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417 E. Realty LLC v Kejriwal
2023 NY Slip Op 23190
Decided on June 26, 2023
Civil Court Of The City Of New York, New York County
Bacdayan, J.
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Decided on June 26, 2023

Civil Court of the City of New York, New York County

<p>417 East Realty LLC, Petitioner,</p> <p>against</p> <p>Rahul Kejriwal, John Doe, Jane Doe, Respondent.</p>
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Index No. 319561-22

Daniels Norelli Cecere & Tavel (George Norelli, Esq.), for the petitioner

Law Office of Jonathan E. Neuman (Jonathan Ellery Neuman, Esq.), for the respondents

Karen May Bacdayan, J.

Recitation, as required by CPLR 2219 (a) of the papers considered in review of this motion by NYSCEF Doc No: 8-13.

PROCEDURAL HISTORY AND BACKGROUND

This is a holdover proceeding based on service of a notice of nonrenewal of lease pursuant to Real Property Law ("RPL") Section 226-c on Rahul Kejriwal ("respondent") and other presumed occupants of the apartment. Respondent's lease expired May 27, 2022.

Petitioner served respondent with the notice of nonrenewal on or about September 13, 2022, which terminated his tenancy as of November 20, 2022. (NYSCEF Doc No. 1 at 7-9, notice of nonrenewal and affidavit of service.) Petitioner commenced the proceeding on December 16, 2022. (*Id.* at 1-2.) Prior to the commencement of the proceeding, and prior to the expiration of his lease, respondent applied for Emergency Rental Arrears Program ("ERAP") assistance and was approved in April 2022 with a stated payment date of April 20, 2022, almost five months prior to petitioner's service of the notice of nonrenewal, and 8 months prior to commencing this proceeding. (NYSCEF Doc No. 10, respondent's exhibit 1, notice of approval for ERAP; *see generally* L 2021, ch 56, part BB, subpart A, as amended by L 2021, ch 417, Part A.) According to petitioner's attorney's affirmation in opposition, "the ERAP benefits were received by the [p]etitioner on April 27, 2022. Ledger annexed as Exhibit B."^[FN1] (NYSCEF Doc No. 11, [*2]petitioner's attorney's affirmation ¶ 10.)

ARGUMENTS

Respondent has moved to dismiss the proceeding, arguing that petitioner was foreclosed from "seeking to evict" respondents by service of a notice of nonrenewal of lease during the 12-month period commencing with the acceptance of ERAP funds (NYSCEF Doc No. 8, notice of motion [motion sequence 1].) Respondent initially cites to [*Liadi v Kaba*, 78 Misc 3d 1209](#) (A), 2023 NY Slip Op 50187 (U), (Civ Ct, Queens County 2023) in support of his argument. The *Kaba* court held that "[t]he act of initiating an eviction within the 12-month period, effectively undermines the plain reading of the statute and the obligation not to evict." (*Id.*, *1.) In *Kaba*, the court construed the ERAP statute as prohibiting even the "[t]he pursu[it] of an eviction case during the window period, 12-months after the acceptance of ERAP funds," and dismissed the proceeding on the basis that service of a notice of termination was an "act[] designed to cause an eviction" in violation of the statute. (*Id.* *1-2.) Respondent contends that the predicate notice of nonrenewal is incurably defective, and this proceeding must be dismissed, because he enjoyed a 12-month statutorily created tenancy from the date petitioner accepted the approved ERAP funds, *prior* to service of the predicate notice. Thus, his tenancy could not have been terminated on November 20, 2022, because his tenancy was statutorily extended through at least April 26, 2023, due to the acceptance of ERAP funds on April 27, 2022. (NYSCEF Doc No. 9, respondent's attorney's affirmation ¶¶ 5-7; *see also* NYSCEF Doc No. 11, petitioner's attorney's affirmation in opposition ¶ 10 [acknowledging receipt of ERAP funds on April 27, 2022].)^[FN2]

