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2023-03-18

### 1661 TOPPING REALTY LLC v. GOODWIN

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CIVIL COURT OF THE CITY OF NEW YORK  
BRONX COUNTY: HOUSING PART G (by Part C)

-----X  
1661 TOPPING REALTY LLC,

L&T Index # 309194/2020

*Petitioner,*

-against-

**DECISION & ORDER**

LUWANA GOODWIN,

*Respondent.*

-----X  
Hon. Diane E. Lutwak, HCJ:

Recitation, as required by CPLR Rule 2219(A), of the papers considered in the review of Petitioner’s motion to lift ERAP Stay (motion seq #1) and Respondent’s cross-motion to file Amended Answer (motion seq #2), consolidated herein for disposition:

| <u>Papers</u>                                       | <u>NYSCEF Doc #</u> |
|---|---------------------|
| Notice of Motion, Affirmation, Affidavit, Exhibit 1 | 12, 13              |
| Affidavit in Opposition                             | 14                  |
| Affirmation in Opposition (requesting adjournment)  | 15                  |
| Notice of Cross-Motion                              | 17                  |
| Affirmation in Support of Cross-Motion              | 18                  |
| Exhibit C in Support of Cross-Motion                | 19                  |
| Supplemental Affirmation in Opposition to Motion    | 20                  |
| Exhibits A & B in Opposition to Motion              | 21, 22              |
| Affirmation in Reply                                | 23                  |

**FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

This is a nonpayment eviction proceeding against a Rent Stabilized tenant whose rent is subsidized through the New York City Housing Authority’s (NYCHA) Section 8 Housing Choice Voucher Program. The Petition, filed December 23, 2020, sought rent arrears of \$8109.82 for July 2019 through September 2020. After Respondent answered and the case was conferenced several times Respondent filed an “ERAP” (COVID-19 Emergency Rent Assistance Program) application and the case was stayed “pending a determination of eligibility” pursuant to the ERAP Law, L. 2021, c. 56, Part BB, Subpart A, § 8, as amended by L. 2021, c. 417, Part A, § 4.

Now before the court is Petitioner's motion seeking vacatur of the ERAP stay and restoration of the case to the court's calendar. Petitioner asks the court to exercise its discretion to vacate the ERAP stay, pointing to Respondent's NYCHA Section 8 rent subsidy, arguing that, "respondent's application will not be paid because of their Section 8 status", Attorney's Affirmation in Support at ¶ 11, and citing to, *inter alia*, *Bay Park Two-A LLC v Pearson* (77 Misc3d 534, 179 NYS3d 873 [Civ Ct Kings Co 2022]). Petitioner's agent asserts that as of January 2023 Respondent owed \$18,276.14 in her share of the rent; an accompanying rent ledger reflects that the only funds Petitioner has received since August 2019 are the Section 8 subsidy payments.

In opposition, Respondent asserts that the ERAP stay should remain in place, citing to this court's unreported decision in *River Park Residences v Acevedo* (L&T # 030615-19/BX), and *Robo LLC v Matos* (75 Misc3d 1211[A], 168 NYS3d 676 [Civ Ct Bx Co 2022]). Respondent also cross-moves for leave to file an Amended Answer and to deem the proposed Amended Answer served and filed.

In reply, Petitioner re-asserts its original arguments and points to statements on the ERAP website indicating that applications from subsidized housing tenants whose rent is limited to a certain percentage of income are not currently able to be paid. Petitioner also provides a link to a press release by the New York State Senate announcing that State Senator Kavanagh, State Assemblymember Grace Lee, public housing and subsidized housing tenant leaders, public housing authority officials, affordable housing providers and housing advocates are calling for the State budget to include additional funding for ERAP to cover applications submitted by subsidized tenants. Petitioner does not oppose Respondent's cross-motion for leave to file an Amended Answer.

## DISCUSSION

The narrow question before the court in this nonpayment proceeding against a Section 8-subsidized tenant is whether to follow the reasoning of cases such as *Bay Park Two-LLC v Pearson*, *supra*, and lift the ERAP stay imposed by L. 2021, c. 56, Part BB, Subpart A, § 8, *as amended*, L. 2021, c. 417, Part A, § 4, or of *Robo LLC v Matos*, *supra*, and decline to do so.

