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Clinton Arms Assoc. v De Gonzalez
2023 NY Slip Op 23079 [78 Misc 3d 1131]
March 27, 2023
Ibrahim, J.
Civil Court of the City of New York, Bronx County
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[*1]

Clinton Arms Associates, Petitioner, v Ana Duran De Gonzalez, Respondent.
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Civil Court of the City of New York, Bronx County, March 27, 2023

APPEARANCES OF COUNSEL

Hertz, Cherson & Rosenthal, P.C., Forest Hills, for petitioner.

The Legal Aid Society, Bronx Neighborhood Office, Bronx (*Nadia Okraku, Adriene L. Holder and Shervon Small* of counsel), for respondent.

{**78 Misc 3d at 1132} OPINION OF THE COURT

Shorab Ibrahim, J.

Procedural Posture

This nonpayment proceeding was commenced by petition dated October 7, 2020 (*see* NY St Cts Elec Filing [NYSCEF] Doc No. 1, petition). It appears this matter was not heard until February 2022. However, as there was a COVID-19 Emergency Rental Assistance Program of 2021 (ERAP) application pending as of June 2021, the matter was stayed. Petitioner now moves to vacate the stay arguing that ERAP will not pay because the respondent is a subsidized tenant. In this case, the tenant resides in a HUD (Department of Housing and Urban Development) project-based subsidized building. (*See* NYSCEF Doc No. 1 para 7.) Respondent opposes the motion, arguing that the plain language of the ERAP statute requires the stay remain until a determination is made on respondent's application.

Discussion

Section 8 of the ERAP statute states, in relevant part, as follows:

"Except as provided in section nine-a of this act, in any pending eviction proceeding, whether filed prior to, on, or after the effective date of this act, against a household who has applied or subsequently applies for benefits under this program . . . to cover all or part of the arrears claimed by the petitioner, all proceedings shall be stayed pending a [*2]determination of eligibility [by the Office of Temporary and Disability Assistance (OTDA)]."^[FN*]

Though the statute is not written as applying to *anyone* who filed an application with OTDA, there was a presumption that filing stayed *any* summary proceeding not specifically exempted. It did not matter whether the case was a holdover, a [**78 Misc 3d at 1133](#) nonpayment, or something else ([see e.g. Joute v Hinds, 75 Misc 3d 764](#), 767 [Civ Ct, Kings County 2022] [Anyone can file an ERAP application and "(t)he mere act of filing the application, regardless of whether the person is a tenant, lawful occupant, squatter, family member, guest, licensee, or former employee, would conceivably stay the proceeding . . . The person filing the application evokes the automatic stay even if such application was not made in good faith or where rent or use and occupancy is not sought"]; [Actie v Gregory, 74 Misc 3d 1213](#)[A], 2022 NY Slip Op 50117[U], *1-2 [Civ Ct, Kings County 2022] ["An occupant may file an ERAP application, whether eligible or not, an intended beneficiary of the program or not, in good faith or bad, and significantly where the outcome will not result in the preservation of a tenancy"]).

Indeed, the mere mention of "ERAP" caused cases to be placed on administrative calendars, often without a judge deciding that the applicant was a person intended to be protected by the statute. ([See EQR-Hudson Crossing, LLC v Magana, 75 Misc 3d 979](#), 982 [Civ Ct, NY County 2022] ["As an application for ERAP funds has the effect of staying 'all proceedings . . . pending a determination of eligibility,' this proceeding was administratively stayed by the court upon receiving notice of the application"], citing Admin Order of Chief Admin Judge of Cts AO/34/22.) The burden was on petitioners to make motions to vacate stays.

This appears to have been in error. This court can state this only because it is armed with both the benefit of hindsight and with recent appellate case law. In *Bank of N.Y. Trust Co., N.A. v Courtney*, decided on March 23, 2023, the Appellate Term held that "[h]ad the Legislature intended to extend the ERAP stay to any individual who files an application, regardless of status, it could have chosen to do so through appropriately worded legislation." (78 Misc 3d 27, 30 [App Term, 1st Dept 2023].)

Despite (or maybe because of) the broad application of the stay, courts began to vacate

stays in a class of cases where small homeowners wanted possession of their property and ERAP funds, even if paid, would not preserve a tenancy ([see *Ben Ami v Ronen*, 75 Misc 3d 335](#) [Civ Ct, Kings County 2022]; *Actie v Gregory* [unregulated unit in a private house and the landlord would not renew the lease because he wanted it for family use]; *Joute v Hinds*; *Silverstein v Huebner*, 2022 NY Slip Op 31051[U] [Civ Ct, Kings County 2022] [unregulated {**78 Misc 3d at 1134} unit sought for personal use]; [Papandrea-Zavaglia v Arroyave](#), 75 Misc 3d 541 [Civ Ct, Kings County 2022]).