In opposition, petitioner argues that its acceptance of ERAP funds does not preclude

petitioner from serving a notice of termination and/or commencing a holdover proceeding. Petitioner advances that it has only agreed "not to evict" respondent by reason of his expired lease pursuant to L 2021, ch 56, part BB, subpart A, § 9 (d) (iv), as amended by L 2021, ch 417, Part A, § 5; and that the plain meaning of "the word 'evict' is unambiguous, and the time to 'evict' is when a marshal or sheriff removes persons from possession by a warrant." (NYSCEF Doc No. 11, petitioner's attorney's affirmation in opposition ¶ 8.) Petitioner cites to one case, [Feuerman v Hugo, 77 Misc 3d 171](#) [Civ Ct, New York County 2022], a decision and order written by this judge, in support of its argument.

In reply, respondent distinguishes *Feuerman* as "inapplicable." (NYSCEF Doc No. 12, respondent's attorney's affirmation in reply ¶¶ 2, 4.) Respondent reconciles the facts of this proceeding with *Feuerman* on the basis that, in *Feuerman*, at the time of both the tenant's application for ERAP and the landlord's acceptance of same, there was *already a pending holdover proceeding*. Thus, the landlord permissibly accepted ERAP funds without reinstating the already properly terminated tenancy, as is a landlord's right under Real Property Actions and [*3]Proceedings Law ("RPAPL") § 711. [\[FN3\]](#) (*Id.* ¶ 5.) In contrast here, respondent applied for, and petitioner accepted, ERAP funds *prior* to petitioner's commencement of the current proceeding. Respondent argues that by these actions, petitioner agreed not to "seek to evict" respondent for 12 months. (*Id.* ¶ 16.) Respondent extracts the words "seek to evict" from the sponsor's memorandum for the legislation that created the ERAP program, and urges that the memorandum elucidates what the Legislature intended by the words "not to evict." (NYSCEF Doc No. 13, respondent's exhibit 2, Senate Introducer's Mem in Support of 2021 NY Senate Bill S2742C, § 607.) Respondent further argues that service of a notice of termination is "a statutorily mandated pre-requisite to beginning an eviction proceeding," and is tantamount to "seeking to evict" respondent; thus, respondent posits that service of a predicate notice of nonrenewal of lease violated this agreement by putting respondent on notice that the landlord would commence an eviction proceeding. (NYSCEF Doc No. 12, respondent's attorney's affirmation in reply ¶¶ 5, 15.) Respondent contends that petitioner is reading the word "evict" too narrowly, and that service of a notice of termination signals to a tenant an intention to evict them. Quoting from [Casey v Whitehouse, 73 Misc 3d 562](#) [Sup Ct, New York County 2021], respondent posits that the "definition [of the word eviction] should itself be construed broadly to further the Legislature's aim of avoiding public-health, economic, and social harms from residential evictions during the COVID-19 pandemic." (NYSCEF Doc No. 12, respondent's attorney's affirmation ¶ 17; *Casey* at 568 [stating that use of the term "eviction proceeding" should be construed broadly under Chapter 417 of the Laws of 2021, without defining the word

"evict"].)