New York State's ERAP, which expires September 30, 2025, provides for the distribution by its Office of Temporary and Disability Assistance (OTDA) of federal and state funds made available to eligible applicants to pay rent "accrued on or after March 13, 2020" of up to twelve months of arrears and three months of prospective rent. L. 2021, c. 56, Part BB, Subpart A, § 9, as amended by L. 2021, c. 417, Part A, § 5. Government-subsidized tenants paying a percentage of their income as their share of the rent are eligible, "to the extent that funds are remaining after serving all other eligible populations." L. 2021, c. 56, Part BB, Subpart A, § 5(1)(a)(i). OTDA's ERAP website home page explains, "Applications from subsidized housing tenants whose rent is limited to a certain percentage of income (**including public housing**,

**section 8 and FHEPS)** are not currently able to be paid. State law requires that these applications be paid after all other eligible applicants have been reviewed and paid. Therefore, at this time, none of the subsidized housing applications can be paid regardless of the date their application was submitted.”

OTDA’s notice regarding applications from subsidized housing tenants has been on the ERAP home page since at least June 2, 2022, when it was quoted in full in *Robo LLC v Matos, supra*, and the court noted that the tenant’s ERAP application, “which has been pending for almost a full calendar year, was, is, and will continue to be at the back of the line, behind all other eligible applicants, no matter when they apply.” The court in *Robo LLC* declined to lift the ERAP stay, even though the arrears were “north of \$28,000,” finding that, “Whatever the wisdom of this choice, this is the policy choice the legislature has made”. *Robo LLC* cites to, *inter alia*, *Mason v Reyes* (75 Misc3d 1210[A], 168 NYS3d 299 [Civ Ct Kings Co May 31, 2022]), a nonpayment proceeding against an unregulated tenant in a two-family building who owed over \$58,000 in rent arrears, where the court held, “An approval by the ERAP program, although perhaps not satisfying the entire rental arrears owed by a respondent, would assist in preserving a tenancy.”

Since ERAP’s inception, courts have been divided on the issue of when – if ever - it is appropriate to lift an ERAP stay, in part because ERAP itself has been in flux; OTDA’s latest “Important Update” dated March 2, 2023, see <https://otda.ny.gov/programs/emergency-rental-assistance/>, is that ERAP applications are no longer be accepted since the portal closed on January 20, 2023 and that, “OTDA is currently reviewing and processing eligible ERAP applications submitted through December 15, 2022. Additional applications are expected to be reviewed and processed in the future as funds become available. This notification will be updated if additional funding is available to pay eligible applications submitted after December 15, 2022.” This is not the first time OTDA has notified the public that ERAP’s funding has been exhausted. See, e.g., *Harmony Mills W, LLC v Constantine* (75 Misc3d 594, 169 NYS3d 476 [Cohoes City Ct, April 25, 2022]).

In nonpayment proceedings against Section 8-subsidized tenants, some courts have followed the reasoning of *Robo LLC v Matos*, see, e.g., *14 N Highstreet, LLC v Clowney* (76 Misc3d 768, 172 NYS3d 824 [City Ct Mt Vernon, Aug. 23, 2022]), and others have declined to do so, see, e.g., *EG Mt Vernon Pres LP v Duncan* (2023 NY Slip Op 50044[U][City Ct Mt Vernon, Jan. 17, 2023]); *Leschinsky v Lutula* (2022 NY Slip Op 51156[U], 77 Misc3d 1206[A][Civ Ct Kings Co, Nov. 21, 2022]); *Bay Park Two-LLC v Pearson, supra*.

What this court finds persuasive is the fact that the statute – which does not expire until September 30, 2025 - has not been amended and, rather than excluding Section 8-subsidized tenants from ERAP, as noted above makes them eligible “to the extent that funds are remaining after serving all other eligible populations.” L. 2021, c. 56, Part BB, Subpart A, § 5(1)(a)(i). It cannot be determined from OTDA’s website whether pending applications submitted by Section 8-subsidized tenants by December 15, 2022 – including Respondent’s, filed in April 2022

- are included among those which "OTDA is currently reviewing and processing". See OTDA ERAP website, *supra*.<sup>1</sup> Accordingly, this court cannot find on the record before it that Respondent's ERAP application is futile.

Turning to Respondent's unopposed cross-motion for leave to file an Amended Answer, as such leave is "freely given" under CPLR R 3025(b), the request is granted.

#### CONCLUSION

Based on the above analysis, it is hereby ORDERED that Petitioner's motion is denied without prejudice, the proceeding will remain on the ERAP calendar, Respondent's cross-motion is granted and the proposed Amended Answer is deemed duly served and filed. This constitutes the court's Decision and Order, which is being uploaded to NYSCEF.



Hon. Diane E. Lutwak, HCJ

Dated: Bronx, New York  
March 18, 2023

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<sup>1</sup> It is, at least, promising that State Legislators and other leaders are calling for the upcoming State budget to include additional sufficient funding for ERAP to cover the cost of providing rental assistance to tenants such as Respondent who reside in subsidized housing.