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1779 81ST STREET LLC v. MOHAMED

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Civil Court of the City of New York
County of Kings

Index # **LT-302309-23/KI**



1779 81ST STREET LLC

Petitioner(s)

Decision / Order

-against-

YOUSSEF MOHAMED; GHIZLANE EL GHAYOUR

Respondent(s)

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

Papers	Numbered
Notice of Motion and Affidavits /Affirmations	NYSCEF # 10-13
Answering Affidavits/ Affirmations	NYSCEF # 14-18
Reply Affidavits/ Affirmations	NYSCEF # 19

Upon the foregoing cited papers, the Decision/ Order on respondent's motion for summary judgment is as follows:

This is a summary nonpayment proceeding. Petitioner seeks alleged rental arrears for the premises known as 1779 81st Street, Apt A-18, Brooklyn, NY 11214.

Respondent Mohamed retained counsel, filed an Amended Answer and now moves for summary judgment. The matter was fully briefed, and the Court heard arguments.

The instant Petition and Notice of Petition are dated January 13, 2023. The petition states that Mohamed is "in possession of [the] premises pursuant to a rental agreement; in writing wherein [he] promised to pay the landlord as rent \$1,8000.00 each month." *NYSCEF Doc. No. 1* The lease between the parties expired on June 30, 2022. *NYSCEF Doc. No. 15* Petitioner received an ERAP payment in August 2022. The ERAP payments were specifically earmarked for the months of November 2021 – June 2022.¹ Other than the ERAP payments (on August 13, 2021 and August 10, 2022), the ledger shows no payments have been received since September 2021.

Respondent seeks summary judgment and dismissal of the proceeding as there was no lease in effect when the proceeding was commenced in contravention of *RPAPL 711(2)*.

Respondent relies on an Appellate Term, 2nd Department case *Fairfield Beach 9th, LLC v. Shepard-Neely*, 77 Misc 3d 136(A) (App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2022) and its progeny. *Shepard-Neely* affirmed a dismissal of a nonpayment case where there was no lease in effect at the time the case was commenced. Further, the *Shepard-Neely* court held that acceptance of rent after the expiration of the lease does not constitute an "agreement" for the purposes of *RPAPL 711(2)*. Respondent cites to various cases that have followed *Shepard-Neely* in the 2nd Department. For example, in *ZB Prospect Realty v Olenick*, 79 Misc 3d 592 (Civ. Cit. Kings County 2023), Judge Weisberg found that dismissal of the petition was appropriate when a

¹ The Court notes that there were two ERAP applications that were made/paid on behalf of respondent. The court will only discuss the implication of the most recent ERAP, OUNOY, paid in August 2022.

lease expired before the nonpayment case was commenced despite the fact that respondent paid rent after the expiration of the rental agreement.

Petitioner opposes this summary judgment motion on the following grounds: *Shepard-Neely* only applies to rent stabilized tenancies; a month-to-month tenancy exists; and acceptance of ERAP created an agreement akin to a lease which is sufficient to support the requirements of *RPAPL 711(2)*.

RPAPL 711(2) governs nonpayment proceedings and states that a tenant must be in default of paying rent pursuant to an agreement under which the premises are held in order to maintain a summary nonpayment case. The Court of Appeals has stated that an “action for nonpayment of rent, based on a notice purporting to fix a rent, never agreed upon by tenant and never paid by tenant, does not lie, there being no tenancy in fact or at law obligating the tenant for such rent.” *Jaroslow v. Lehigh Valley RR. Co.*, 23 NY2d 991 (NY 1968).

The Court now turns to petitioner’s arguments. Petitioner’s first argument that *Shepard-Neely* only applies to rent stabilized tenancies is not supported by statute or caselaw. Just because *Shepard-Neely* involved a rent-stabilized apartment, it does not mean the ruling does not apply to other tenancies. Nothing in the Appellate Term decision or in the plain language of *RPAPL 711(2)* suggests that it applies only to rent-stabilized tenancies.

