

Diorio v Harding
2015 NY Slip Op 31513(U)
August 12, 2015
City Court of Peekskill
Docket Number: LT-329-15
Judge: Reginald J. Johnson
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PEEKSKILL CITY COURT
COUNTY OF WESTCHESTER: STATE OF NEW YORK

-----X
PETER DIORIO,

DECISION & ORDER
Petitioner-Landlord, Index No. LT-329-15

--against--

NICOLE HARDING and HUETT HARDING,

Respondents-Tenants.
-----X

REGINALD J. JOHNSON, J.

The Respondents-Tenants, Nicole Harding and Huett Harding¹ pro se (hereinafter “the Respondents”), move by Order to Show Cause seeking a vacatur of the judgment and warrant of eviction in favor of Peter Diorio, who is represented herein by Clifford L. Davis (hereinafter, “the Landlord”), and dismissal of the petition; or, in the alternative, restoration of the case to the calendar upon the ground that the Respondents have all of the monies due, and for such other and further relief as may seem just and proper.

The motion is decided as set forth herein.

In deciding this Order to Show Cause, the Court considered the Order to Show Cause with supporting affidavit, and Affirmation in

¹ The Affidavit in Support of Order to Show Cause was provided by Nicole Harding only.

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Opposition to Order to Show Cause.

Procedural History

On June 22, 2015, the Landlord commenced a non-payment proceeding against the Respondents by filing a notice of petition and petition with the Court.² On June 24, 2015, affidavits of service were filed with the Court. On June 30, 2015, the Landlord and Respondents appeared in the Landlord/Tenant Part of this Court for a first appearance in this matter. At the conclusion of the hearing, the Court rendered a judgment in favor of the Landlord in the sum of \$2,025.00, a judgment of possession, together with a warrant of eviction stayed to July 10, 2015. On July 14, 2015, the Court signed a judgment of possession and judgment for \$2,025.00³, and a warrant of eviction. On July 23, 2015, the warrant was given to the city marshal. On July 30, 2015, the Respondents filed, and the Court signed, an order to show cause seeking to vacate the judgment and warrant and to dismiss the petition. The Court directed the parties to appear for a hearing on the order to show cause on August 7, 2015. On August 4, 2015, the Landlord submitted opposition papers and requested an adjournment of the hearing to August 11, 2015.⁴ The Court

² Affidavits of service in the file indicate that the Respondents were served with a three-day notice and a notice of petition and petition by substituted service.

³ A review of the Non-Payment Judgment In Favor of Landlord inaccurately recites that the notice of petition and petition were personally served on the Respondents. Service of these documents were made by substituted service. See Affidavits of Service for Notice of Petition and Petition.

⁴ Petitioner's counsel's cover letter, to which his affirmation in opposition was annexed, indicated that the Respondent Nicole Harding was copied. The Court does not consider this letter sufficient

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adjourned the hearing to August 18, 2015.

Discussion

I. Vacating the Judgment and Warrant of Eviction

RPAPL §749(3) states, in pertinent part,

3. The issuing of a warrant for the removal of a tenant cancels the agreement under which the person removed held the premises, and annuls the relation of landlord and tenant, **but nothing contained herein shall deprive the court of the power to vacate such warrant for good cause shown prior to the execution thereof.**

(emphasis added).

It is well settled that the “issuance” of a warrant of eviction does not terminate the summary proceeding until the warrant is “executed.” Whitmarsh v. Farnell, 298 N.Y. 336 (1949); 203 East 13th St. Corp. v. Lechycky, 67 Misc.2d 451 (1st Dept. App. Term 1971) (holding that the trial judge had jurisdiction to stay the proceeding even though the warrant had already been issued); Harvey v. Bodenheim, 96 A.D.3d 664 (1st Dept. 2012) (Court noted that a court always retains the power to vacate a warrant of eviction prior to its execution for ‘good cause’

proof of service that Nicole Harding was duly served with the opposition papers. See, Civil

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shown). A warrant of eviction is “issued” when the warrant is made out or signed by the judge and delivered by said judge to the court clerk for delivery to the marshal. See, Ash v. Purnell, 19 N.Y. Civ. Proc.R 234, 32 N.Y. St. Rep. 306, 11 N.Y.S. 54 (1890).