Respondent's reply affirmation cites to non-binding authority from this court — namely, [100 Realty Equities LLC v Tian, 78 Misc 3d 1233](#) (A) (Civ Ct, New York County 2023, 2023 NY Slip Op 50411 (U) — in an effort to eschew the general principle of statutory interpretation that the omission of a provision or a word that the Legislature applied elsewhere in the statute gives rise to an irrefutable inference that the legislature intended its omission. (NYSCEF Doc No. 12, respondent's attorney's affirmation in reply ¶ 20.) In *Tian*, which respondent quotes from at great length, the court conducted an in-depth examination of the ERAP statute and acknowledged that the Legislature provided for dismissal of a holdover proceeding in another provision of the statute but did *not* provide for dismissal of an eviction proceeding commenced within 12 months of a landlord's first acceptance of an ERAP payment. (*Tian*, 2023 NY Slip Op 50411 [U], *2, citing *Park Cent. I LLC v Price*, 2022 NY Slip Op 31909 [U] [Civ Ct, Bronx County 2022] [acceptance of ERAP requires dismissal in only one instance, and in all other cases, litigation may continue].) ^[FN4] Notwithstanding the foregoing, the *Tian* court construed L [*4]2021, ch 56, part BB, subpart A, § 9 (2) (d) (iii) and (iv), as amended by L 2021, ch 417, part A, § 5, as creating a binding "agreement" that . . . specifies the amount of rent and definite terms by which the agreement begins and ends, terms that are crucial toward rendering the agreement to be a valid lease (internal citations omitted)." (*Id.* *3.) The *Tian* court concluded that a landlord's "acceptance of an ERAP benefit creates the kind of agreement that is essentially a lease . . . [which gives] rise to liability for nonpayment of rent . . . [and] which bars . . . [a] no cause holdover proceeding" (*Id.*) In other words, the *Tian* court found that the omission of a dismissal remedy for serving a notice of termination, and the provision of that remedy elsewhere in the statute, does not foreclose a court from dismissing a holdover proceeding based on an expired lease because a lease agreement has been created by accepting ERAP funds; and, based on this interpretation of the statute, the statute must also be interpreted to require dismissal.

Oral argument was held on June 14, 2023, and the court reserved decision.

DISCUSSION

The consequences for a landlord when it accepts ERAP monies are set forth in the ERAP statute:

"*Acceptance of payment* for rent or rental arrears from this program . . . shall

constitute *agreement* by the recipient landlord or property owner . . . (iii) to *not increase the monthly rent due* for the dwelling unit such that it shall not be greater than the amount that was due at the time of application . . . (iv) *not to evict for reason of expired lease or holdover tenancy any household on behalf of whom rental assistance is received for 12 months after the first rental assistance payment is received* . . . (emphases added)." (L 2021, ch 56, part BB, § 9 (2) (d) (iii)-(iv), as amended by L 2021, ch 417, part C, subpart A, § 5.)

Respondent is correct that *Feuerman*, as well as *Tian* and *Kaba*, are distinguishable from the instant case for the reason that the ERAP application, approval, and payment in *Feuerman* was made *after* the landlord commenced the holdover proceeding. In both *Tian* and *Kaba*, as is the case here, the ERAP application, approval, and acceptance of payment all occurred *prior* to the service of the notice of termination and commencement of the proceeding. Even so, while the *Kaba* and *Tian* courts' analyses are compelling, the court respectfully disagrees with their holdings, and respondent's argument, for several reasons.

First, respondent cites to *Tian* to support his argument that the predicate notice is defective because "[a] new 12-month lease had already been issued and had not expired." (NYSCEF Doc No. 12, respondent's attorney's affirmation in reply ¶ 21.) More specifically, respondent argues that "the predicate notice . . . reference[s] the wrong lease and the wrong date, [*5] as a new 12-month lease had already been put into place." (*Id.*) However, basic principles of contract law militate in favor of finding the agreement that the landlord entered into upon accepting payment of ERAP monies to be with the administering agency, the Office of Temporary and Disability Assistance ("OTDA"), *not* with respondent, the approved applicant. Contrary to *Tian*, this court finds that the ERAP statute provides for an agreement between a recipient landlord and OTDA, to which the approved occupant is an intended third-party beneficiary. [\[EN5\]](#)

A valid contract comprises "an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound." (22 NY Jur 2d, Contracts § 9.) The acts that support an agreement between OTDA and petitioner herein are as follows: OTDA informed petitioner that respondent's ERAP application had been approved and offered payment of the approved funds conditioned on petitioner's agreement to certain terms. Petitioner was given a choice whether to accept the offer of payment from OTDA subject to the terms of acceptance, or to refuse the offer of payment. Petitioner accepted the payment of arrears, in consideration for which it relinquished its right to evict or increase the rent for one year. ([See *Lebedev v Blavatnik*, 193 AD3d 175](#), 183 [1st Dept 2021] [stating that valuable consideration for a contract may be some forbearance, or responsibility assumed]; *see also Springstead v Nees*,

