

Matter of Miles v Rhea
2010 NY Slip Op 33478(U)
December 15, 2010
Sup Ct, NY County
Docket Number: 400942/10
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE BARA JAFFE J.S.C.
Justice

PART 5

Jayquane Miles

INDEX NO.

400942/10

MOTION DATE

John B. Rhea

MOTION SEQ. NO.

2

MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for stay

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

PAPERS NUMBERED

1

2

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

DEC 21 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/16/10

DEC 16 2010

BJ
BARBARA JAFFE

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
In the Matter of the Application of
JAYQUANE MILES,

Petitioner,

Index No. 400942/10

Motion Date: 10/19/10
Motion Seq. Nos.: 001,002

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules

DECISION & JUDGMENT

-against-

JOHN B. RHEA, as Chairperson and Member of the
New York City Housing Authority,

and

BERGEN REALTY AND MANAGEMENT, LLC (landlord),

Respondents.
-----X

BARBARA JAFFE, J.:

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FILED
DEC 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

By order to show cause dated July 15, 2010, petitioner seeks an order staying Kings County Civil Court non-payment proceeding *Bergen Realty and Management, LLC v Jayquane Miles*, L&T Index Number 75689/09, pending respondent New York City Housing Authority's (NYCHA) determination as to whether petitioner is entitled to a section 8 subsidy. Defendant Bergen Realty and Management, LLC (Bergen) opposes the stay.

I. BACKGROUND

On April 13, 2010, petitioner and Bergen entered into a stipulation settling the

non-payment proceeding, with petitioner agreeing to a final judgment for \$14,623.66, representing rent due from June 2009 to April 2010, with execution of the warrant of eviction stayed to June 30, 2010. (Affirmation of Michael Williams, Esq., dated July 15, 2010, Exh. A). The parties recognized that petitioner was seeking a determination by NYCHA as to his eligibility for the section 8 program, and thus agreed that in the event NYCHA had not issued its determination by June 30, 2010, petitioner could move for a stay of eviction in Civil or Supreme court. After the stipulation was signed, petitioner and Bergen agreed to extend the stay to July 13, 2010. However, that day petitioner received a warrant of eviction. (*Id.*).

On or about April 22, 2010, petitioner commenced the instant Article 78 proceeding seeking an order directing NYCHA to vacate and annul its determination to terminate the section 8 subsidy of petitioner's mother, effective November 2008, and upon vacating it, directing NYCHA to transfer the subsidy to petitioner. By stipulation dated June 15, 2010, petitioner and NYCHA settled the proceeding as follows:

- (1) petitioner agreed to submit to NYCHA all documents and information necessary to certify his eligibility for the section 8 program;
- (2) if NYCHA determines that petitioner is eligible for the section 8 program, it shall place petitioner in the program and pay all section 8 subsidies retroactive to June 1, 2009 within a reasonable time after petitioner submits the necessary documents and the apartment passes an inspection; and
- (3) if either party defaults with respect to the above terms, or if NYCHA determines that petitioner is not eligible for the program, the proceeding may be restored.

II. ANALYSIS

The only issue remaining is whether Bergen's eviction against petitioner should be stayed. Petitioner contends that he is entitled to a stay as NYCHA has yet to make its determination and that if it determines that he is eligible for section 8 benefits, in light of its agreement to pay the section 8 subsidy retroactive to June 1, 2009, petitioner will be able to satisfy the judgment amount as well as any subsequently accrued rent. However, until the determination is made, petitioner does not have the means to satisfy the judgment. (*Id.*).

Bergen argues that a stay of eviction must be conditioned on petitioner's payment of use and occupancy and posting of an undertaking in the amount of the past due rent, and that, in any event, respondent has not shown that he will qualify for the section 8 program. (Affirmation of Scott D. Gross, Esq., dated Oct. 15, 2010).

In reply, petitioner argues that he is entitled to a stay, and claims that Bergen failed to complete the Housing Assistance Payments contract required as part of NYCHA's application process for petitioner's participation in the section 8 program. He thus maintains that Bergen cannot claim that its rights have been prejudiced when it has failed to submit the contract which would have expedited the matter. (Reply Affirmation, dated Oct. 18, 2010).

A preliminary injunction may be granted upon a showing by petitioner of a likelihood of success, a danger of irreparable injury, and that the balance of equities is in his favor. (*Jones v Park Front Apts., LLC*, 73 AD3d 612 [1st Dept 2010]). In *Jones*, the court upheld the trial court's stay of eviction pending the outcome of plaintiff's action against her landlord based on its failure to accept her section 8 subsidy, finding that plaintiff demonstrated that the equities were in her favor, that irreparable harm would result if she was evicted, and that she would likely succeed in

her action against the landlord.

Here too, the equities are in petitioner's favor as he is facing eviction from his home, while Bergen will suffer no prejudice as a result of the stay if NYCHA finds petitioner eligible for the section 8 program, it will pay Bergen petitioner's rent retroactive to June 2009, and if petitioner is ineligible, Bergen has already obtained a final judgment of possession against him. Moreover, not only would irreparable harm result if plaintiff is evicted, but it would render meaningless this proceeding and the parties' stipulation. While it is not certain that petitioner will succeed with NYCHA, he has already succeeded to the extent that NYCHA has agreed to review his eligibility. (*See Reynolds v Div. of Hous. and Community Renewal*, 199 AD2d 15 [1st Dept 1993] [court properly stayed eviction proceeding against petitioner pending determination by defendant of petitioner's rent overcharge complaint]; *Diaz v Donovan*, NYLJ, July 15, 2008 [Sup Ct, New York County] [stay of nonpayment proceeding was warranted pending agency's review of decision to terminate plaintiff's section 8 subsidy]).

However, pursuant to CPLR 6312(b), prior to the grant of a preliminary injunction, including an injunction to stay proceedings in another action, the party receiving the injunction must post an undertaking in an amount to be fixed by the court. The undertaking is mandatory and may not be waived by the court. (Alexander, Practice Commentaries, McKinney's Cons Laws of New York, C6312:2 [2010 main vol]; *see also Reynolds*, 199 AD2d at 16 [while stay in effect, petitioner directed to pay continuing use and occupancy and post undertaking]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that petitioner's motion for a preliminary injunction is granted and a stay is

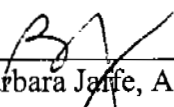
issued in the proceeding *Bergen Realty and Management, LLC v Jayquane Miles*, L&T Index Number 75689/09 (Kings County Civil Court), including any attempt to evict petitioner, pending NYCHA's determination as to petitioner's eligibility for the section 8 program; it is further

ORDERED, that the stay is conditioned upon petitioner's posting of an undertaking in an amount to be set at a hearing; it is further

ORDERED, that the parties are directed to appear for a hearing on the undertaking on January 25, 2011 at 2:30 pm at 80 Centre Street, room 180, New York, New York; and it is further

ORDERED, that the stay is also conditioned on petitioner's monthly payment of use and occupancy to Bergen of the amount of rent that would not be covered by the section 8 subsidy, commencing on January 1, 2011.

ENTER:


Barbara Jaffe, AJSC
BARBARA JAFFE
J.S.C.

DATED: December 15, 2010
New York, New York
DEC 16 2010

FILED
DEC 21 2010
NEW YORK
COUNTY CLERK'S OFFICE