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2023-12-22

55 Perry Place LLC v. Wolfgang Ban

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

55 PERRY PLACE LLC

Index No. 304361-23

Petitioner

DECISION/ORDER

-against-

CIVIL COURT OF THE
CITY OF NEW YORK

WOLFGANG BAN

Respondents

DEC 22 2023

ENTERED
NEW YORK COUNTY

Novick Edelstein Pomerantz, PC, for the petitioner
Manhattan Legal Services, for the respondent

Recitation, as required by CPLR 2219 (a), of the papers considered in review of this motion by NYCEF Doc No: 19-30, 35-36.

PROCEDURAL POSTURE AND BACKGROUND

This is a nonpayment proceeding commenced against Wolfgang Ban (“respondent”). Respondent was connected with Manhattan Legal Services (“MLS”) through the Universal Access to Counsel (“UAC”) program which provides free legal advice and/or counsel to income eligible tenants at risk of eviction. An income eligible tenant is one whose gross income is no more than 200% of the federal poverty guidelines. The UAC Office of Civil Justice (“OCJ”) coordinator establishes and oversees the program. NYC Admin Code § 26-1302 (d) of the Act requires the coordinator to annually review the performance of not-for-profit organizations who have been designated as UAC providers. While the Act strives to provide every eligible tenant with representation or advice in Housing Court, only a small percentage of eligible tenants actually receive full legal representation.

Respondent has moved to amend his answer with the benefit of his attorney, and also for leave to conduct discovery regarding his defenses and counterclaim of unlawful deregulation fraudulent overcharge. Previously, the parties adjourned twice for motion practice. On the third adjournment date the court issued a “final” briefing order and indicated that late-filed papers would not be considered. Respondent filed its motion timely. On December 4, 2023, 11 days before petitioner’s opposition was due, petitioner filed an order to show cause to disqualify MLS

as respondent's attorney and for additional time to oppose respondent's timely filed motion. Petitioner posits that "regardless of the decision on this instant application, an additional 30 days should be given to petitioner to respondent's pending discovery motion." (NYSCEF Doc No. 29, Fein affidavit ¶ 6.) Aside from the allegation that MLS should be disqualified, petitioner does not explain why its deadline should be extended. There is a pending motion for leave to file and amended answer and leave to conduct discovery. That motion would remain pending regardless of whether MLS were to be disqualified by the court or not. It curious at best why petitioner would seek to create even further delay.

Petitioner speculates that respondent is an executive chef who works at "a more upscale Manhattan restaurant" and, thus, respondent must be ineligible for free legal services. In support of this statement, petitioner attaches an undated apartment application signed by respondent on which respondent represented that his income is \$150,000. Petitioner also attaches a google search for the average salary of an executive chef which calculates the average salary of \$96,386. Petitioner notes that the 200% of the federal poverty level is \$29,160.

In opposition, MLS challenges petitioner's standing to argue that MLS should be disqualified. Respondent argues that there is neither an express private right of action (true), nor an implied right of action. NYSCEF Doc No. 35, respondent's attorney's affirmation in opposition ¶ 16 ["The program squarely places the oversight and coordination of the UAC program with OCJ and HRA, not the private landlord bar, opposing counsel or the court system."]) Respondent further argues that the UAC statute does not restrict who MLS can represent; it only requires that UAC contract funds not be expended on ineligible individuals. (*Id.* ¶ 17.)

In reply, petitioner reiterates that it has an implied right of action to enforce the income limitations set by UAC. "Since the legislative intent was to restrict free legal counsel under the Counsel Program to those under certain income levels, Petitioner's right to challenge MLS's qualification as counsel is in line with the intent of the Counsel Program. Therefore, an implied private right for Petitioner, the opposing party on a summary proceeding involving Respondent, to challenge Respondent's right to free legal counsel under the Counsel Program should be recognized by this Court." (NYSCEF Doc No. 36, petitioner's attorney's affirmation in reply ¶ 7.) Petitioner also points out that respondent did not deny that his salary is over 200% of the federal poverty guidelines. Petitioner further argues it should be able to inspect respondent's "W-

2's, wage statements, and so forth." (*Id.* ¶ 9.) Such documents, petitioner argues, "would not be precluded from being obtainable in litigation where, as here, MLS does not deny they created such documents for purpose of legal advice." Petitioner has not moved for leave to conduct discovery but is difficult to understand why petitioner would seek to delay this proceeding further to engage in this dispute while another more substantive motion is pending before the court.

DISCUSSION

To have standing to make a legal claim, where there is no express private right of action in a statute, and implied right of action must be demonstrated.

"A private right of action will be implied if (1) the plaintiff is a member of the class for whose benefit the statute was enacted; (2) the recognition of such right promotes the legislative purpose which undergirds the statute; and (3) the creation of such right is consistent with the legislative scheme for the statute. Legislative intent is thus the linchpin in any case where a private right of action is to be implied. . .

Resolution of the second prong, whether an implied private right of action promotes the legislative purpose, is a two-part inquiry, requiring determination of (1) what the Legislature was seeking to accomplish in enacting the statute; and (2) whether a private right of action promotes that objective." (*Rhodes v Herz*, 84 AD3d 1 [1st Dept [2011].)


Petitioner has not sustained its burden to show it has standing to move to disqualify MLS through an implied right of action. All three prongs of the *Rhodes* test must be met. Certainly, petitioner is not a member of the class of persons for whose benefit and protection the statute was enacted. Giving landlord's the right to second-guess legal services providers and seek their disqualification on statutory grounds does not promote the legislative purpose to expand representation in Housing Court. Indeed, it potentially limits the number of tenants who may benefit. In any case, the statute provides for oversight by a designated coordinator. If petitioner seeks to be heard on this issue, petitioner may attend the annual public hearing which the OCJ coordinator is mandated to hold "each year to receive recommendations and feedback about [the program]." (NYC Admin Code §§ 26-1303 [a] – [b].)

Accordingly it is

ORDERED that petitioner's motion is denied in its entirety.

Dated: December 18, 2023
New York, NY

HON. KAREN MAY BACDAYAN

Ordered: 
Hon. Karen May Bacdayan