Though these cases often invoked equity, they also relied on the statute's intent—to preserve tenancies. When that goal was not realistic, the courts reasoned that it was futile to maintain a stay (*id.* at 546; [178 Broadway Realty Corp. v Charles](#), 75 Misc 3d 937, 939-940 [Civ Ct, Kings County 2022]). It can be argued that the respondents in this line of cases also did not have a "rent" obligation, as the term is defined in the statute ([see *Awaly LLC v Pena*, 75 Misc 3d 1227](#)[A], 2022 NY Slip Op 50673[U], *1-2 [Civ Ct, Bronx County 2022] ["rent" in the ERAP statute is defined under RPAPL 702—" 'rent' shall mean the monthly or weekly [*3] amount charged in consideration for the use and occupation of a dwelling pursuant to a written or oral rental agreement"]). Once a lease expires, "rent" cannot be sought ([see *Fairfield Beach 9th, LLC v Shepard-Neely*, 77 Misc 3d 136](#)[A], 2022 NY Slip Op 51351[U], *4 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2022] [holding "there must be a rental agreement in effect at the time the proceeding is commenced pursuant to which rent is due and owing"]). Consequently, those respondents likely should not have been protected by the stay in the first instance ([see *Bank of N.Y. Trust Co., N.A. v Courtney*, 78 Misc 3d at 29-30](#) [stay applies to tenants with a lease, statutory tenants, and occupants with a rent obligation]).

There was another line of cases where the courts applied the statute's plain language and vacated stays where the applicant was not a tenant, nor an occupant obligated to pay rent ([see *2986 Briggs LLC v Evans*, 74 Misc 3d 1224](#)[A], 2022 NY Slip Op 50215[U] [Civ Ct, Bronx County 2022] [respondent was not a tenant, but a licensee who was not obligated to pay rent]; [Karan Realty Assoc. LLC v Perez](#), 75 Misc 3d 499 [Civ Ct, Queens County 2022] [respondent was former employee and he had no duty to pay rent]; [Kelly v Doe](#), 75 Misc 3d 197 [Civ Ct, Kings County 2022] [respondents had no legal right to possession and thus no obligation to pay rent]; [U.S. Bank Trust, NA v Alston](#), 74 Misc 3d 1068 [Pleasant Valley Just Ct 2022] [occupants were former owner and tenant of foreclosed property with no "rent" obligation]; [see also *Awaly LLC v Pena*, 75 Misc 3d 1227](#)[A], 2022 NY Slip Op 50673[U] [Civ Ct, Bronx County 2022] [licensee]; [West 49th St., LLC v O'Neill](#), 76 Misc 3d 459 [Civ Ct, NY County 2022] [licensee]; [Valsac 908 LLC v Crespo](#), 75 Misc 3d 1213[A], 2022 NY Slip Op 50484[U] [Civ Ct, NY {**78 Misc 3d at 1135} County 2022] [superintendent]; 22

Hawthorne St. LLC v Lendor, 2022 NY Slip Op 34536[U] [Civ Ct, Kings County, Sept. 6, 2022, Weisberg, J.] [opining that RPAPL 713 proceedings (where no landlord tenant relationship exists) are not "holdovers").

During this time, no case emerged where the stay was vacated for a rent-regulated tenant obligated to pay rent. This court remarked in *Robo LLC v Matos*, decided on June 2, 2022, that the petitioner had failed to identify any case where the ERAP stay was vacated when the tenant in a nonpayment case had a pending application (75 Misc 3d 1211[A], 2022 NY Slip Op 50468[U], *2 [Civ Ct, Bronx County 2022]). This was not surprising, since the legislative intent section for the amended ERAP statute states that the Legislature

"is especially cognizant of the ongoing risks posed by *residential evictions stemming from non-payment of rent* during the height of the public health emergency, and its recovery period, such as the potential to exacerbate the resurgence of COVID-19, the damage significant numbers of evictions would cause to the state's economic recovery, and the deleterious social and public health effects of homelessness and housing instability." ([2986 Briggs LLC v Evans](#), 74 Misc 3d 1224[A], 2022 NY Slip Op 50215[U], *4 [emphasis added], quoting L 2021, ch 417, § 2.)

Recently, however, several cases have vacated the stay in a nonpayment proceeding against rent-regulated tenants. In *Bay Park Two-A LLC v Pearson*, the court determined the equities were out of balance and lifted the stay for pre- and post-pandemic arrears (*see* 77 Misc 3d 534 [Civ Ct, Kings County 2022]). *Pearson* involved a Section 8 tenancy. Ultimately, the holding has been used, fairly or not, to support arguments that stays must be vacated because subsidized tenant applications are unlikely to be paid. In fact, *Pearson* expressly does not rely on whether the applications will ultimately be approved. "While this court does not agree with petitioner's essentially speculative assertion that monies will *never* be paid on these cases, it does agree that the continued stay is prejudicial, particularly as the statute does not expire for close to [*4]three years" (*id.* at 540). In other words, the *Pearson* court found that prejudice, largely measured through the passage of time, supersedes the statute's plain language. {**78 Misc 3d at 1136}