But when is a warrant of eviction “executed”? A warrant of eviction is executed when the tenant is actually dispossessed or evicted, or the locks to the premises changed by the marshal. Grattan v. P.J. Tierney Sons, Inc., 226 A.D. 811 (2d Dept. 1929). Unless and until a tenant is actually dispossessed or evicted from the premises, the summary proceeding will be deemed pending and the Court retains the power to vacate the warrant of eviction for good cause shown. See, 90 N.Y. Jur. 2d, Real Property-Possessory Actions §276, *citing*, Whitmarsh v. Farnell, *supra*; Harvey v. Bodenheimer, *supra*.

In furtherance of determining whether to vacate a warrant of eviction, the Court has the power to stay a summary proceeding in order to consider whether the facts and circumstances presented by the tenant warrant a finding of “good cause” to justify a vacatur of the warrant of eviction. See, CPLR §2201⁵; 203 East 13th St. Corp. v. Lechycky, *supra*; MacLeod v Shapiro, 20 A.D.2d 424, 247 N.Y.S.2d 423 (1st Dept. 1964); City of New York v. Falcone, 160 Misc.2d 234, 612 N.Y.S.2d 745

Practice Law and Rules (CPLR) §306.

⁵ CPLR §2201 states: “[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.”

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(App.Term 2d Dept. 1994). It has been held that Uniform City Court Act (UCCA) §§212⁶ and 2102⁷ extends the authority of CPLR §2201 to City Courts to grant a stay of proceedings in a proper case. Matter of Fulton Redevelopment Co. v. Kendall, 68 Misc.2d 813, 327 N.Y.S.2d 956 (Sup. Ct. Westchester Co. 1971).

Further, the determination as to whether a tenant has presented sufficient factual proof to justify a finding of “good cause” is entrusted to the sound discretion of the Court. See, Harvey v. Bodenheim, 96 A.D.3d at 664; Martin v. Sandoval, 46 Misc.3d 1216, 9 N.Y.S.3d 594(A)(Peekskill City Court 2015).

What constitutes “good cause” for purposes of vacating a warrant of eviction in a summary nonpayment proceeding? The Court must make a sui generis determination in every case based on the facts presented when deciding whether the tenant has demonstrated “good cause.” See, Archstone Camargue I LLC v. Korte, 40 Misc.3d 103, 971 N.Y.S.2d 642 (App. Term 1st Dept. 2013). Parkchester Apartment Co. v. Heim, 158 Misc.2d 982, 607 N.Y.S.2d 212 (App. Term 1st Dept. 1993).

The Courts have found “good cause” to vacate the warrant of

⁶ UCCA §212 states: “[i]n the exercise of its jurisdiction the court shall have all of the powers that the supreme court would have in like actions and proceedings.”

⁷ UCCA §2102 states: “The CPLR and other provisions of law relating to practice and procedure in the supreme court, notwithstanding reference by name or classification therein to any other court, shall apply in this court as far as the same can be made applicable and are not in conflict with this act.”

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eviction in proceedings involving the potential forfeiture of a long-term, rent-stabilized tenancy based upon on the tenant's failure to tender outstanding arrears and ancillary fees immediately upon the due date (Parkchester Apartment Co. v. Heim, *supra*); in proceedings involving the hospitalization of the tenant and a lengthy convalescence after issuance of the warrant of eviction (Pomeroy Co. v. Thompson, 5 Misc.3d 51, 784 N.Y.S.2d 278 (App. Term 1st Dept. 2004); in proceedings involving a longtime rent-stabilized tenant who needed a short stay of execution in order to pay his rent arrears (Harvey v. Bodenheim, *supra*.); and in proceedings involving a tenant who diligently applied to organizations for the rental arrears and belatedly received a commitment letter for the full amount of the arrears (Bushwick Props., LLC v. Wright, 34 Misc.3d 135[A], 2011 N.Y. Slip Op. 52389[U], *1-2, 2011 WL 6934404 [App. Term 2nd & 11th & 13th Jud. Dists. 2011]), among other proceedings.

