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2023-09-21

### Gentles v. Day

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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF KINGS: HOUSING PART F

-----X

Paul Gentles,

Petitioner

Index No. LT # 307665-21

- against -

**DECISION/ORDER**

Donna Day  
Radika Dass  
987 Montgomery Street  
Apt 1R, on the First Floor  
Brooklyn, New York 11213

Respondent,

John Doe, Jane Doe

Respondent-Undertenant(s)

-----X

**HON. HANNAH COHEN:**

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of petitioner's motion seeking summary judgment and ensuing opposition.

**Papers**

Notice of Motion

Opposition

**Numbered**

1

2

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Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Petitioner commenced this nonpayment proceeding on August 16, 2021 seeking rental arrears. On August 18, 2021, respondent Donna Day filed a hardship declaration which stayed the proceeding through January 15, 2022 as respondent checked off the statement of " I am experiencing financial hardship, and I am unable to pay my rent or other financial obligations under the lease in

full or obtain alternative suitable permanent housing”. Respondent Donna Day then filed an answer on September 7, 2021 noting the petitioner is not the owner, warranty of habitability and a general denial. The case was then administratively adjourned several times due to Covid-19 administrative calendaring and then placed on the ERAP administrative calendar. Riseboro legal services filed a notice of appearance for Donna Day on September 15, 2022. On May 19, 2023 petitioner filed a motion seeking to restore the proceedings to the courts calendar and vacate any ERAP stay. Said motion was settled by stipulation on July 26, 2023 and granted and the case was adjourned to September 6 and then the 20<sup>th</sup> for motion practice. Riseboro filed the herein motion seeking summary judgment pursuant to CPLR 3212 seeking dismissal of the proceeding.

Respondent seeks dismissal of the proceedings on the following basis (1) that there was no lease in effect with the petitioner at the time the case was commenced; (2) no privity of contract and therefore a non payment proceeding may not be commenced; (3) lack of personal jurisdiction in the affidavit of service was not filed within three days of service with the clerk of the court and therefore service is incomplete and (4) failure to serve a thirty day rent demand. In support respondent offers the deed to the former owner Joyce Grant from 1982, the recorded deed from Owen Bailey to Paul Gentles and himself, a copy of the first page of a lease from 2018 to 2019 between Joyce Grant and Donna Day for \$1,000 per month and a NYC DOF printout of a website indicating owners as Owen Bailey and Paul Gentiles and a four unit building and a undated printout showing building is not validly registered or the last registration was invalidated in 2022.

In opposition petitioner notes it was the owner before the case commenced and that there is a lease in effect. Petitioner argues that in respondent’s answer she acknowledged that rental arrears are owed and that petitioner is the owner of the premises. Petitioner notes that respondent sought

and received ERAP funds and therefore acknowledged her tenancy. Pursuant to the OTDA website, OTDA approved an ERAP payment for the following months, March 2020 through September 2020, February and March 2021, September through November 2021. Petitioner notes that ERAP was approved for \$16,500 on or about January 4, 2023 for \$1,100 per month. Petition argues that respondent cannot now allege that there is no rental agreement between the parties when she had previously acknowledged, requested and received rental arrears. Petitioner notes that it properly served the 14 day required notice and a thirty day notice is not proper in a non payment proceeding.

Petitioner seeks summary judgment pursuant to CPLR 3212. Summary judgment will be granted “if upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party” (CPLR 3212[b]). The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). In considering a summary judgment motion, the courts function is to determine whether a material issue of fact exists, not to determine said issues (*Esteve v Abad*, 271 AD 725 [1<sup>st</sup> Dept 1947]).

Summary judgement should be granted when the moving party makes a prima facie showing of entitlement to judgment as a mate of law, giving sufficient evidence to eliminate any material issues of fact from the case. See (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]).

In *Fairfield Beach 9th, LLC v Shepard-Neely*, 77 Misc 3d 146 (A), 2022 NY Slip Op 51351 (U), (App Term, 2d Dept 2022) and in, *ZB Prospect Realty v Olenick*, — NYS3d —, 2023 NY Slip Op 23115 (Civ Ct, Kings County 2023), the Court held that “It is undisputed that no rental agreement was in effect when this proceeding was commenced, and a nonpayment proceeding lies

only where a tenant has defaulted in the payment of rent, pursuant to the agreement under the agreement under which the premises are held or, in other words, there must be a rental agreement in effect at the time the proceeding is commenced pursuant to which rent is due and owing. Thus, this nonpayment proceeding does not lie.”