125 AD 230 [2d Dept 1908] ["Forbearance to assert either a legal or an equitable claim is sufficient consideration for a contract."]) *Respondent* did not accept the approved ERAP funds; rather, *petitioner* accepted them on his behalf. *Respondent* was not given the choice to have *petitioner* accept or reject the monies; rather, it was *only petitioner* who could accept or reject the offer. *Respondent* did not provide consideration for the payment; rather, it was *petitioner* who forfeited its legal right to possession of the premises after expiration of the lease for a period of 12 months following *petitioner's* acceptance of the ERAP funds.

Put another way, in exchange for payment of rent arrears by OTDA, a landlord sacrificed certain rights in order to further the State's intention to prevent widespread evictions during the pandemic. The approved applicant benefits from a statutory moratorium on an increase in rent and on eviction "for reason of expired lease or holdover tenancy" which arises upon the landlord's acceptance of ERAP funds on the applicant's "behalf." (L 2021, ch 56, part BB, § 9 (2) (d) (iv), as amended by L 2021, ch 417, part C, subpart A, § 5.) Moreover, as a third-party beneficiary, the approved applicant benefits from the ability to enforce the terms of the landlord's agreement with OTDA by raising as a defense that their rent was prematurely increased, or by seeking a stay of the execution of a warrant in a summary proceeding for up to 12 months from the landlord's first acceptance of the ERAP funds. [\[FN6\]](#) This court finds that *respondent* did not enjoy a statutorily created lease between himself and his landlord for one [\[*6\]](#) year, nor can it be inferred that this was the parties' intent. [\[FN7\]](#) (*Cf. JSB Properties LLC v Yershov*, 77 Misc 3d 235, 242 [Civ Ct, New York County 2022] ["[O]ccupant's ERAP application constitutes an effort to bind a landlord to treat the applicant as a tenant for one year, an act consistent with an intention to continue a landlord-tenant relationship."])

Second, the court disagrees with *Kaba* that service of a notice of termination or commencement of a holdover proceeding is an act that violates the statute's prohibition "not to evict by reason of expired lease" after acceptance of approved ERAP funds. The Legislature chose a distinct consequence for *acceptance* of ERAP funds as compared to the *forbearance* of commencement of a proceeding required while an ERAP application is pending; to wit, that the landlord cannot evict the benefitting tenant household for 12 months after first acceptance of approved monies. The *Kaba* court's holding is premised on construction of the words "evict" to mean something much broader than its plain meaning, *i.e.* the pursuit of an eviction which occurs with the service of a notice of termination. (*Kaba*, 78 Misc 3d, *1-2.)

"Evict" has a very explicit meaning: Black's Law Dictionary defines "evict" as "[t]o

expel (a person, esp. a tenant), from real property, usu. by legal process" and "[t]o recover (property or title) from a person by legal process." (Black's Law Dictionary [11th ed 2019].) Merriam-Webster's Collegiate Dictionary, 11th ed, 2020 (Note: online version) defines "evict" as "to recover (property) from a person by legal process . . . to force out." (Merriam-Webster Collegiate Dictionary, available at <https://www.merriam-webster.com/dictionary/evict> (last accessed June 24, 2023].) It must be construed that the Legislature intended the plain meaning of the transitive action verb "evict." (See *Schneiderman*, 30 NY3d at 12 ["[C]ourts may not reject a literal construction [of a statute] unless it is evident that a literal construction does not correctly reflect the legislative intent (internal citations and quotation marks omitted)"]; *Albano v Kirby*, 36 NY2d 526, 530 [1975] ["No rule of construction, however, permits the segregation of a few words from their context and from all the rest of the section or rule for purposes of construction . . . and the enacting body will be presumed to have inserted every provision for some useful purpose (internal citations omitted)."]). By the words of the statute a respondent in a summary holdover proceeding based on "expired lease or holdover tenancy" is provided safe haven from an eviction for 12 months and is protected from any rent increase in excess of that for which the tenant applied for 12 months. (L 2021, ch 56, part BB, subpart A § 9 (2) (d) (iii)-(iv), as amended by L 2021, ch 417, part C, subpart A, § 6.) This is a useful purpose which is met without the need to infer an intent to create a one-year tenancy.