A court retains the power to vacate a warrant of eviction and return a tenant to possession even after its execution upon a proper showing by the tenant (Harvey v. Bodenheim, *supra*.); Brusco v. Braun, 84 N.Y.2d 674, 682, 645 N.E.2d 724, 727 (1994)(same); *but see*, Davern Realty Corporation v. Vaughn, 161 Misc.2d 550, 616 N.Y.S.2d 683 (App. Term, 2d & 11th Jud. Dists. 1994) (Court held that a court lacks the authority to vacate a warrant of eviction and restore a tenant to possession after the

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warrant has been executed).

In vacating a warrant of eviction, a Court should balance the equities to determine whether granting an application to vacate a warrant of eviction would cause more harm to the landlord than denying same would cause to the tenant. See, New York City Housing Authority v. Torres, 61 A.D.2d 681 (1st Dept. 1978).

With regard to the money judgment, it is well settled that a Court can vacate warrant of eviction without vacating the money judgment. See, 16 Apt. Assoc., Inc. v. Lewis, 827 N.Y.S.2d 441, 442-43 (App. Term, 9th & 10th Jud. Dists. 2006) (vacating warrant without impacting the money judgment); Kew Gardens NY, LLC v. Saltos, 814 N.Y.S.2d 891 (App. Term, 2 & 11th Jud. Dists. 2006) (same).

II. RPAPL §751: Stay upon Paying Rent or Giving Undertaking:
discretionary stay outside city of New York

RPAPL §751 states, in pertinent part,

The respondent may, at any time before a warrant is issued, stay the issuing thereof and also stay an execution to collect the costs, as follows:

1. Where the lessee or tenant holds over after a default in the payment of rent, or of taxes or assessments, he may effect a stay by depositing the amount of the rent due or of such taxes or assessments, and interest and

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penalty, if any thereon due, and the costs of the special proceeding, with the clerk of the court, or where the office of clerk is not provided for, with the court, who shall thereupon, upon demand, pay the amount deposited to the petitioner or his duly authorized agent; or by delivering to the court or clerk his undertaking to the petitioner in such sum as the court approves to the effect that he will pay the rent, or such taxes or assessments, and interest and penalty and costs within ten days, at the expiration of which time a warrant may issue, unless he produces to the court satisfactory evidence of the payment.

Simply stated, where a tenant, against whom a nonpayment proceeding is pending, deposits the full amount of the rent due together with costs with the clerk of the court prior to the issuance of the warrant of eviction, the deposit stays the issuance of the warrant. See, Stevens v. Roberts, 183 Misc.2d 174 (County Ct. Monroe County 1999); Everett D. Jennings Apts. L.P. v. Hinds, 12 Misc.3d 139(A) (App. Term 2nd & 11th Jud. Dists. 2006); 114 East 84th Street Associates v. Albert, 128 Misc.2d 753 (N.Y. City Civ. Ct. 1985).

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Although RPAPL §751(1) provides a tenant with a self help means to effect a stay of the issuance of a warrant by depositing all rents due and costs with the clerk of the court, this section does not prohibit the tenant from seeking a stay and an eventual vacatur of the warrant after the warrant has been issued. In fact, after a warrant has been issued in a nonpayment proceeding, a stay of the warrant under RPAPL §751(1) is no longer viable. See, Everett D. Jennings Apts. L.P. v. Hinds, *supra*. But does that mean that a tenant is foreclosed from seeking a stay of the warrant by other means? No.

In the case at bar, the Landlord argues that since the Respondent did not deposit all of the rents due including costs with the clerk of the court before the issuance of the warrant in this case, the Respondent is precluded from seeking and obtaining a stay. See, *Affirm. of C. Davis*, ¶3. This argument is misplaced. As previously stated, a court may stay the execution of a warrant of eviction pursuant to CPLR §2201, which permits stays “in a proper case, upon such terms as may be just,” even though the tenant has not paid rent and court costs as required for a stay under RPAPL §751. See, Canigiani v. Deptula, 59 Misc.2d 401, 299 N.Y.S.2d 234 (Dist. Ct. 1969). A court’s power to grant a stay of execution of a warrant in a particular case is not derived solely from the RPAPL §751 et seq., but from CPLR §2201 and UCCA §212. See, Pepsi-Cola Metropolitan Bottling Co., Inc., v. Miller, 50 Misc.2d 40 (N.Y. City

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Civ. Ct. 1966); Novick v. Hall, 70 Misc.2d 641 (N.Y. City Civ. Ct. 1972)(Court stated that it is not divested of power to vacate or to extend a stay after issuance of warrant of eviction).