This notion of prejudice (through delay) has been accepted in subsequent nonpayment cases where the tenant is the beneficiary of a subsidy (*see Leshchinsky v Lutula*, 77 Misc 3d 1206[A], 2022 NY Slip Op 51156[U], *3 [Civ Ct, Kings County 2022] ["as the time passes with the respondent's application lingering, the *prejudice* to petitioner outweighs the benefit of waiting for a possible outcome on a filed ERAP application . . . and the likelihood of any payments by OTDA diminishes" (citation omitted and emphasis added)]; [Horizon Realty of](#)

[Mt. Vernon, LLC v Dabbs, 77 Misc 3d 1233](#)[A], 2023 NY Slip Op 50084[U], *2 [Mount Vernon City Ct 2023] ["Forcing the Petitioner to wait any longer would only exacerbate the *inequity* placed upon the Petitioner/landlord in this process. To reiterate, the lifting of the stay is premised at this time to the *inequity* suffered by the Petitioner/landlord in the protracted amount of time and the reality that the likelihood of the Respondent securing any monies from ERAP is slim to none at this point" (emphasis added)].

Unsurprisingly, petitioner here moves to vacate the ERAP stay citing to *Bay Park Two-A LLC v Pearson*, alleging prejudice caused by the passage of time and that the application will not be paid because of respondent's Section 8 status. (See NYSCEF Doc No. 6, affirmation in support at 6.)

The motion is denied. This court will not abandon its reasoning as stated in *Robo LLC v Matos*, notwithstanding the further passage of time. Having subsidized tenants at the back of the ERAP applications line is written into the statute. OTDA has implemented the statute as written. "Whatever the wisdom of this choice, this is the policy choice the legislature has made" ([Robo LLC v Matos, 75 Misc 3d 1211](#)[A], 2022 NY Slip Op 50468[U], *2, citing [Xiang Fu He v Troon Mgt., Inc., 34 NY3d 167](#), 172 [2019]; *Hope v Perales*, 83 NY2d 563, 575 [1994] ["It is not the role of the courts to pass upon the wisdom of the Legislature's policy choice"]; *see also Savy Props. 26 Corp. v James, 76 Misc 3d 1214*[A], 2022 NY Slip Op 50942[U], *1 [Civ Ct, Kings County 2022] ["Public policy determined by the legislature is not to be altered by a court by reason of its notion of what the public policy ought to be. It is not the role of the court to 'second-guess' the determination of the legislature; the court may not substitute its own determination therefor. 'A statute must be read and given effect as it is written by the legislature, not as the court may think it should or would have been written if the legislature had envisaged all of the problems **{**78 Misc 3d at 1137}** and complications which might arise in the course of its administration; and no matter what disastrous consequences may result from following the expressed intent of the legislature, the judiciary cannot avoid its duty' " (citations omitted)]).

More recently, the court in *Elliot Place Properties v Jaquez* (see [77 Misc 3d 1230](#)[A], 2023 NY Slip Op 50067[U] [Civ Ct, Bronx County 2023]) declined to vacate the ERAP stay in circumstances like those here and in *Matos*. The *Jaquez* court relied on the plain words of the statute (*Jaquez*, 2023 NY Slip Op 50067[U], *3-5 ["Here, the unambiguous language of the statute, which provides protection to a Section 8 tenant who has applied for the program, shall be given its plain meaning and this court may not resort to statutory construction beyond the words of the statute"], citing [Kuzmich v 50 Murray St. Acquisition LLC, 34 NY3d](#)

[84](#), 91 [2019]).

Bank of N.Y. Trust Co., N.A. v Courtney (see 78 Misc 3d 27 [App Term, 1st Dept 2023]), the first appellate level decision addressing ERAP stays, also supports the *Matos* and *Jaquez* analysis. Critically, the *Courtney* court reminds the courts that "[i]t is a fundamental principle of statutory interpretation that a court should attempt to effectuate the intent of the Legislature, and where the statutory language is clear and unambiguous, the court should [*5]construe the statute to give effect to the plain meaning of the words used" (*id.* at 29 [citations omitted]).

Courtney reiterates that those decisions finding that non-tenants without a rent obligation were not entitled to a stay were correct (*id.* at 30 ["The ERAP statute contains no language affording a stay to one who is neither a tenant nor an occupant obligated to pay rent"]). Conversely, this court reads *Courtney* as reiterating that those persons "protected" by the statute, such as the tenant here, continue to be protected by the stay until OTDA makes its determination, notwithstanding that petitioner and those similarly situated are undoubtedly prejudiced (see *Jaquez*, 2023 NY Slip Op 50067[U], *3 [Despite delay, "(r)espondent is still entitled to the continuance of the stay even though she owes more than 15 months in rental arrears and the E.R.A.P. funds would not cover all the arrears outstanding. *The plain reading of the statute supports that finding*" (citation omitted and emphasis added)]).

Whatever outcomes the ERAP stay may lead to must be addressed by the Legislature, not the courts. {**78 Misc 3d at 1138}

For these reasons, the motion to vacate the ERAP stay is denied. The case shall remain on the court's administrative calendar.

Footnotes

Footnote *:L 2021, ch 56, § 1, part BB, § 1, subpart A, sec 1, § 8, as amended by L 2021, ch 417, § 2, Part A, § 4.