However, here OTDA's action on Respondents' ERAP application complicates respondents' argument. Respondent argues that there was no lease after 2019, however. OTDA paid petitioner for 15 months after the suppose lease expiration at a new rate of the \$1,100, an amount above the prior monthly rent with the previous landlord, based upon respondent's representation to OTDA that she had a rental obligation to pay rent owed.. A landlord must apply tenders of rent from a government agency to the months the agency earmarks the tenders for. *Neptune Dev. Corp. v. Kalogiannis*, 63 Misc. 3d 164(A), 2019 WL 2455017 (App. Term 2nd Dept. 2019), 1 *Beach 105 Realty LLC v. Murphy*, 2020 N.Y.L.J. LEXIS 1865, \*5 (Civ. Ct. Bronx Co.). Petitioner must therefore apply ERAP benefits to months post-dating the expiration of the lease. Payment of rent after an expiration of a lease shows an intention to continue a landlord/tenant relationship at the same monthly rent. *Priegue v. Paulus*, 43 Misc. 3d 135(A), 2014 WL 1622924( App. Term 2nd Dept. 2014). Normally, if a tenant remains in possession after a lease expires with no new agreement as to a rental amount, a landlord's remedy is to obtain possession via a holdover proceeding. RPL §§ 226-c(1)(a), 232-a.2 However, a successful ERAP application precludes that remedy. A landlord's acceptance of rental arrears from ERAP “shall constitute agreement by the ... landlord ... 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 ” L. 2021, c. 56, Part BB, Subpart A, § 9(2)(d)(iv).

If the court credits respondent's arguments, respondent would have gained the benefit of being permitted to reside at the premises for one year after acceptance of the rent, but without the legal obligation to pay rent for that year period. Respondents logic would allow , tenants who obtain an ERAP benefit that a landlord accepts can live in their apartments for free for a year without the landlord having a remedy. The law does not permit a non-owner to possess a property for free. 35 *Lispenard Partners, Inc. v. 35 Smoke & Grill, LLC*, 74 A.D.3d 496, 496, 901 N.Y.S.2d 841 (1st Dept. 2010), *Ruru & Assocs. LLC v. Weinberg Holdings, LLC*, 2022 N.Y. Slip Op. 30405(U), ¶ 3, 2022 WL 295761 (S. Ct. N.Y. Co.). Canons of statutory construction do not favor an interpretation of a statute that would render a right — like a right to compensation for possession of one's property — without a remedy. *In re Bailey*, 265 A.D. 758, 761, 40 N.Y.S.2d 746 (1st Dept. 1943), *In re Myones*, 191 Misc. 280, 282, 76 N.Y.S.2d 143 (S. Ct. Kings Co. 1947). The Court does not interpret the ERAP statute to deprive a landlord of a non payment remedy if a tenant without a written lease does not pay rent in the year after a landlord's acceptance of ERAP benefits, but who none the less remains at the premises.

Rather, an occupant's voluntary ERAP application and the one year requirement of maintaining that tenancy constitutes an intentional effort by the legislature to bind landlords and to treat accepted ERAP applicants as a tenant for one year, an act consistent with an intention to continue a landlord/tenant relationship. See *JBS Properties LLC v Yershov*, 77 Misc.3d 235 [Civ Ct NY Co 2022]; *Priegue*, supra, 43 Misc. 3d at 135(A).3 Accordingly, here, the Court finds that a landlord/tenant relationship exists between the parties and continued at least for one year after payment of the ERAP benefits in January 2023 at a rate of \$1,100.00 a month.

As respondent voluntarily applied for ERAP in 2021, she affirmed a landlord tenant

relationship with the petitioner and rental arrear obligations, respondent's motion seeking dismissal for lack of a lease or a privity of contract is denied.

As respondent failed to assert any jurisdiction defense in the answer dated September 7, 2021, respondent may not now, two years later seek dismissal of such. Respondent appearing in the action and electing to answer the petition without objection to jurisdiction, conferred jurisdiction upon the trial court and waived the defense of lack of jurisdiction (CPLR 3211(e)). Any objection to service is waived if it is not interposed in an answer (See *RPS Greenvale Realty LLC v Rosa's of Roslyn, Inc.*, 18 Misc3d 1145(A) [NY Dist. Ct. 2008]; *Addesso v Shemtab*, 70 NY2d 689 (1987); *De Filippis v Perez*, 148 AD2d 490 [2<sup>nd</sup> Dept 1989]). Based upon the above, respondent motion to dismiss for lack of jurisdiction in any deficiency of filing the affidavit of service is denied.

Respondent's motion seeking dismissal for failure to serve a thirty day notice in a non payment proceeding is devoid of any merit and is denied.

Respondent's motion is denied in all parts

The case is restored to the court's calendar to October 11, 2023 at 9:30, part F, rm 612 for trial or settlement.

This constitutes the decision and order of this court.

Dated: September 21, 2023  
Brooklyn, New York



Hon. Hannah Cohen, J.H.C.