Hence, the Landlord's argument that the Respondent was neither entitled to request nor was the Court permitted to grant a stay of execution of the warrant in this case is wholly without merit. *Id.*

Interestingly, the Landlord did not cite any case law authority to support his argument that the Respondent was not entitled to a stay of execution of the warrant or that the Court was prohibited from granting a stay of execution of the warrant in this matter. Further, it is abundantly clear that not only does the Court have the inherent authority (Novick v. Hall, *supra*) and the statutory authority (203 East 13th St. Corp. v. Lechycky, *supra*; Canigiani v. Deptula, *supra*) to stay execution of the warrant of eviction, but also the authority to vacate a warrant of eviction for "good cause" shown. See, Harvey v. Bodenheimer, *supra*; Brusco v. Braun, *supra*.

The Court finds that the Respondent's representation that she recently found employment after being out of work due to medical leave and her representation that she is now in possession of the \$2025.00 judgment sum warrants the employment of equity in her favor. Affid. of N. Harding, No. 12; Tenant's Answer, No. 7. See, Errigo v. Diomede, 14 Misc.3d 988 (N.Y City Civ. Ct. 2007) (decision stated general view that

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courts abhor forfeiture of leasehold estate as a result of the dire consequences that a tenant is faced with when forced to vacate premises). The Landlord has not adequately articulated how he would be greatly prejudiced by any stay of or eventual vacatur of the warrant of eviction in this matter. Affirm. C. Davis, ¶5.

To the extent that the Respondent seeks a vacatur of the money judgment herein, said request is denied as the Respondent has not presented the Court with any basis for doing so.

Accordingly, as a matter of discretion and in the interest of justice, the Court grants the Order to Show Cause herein to the extent that the warrant of eviction is stayed to August 21, 2015 on condition that the Respondent tenders to the Landlord's attorney the sum of \$2025.00⁸ by certified check or money order by that date. If the Respondent tenders the aforementioned sum on or before the aforementioned date, the warrant of eviction is vacated since the money judgment will have been satisfied. If the Respondent fails to tender said sum to the Landlord's attorney by the aforementioned date, the Order to Show Cause is denied.

Any request for relief not addressed by this decision is denied.

Based on the foregoing, it is

Ordered that the Order to Show Cause is granted to the extent that the Respondent is directed to tender the sum of \$2025.00 by certified

⁸ The Landlord's request to amend the judgment to include \$2800.00 (\$1400.00 for the months of

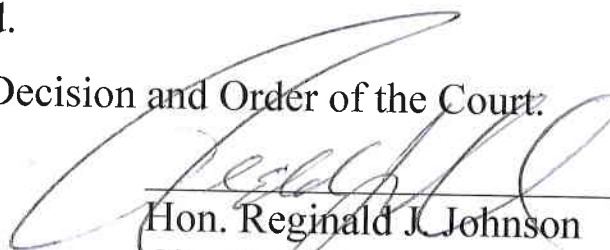
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check or money order to the Landlord's attorney no later than Friday, August 21, 2015;

Ordered that if the Respondent tenders the sum of \$2025.00 to the Landlord's attorney on or before Friday, August 21, 2015, the warrant of eviction is vacated;

Ordered that if the Respondent fails to tender the sum of \$2025.00 to the Landlord's attorney on or before Friday, August 21, 2015, the Order to Show Cause is denied.

The foregoing constitutes the Decision and Order of the Court.


 Hon. Reginald J. Johnson
 City Court Judge

Dated: Peekskill, NY
 August 12, 2015

Judgment entered in accordance with the foregoing on this ____ day of August, 2015.

 Concetta Cardinale
 Chief Clerk

To: Clifford L. Davis, Esq.
 Attorney for Petitioner-Landlord
 202 Mamaroneck Ave, Third Floor
 White Plains, New York 10601-5301
 (914) 761-1003

July and August 2015) is denied.

Nicole Harding
Respondent-Tenant
630 North Division Street, Apt. 3B
Peekskill, New York 10566