Petitioner’s second argument is that a month-to-month tenancy was created when petitioner accepted rent after the lease expired. Petitioner relies on cases that were decided prior to the *Shepard-Neely*. In addition, petitioner cites to *Priegue v Paulus*, 43 Misc. 3d 136(A) which recognized that a month-to-month tenancy continues where the tenant paid rent upon the same terms as the original lease. Here, the tenant did not pay any rent after the expiration of the lease. The only payment received by the landlord was one from ERAP. ERAP payments are earmarked for specific months. The payment was received in August 2023, but the application was submitted before the lease expired and the last payment is earmarked for June 2023. The lease expired on June 30, 2023. Since the payment was earmarked for the months prior to the expiration of the lease, this Court finds that no month-to-month tenancy was created. Even if there were payments received after the expiration of the lease, the *Shepard-Neely* court still found that a non-payment proceeding was not appropriate.

Petitioner’s third argument is that the acceptance of ERAP created a “year-long obligation to pay rent still follows the ERAP payment”. *JSB Properties v Yershov*, 77 Misc3d 235 (Civ. Ct. NY County 2022) as cited by *Fans Assoc. LLC v Yoontaek Im*, 78 Misc 3d 1209(A), *Liadi v Kaba*, 78 Misc3d 1209(A) (Civ. Ct. Queens County 2023) and others. The *Yershov* court held that “a landlord/tenant relationship between the parties continued at least for one year after payment of the ERAP benefits in August of 2021. Respondent cites to other lower court decisions that disagree with *Yershov* and find that acceptance of ERAP funds does not create an agreement between a landlord and a tenant. For example, in *Fans Assoc. LLC v. Im*, 2023 N.Y. Misc. LEXIS 1000 (Civ. Ct. Queens County 2023), Judge Ressos dismissed a nonpayment proceeding and found that the language used by the ERAP program wherein landlord agrees not to evict a tenant for one year does not create a contract or a lease. This Court agrees and finds that the ERAP agreement is between the landlord and the ERAP program. The applicant files an

application through the ERAP portal and agrees to the terms required. The landlord who chooses to participate in the ERAP program submits documentation through the ERAP portal and agrees to the terms required. There is no contract or agreement directly between the tenant and the landlord. The recipient of the ERAP funds is a beneficiary who participates in the application process but does not enter into a direct agreement or a lease with the landlord. Both sides urge the Court to “interpret the statute to avoid an unreasonable or absurd application of the law. *See People v. Schneider*, 37 N.Y.3d 187 (2021). The purpose of the ERAP statute is to avoid evictions. The plain language in the statute does not address a creation of a lease or an agreement between the landlord and the tenant.

Respondent seeks summary judgment pursuant to *CPLR 3212*. On a motion for summary judgment, all of the evidence must be viewed in the light most favorable to the party opposing the motion, and all reasonable inferences must be resolved in that party’s favor. *Matter of Larchmont Pancake House v. Bd. of Assessors*, 33 N.Y.3d 228, 252 (2019). The movant must establish that there are no triable issues of fact. A party opposing summary judgment must show facts sufficient to require a trial of any issue of fact. *See Zuckerman v City of New York*, 49 N.Y.2d 557 (1980).

Here, the facts are undisputed: the last lease between the parties expired on June 30, 2023; the proceeding commenced after the lease expired; the petition alleges that respondents are in possession pursuant to a written agreement; there were no payments made by the respondents after June 30, 2023; an ERAP payment was made on behalf of respondents in August 2023 but the payments were earmarked from months prior to the expiration of the lease. Petitioner’s opposition and exhibits did not raise any issues of fact that would require a trial even when viewed in the light most favorable to the opposing party.

The Court understands petitioner’s frustration, but petitioner is not without a remedy. The ERAP payment was made in August 2022. The 12-month restriction on eviction has expired.

Accordingly, it is ORDERED that respondent’s motion is granted and a judgment shall be entered in favor of respondents dismissing the petition.

This constitutes the Decision/Order of the Court.

Date: _____

Hon. Agata E. Rumprecht-Behrens
Housing Court Judge