 days to accept ERAP funds (citing L 2021, ch 56, §1, Part BB, §1, Subpart A, Sec 1, § 9(2)(b)). [\[FN2\]](#)

The court notes at the onset of its analysis that the OTDA Commissioner is charged with

establishing eligibility standards under the initial ERAP statute. *See* L 2021, ch 56, §1, Part BB, §1, Subpart A, Sec 1, § 5; [2986 Briggs LLC v. Evans, 74 Misc 3d 1224](#)[A], 2022 NY Slip Op 50215[U], *3-4 [Civ Ct, Bronx County 2022]; [Harbor Tech LLC v. Correa, 73 Misc 3d 1211](#)[A], 2021 NY Slip Op 50995[U], *2 [Civ Ct, Kings County 2021]. Therefore, it is not for the court to determine whether respondent, as a low-income cooperative shareholder, qualifies for ERAP assistance. [\[FN3\]](#) Petitioner encourages the court to interpret OTDA's policy on low-income cooperatives to be manifested in its website FAQ on the subject. This is in line with the court's holding in *Smith v. Patrick*, 2022 NY Slip Op 31742[U] [Sup Ct, NY County 2022]. [\[FN4\]](#)

Against this policy is the undisputed fact that OTDA has provisionally approved respondent for ERAP benefits. According to the ERAP website, a provisional approval is not a [\[*3\]](#)"determination" for ERAP purposes; only an approval or denial is a determination.

[\[FN5\]](#) Notwithstanding this, one court found that a provisional approval with "landlord pending" (which is the nature of the provisional approval here) was a determination for the purposes of the ERAP statute on the understanding that it meant "that OTDA has approved the application, based on the information that was provided by the applicant, however, OTDA is waiting for the landlord to submit and complete their information." [Atkinson v. Fenderson, 77 Misc 3d 1201](#)[A], 2022 NY Slip Op 51093[U], *2 [Civ Ct, Queens County 2022]. The court in *Atkinson* also found significance in the language of L 2021, ch 56, §1, Part BB, §1, Subpart A, Sec 1, § 9(2)(c), which states that a tenant may use a provisional determination as an affirmative defense in any proceeding seeking a money judgment or eviction for nonpayment of rent covered by the provisional approval period. *Atkinson*, 2022 NY Slip Op 51093[U], *3. The court in [Park Tower S. Co. LLC v. Simons, 75 Misc 3d 1067, 1070](#) [Civ Ct, NY County 2022] held similarly: "the effect of the provisional approval is the same as the determination of approval in one important aspect: the stay is simply dissolved."

However, nothing on the OTDA ERAP website indicates that the "landlord pending" notation on a provisional approval ripens it into a determination for ERAP purposes. Indeed, nothing would prevent a landlord of a "provisionally approved" tenant from seeking an eviction for the precise months subject to the provisional approval if the case were permitted to proceed. [\[FN6\]](#) The tenant would be able to raise an affirmative defense under L 2021, ch 56, §1, Part BB, §1, Subpart A, Sec 1, § 9(2)(c) (*supra*) but on any affirmative defense, the burden of proof is generally upon the party asserting it. *See Manion v. Pan American World Airways, Inc.*, 55 NY2d 398, 405 [1982]. Seemingly to alleviate this burden before a final determination is made, the legislature mandated that proceedings be stayed pending the

determination. [See *Savy Props. 26 Corp. v. James*, 76 Misc 3d 1214](#)[A], 2022 NY Slip Op 50942[U], *1-2 [Civ Ct, Kings County 2022] ["Neither the statutory text, nor an examination of the spirit, purpose, or history of the legislation, allow for any other conclusion as to the legislative intent except that both nonpayment and holdover proceedings are stayed until there is a determination of eligibility from [OTDA]."]; [see also *Elliot Place Props. Inc. v. Jacquez*, 77 Misc 3d 1230](#)[A], 2023 NY Slip Op 50067[U] [Civ Ct, Bronx County 2023]. Accordingly, the court declines to vacate the ERAP stay in these circumstances, where a determination on respondent's application (for the purposes of the statute) has yet to be made by OTDA. Certainly, petitioner may, as the statute provides, notify OTDA in writing that it does not wish to participate in the ERAP program (L 2021, ch 56, §1, Part BB, §1, Subpart A, Sec 1, § 9(2)(b)), which would presumably generate a determination by the agency.

As for the issue of whether respondent qualifies for ERAP as a low-income cooperative shareholder, the court will defer to OTDA's determination on respondent's application in the absence of any statute prohibiting such shareholders from participating in the program. *See Salvati v. Eimicke*, 72 NY2d 784, 791 [1988]. The court will note, however, that the ERAP statute defines "rent" as it is defined in RPAPL 702 (*see Isidoro v. Team Props. LLC*, 2021 NY [*4]Slip Op 32626[U] [Sup Ct, NY County 2021]). While fees, charges, and penalties are not considered rent under RPAPL 702 as to cooperatives organized under Article 4 of the Private Housing Finance Law (*see* RPAPL 702(2)), relevant appellate case law has not questioned the fundamental ability of Mitchell-Lama cooperatives to seek cooperative rent/occupancy charges (but not use and occupancy or surcharges) in summary nonpayment proceedings. [See *Matter of Dayton Towers Corp. v. Gethers*, 24 AD3d 663](#), 664 [2d Dept 2005]; [Rochdale Vil., Inc. v. Chadwick](#), 73 Misc 3d 131[A], 2021 NY Slip Op 50958[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2021].

For each of these reasons, petitioner's motion to vacate the ERAP stay and for other relief is denied. The case will remain on the ERAP administrative calendar pending a determination on respondent's application by OTDA. Upon a determination being made, either party (upon filing of notice to NYSCEF) may seek restoration by email to the court (with the opposing party's attorney copied).

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: March 6, 2023
Queens, New York
HON. CLINTON J. GUTHRIE
J.H.C.

Footnotes

Footnote 1:FAQ #46 under the "Benefits Available and Who is Eligible" heading on the ERAP website states as follows: "Are shareholders in low-income co-ops eligible for ERAP? No. Co-op shareholders are not eligible for ERAP to cover monthly co-op/maintenance fees. However, if you rent a co-op from a co-op shareholder, you may be eligible for ERAP assistance." (<https://otda.ny.gov/programs/emergency-rental-assistance/faq.asp#faq-benefits-q46>) [last accessed February 9, 2023].

Footnote 2:The court notes that the 180-day period is incorporated in Section 9(2)(c) of the same law.

Footnote 3:The opposition papers do not dispute petitioner's allegation in the petition that respondent is a tenant/shareholder of a Mitchell-Lama cooperative organized under Article 4 of the Private Housing Finance Law.

Footnote 4:The court notes that NYSCEF Document No. 59 cited in the *Smith* opinion includes an OTDA FAQ stating that cooperative shareholders are not eligible for ERAP (*Erika Smith v. Marquis Patrick et al.*, Index No. 155638/21 (New York County Supreme Court), NYSCEF Document No. 59) [last accessed February 9, 2023].

Footnote 5:See "How to Appeal Your ERAP Determination" (<https://otda.ny.gov/programs/emergency-rental-assistance/appeals.asp>) [last accessed February 9, 2023].

Footnote 6:Indeed, at argument on this motion, petitioner's attorney stated that petitioner was not waiving any of the rents that may be subject to the provisional approval.

[Return to Decision List](#)