The court is more concerned with adhering to the plain language of the statute, and less concerned about providing a remedy to a landlord whose occupant remains in the premises without paying rent after acceptance of ERAP funds. (Cf. *JSB Properties LLC v Yershov*, 77 [*7] Misc 3d 235, 242 [Civ Ct, NY County 2022] [finding that acceptance of ERAP by a landlord creates an actionable agreement to pay rent which provides the basis for a nonpayment proceeding].) A landlord is not left without a remedy. A landlord is not barred from seeking use and occupancy from a respondent in a pending holdover proceeding, or from alternatively commencing a plenary proceeding where the ultimate relief does not comprise an eviction.

Accordingly, the court finds that petitioner properly opted not to renew respondent's lease, and properly commenced a proceeding to recover possession of the premises. The 12-month pause on respondent's eviction expired as of April 26, 2023. The proceeding may continue in its normal course.

CONCLUSION

Accordingly, it is

ORDERED that respondent's motion to dismiss is DENIED.

This constitutes the decision and order of this court.

The parties are to appear in room 523, Housing Part F, of the New York County Civil Court, on July 13, 2023, at 9:15 a.m. for settlement or trial.

Dated: June 26, 2023
New York, NY

HON. KAREN MAY BACDAYAN
Judge, Housing Part

Footnotes

Footnote 1: No leger is attached as exhibit B.

Footnote 2: The court notes that respondent's argument that ERAP monies were accepted between the expiration of the notice of nonrenewal and commencement of the proceeding is contradicted by the procedural history of this case, *supra*. NYSCEF Doc No. 12, respondent's attorney's affirmation in reply ¶ 8.

Footnote 3: RPAPL 711 (1) states that in an expiration of lease term holdover, "[a]cceptance of rent after commencement of the special proceeding . . . shall not terminate such proceeding nor effect any award of possession to the landlord or to the new lessee, as the case may be."

Footnote 4: If a holdover based on nuisance or objectionable behavior is pending against a respondent whose landlord has accepted ERAP monies, L 2021, ch 56, part BB, subpart A, as amended by L 2021, ch 417, part C, subpart A § 6, § 9-a (5) (ii) provides that "[i]f the petitioner fails to establish that the tenant [is a nuisance] . . . [and] if the landlord has accepted payment of rental arrears and agreed not to evict the tenant pursuant to paragraph (d) of subdivision two of section nine of this act, *the court shall dismiss the proceeding with prejudice* (emphasis added)." (L 2021, c 417, part C, subpart A, § 9-a [5] [ii].) Accordingly, it is this court's opinion that in all other instances, dismissal is not required. *BOP MW Residential Market, LLC v Lin*, — NYS 2d — 2023 NY Slip Op. 23043 (Civ Ct, New York County 2023).

Footnote 5: See *Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786 [2006] ("Parties asserting third-party beneficiary rights under a contract must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [their]

benefit and (3) that the benefit to [them] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [them] if the benefit is lost (internal citations and quotation marks omitted).")

Footnote 6: See *Comm'r of Dep't of Soc. Servs. of City of New York v New York-Presbyterian Hosp.*, 164 AD3d 93, 98 [1st Dept 2018] (third-party beneficiaries have the right to enforce intended for their benefit).

Footnote 7: The notice of ERAP approval states in relevant part, "*SHOULD YOUR LEASE BE RENEWED WITHIN THE 12 MONTH PERIOD AFTER RECEIPT OF ERAP FUNDS, PLEASE BE ADVISED THAT THE RENT DUE WILL APPEAR AS THE RENT ON THE LEASE* (emphasis added)." NYSCEF Doc No. 10 at 1, respondent's exhibit 1. Moreover, neither respondent nor petitioner has submitted an affidavit evincing an intention to enter into a binding lease agreement.

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