Soriano v New York State Off. of Temporary & Disability Assistance
2021 NY Slip Op 31351(U)
April 22, 2021
Supreme Court, New York County
Docket Number: 450315/2021
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** IAS MOTION 47EFM

Justice

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MAOLI SORIANO, SHEALEAN SMITH

Plaintiffs,

- v -

NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE, MICHAEL P. HEIN, AS COMMISSIONER OF THE NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE,

Defendants.

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INDEX NO. 450315/2021

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56

were read on this motion to/for MISCELLANEOUS.

Plaintiffs move by order to show cause for an order certifying this action as a class action pursuant to Article 9 of the CPLR on behalf of all individuals residing in New York City who would be eligible to receive rental assistance through the Family Homelessness and Eviction Prevention Supplement (FHEPS) program but for the fact that they have not been sued in Housing Court and for a preliminary injunction pursuant to CPLR § 6301 restraining defendants from denying plaintiffs and all putative class members rental assistance through the FHEPS program on the basis that they have not yet been sued in Housing Court for nonpayment of rent for the duration of the COVID-19 pandemic. Plaintiffs brought this declaratory judgment action seeking a declaration that defendants have violated certain sections of the New York Social Services Law (SSL) and the New York State and the United States Constitutions. Plaintiffs seek to enjoin defendants from denying eligible families access to FHEPS benefits by enforcing the

"the lawsuit requirement" for those benefits at least for the duration of the COVID-19 pandemic (NYSCEF Doc No ¶ 84).

BACKGROUND

Local social service districts (districts) are responsible for providing public assistance (PA) to individuals and families within their district (SSL § 62[1]). Districts determine eligibility by applying statewide standards of monthly need as set forth in OTDA's regulations (18 NYCRR § 352.1). The district in New York City is the New York City Department of Social Services (DSS)[1]. PA grants include allowances for shelter (NYCRR § 352.2) and for families receiving Family Assistance (FA) which operates under federal Temporary Assistance for Needy Families guidelines the shelter "[a]llowances shall be adequate to enable the father, mother or other relative to bring up the child properly, having regard for the physical, mental and moral well-being of such child" (SSL § 350[a][1]).

The FHEPS program was developed to settle a class action lawsuit, *Tejada v Roberts*, (NY Co SC Index No 453245/15) on behalf of FA recipients with children in New York City. The class action alleged that the shelter and rent supplement allowances for FA recipients were inadequate. Under the terms of the stipulation of settlement OTDA agreed to replace the New York City Human Resources Administration's (HRA) Family Eviction Prevention Rent Supplement program with the FHEPS A Rent Supplement Plan to resolve the issue of adequacy of rental supplement allowances (NYSCEF Doc No 35 ¶17). To obtain benefits under the FHEPS program a family must demonstrate that : (i) at least one minor child lives in the household, (ii) at least one family member in the household receives public assistance, (iii) the family has a lease for at least one year or an apartment subject to rent regulation, (iv) the

[1] The New York City Human Resources Administration is an administrative unit within DSS (NYSCEF Doc No 32 at Fn 1).

family's rent arrears do not exceed $9,000 and (v) the family has been sued for eviction in Housing Court for failure to pay rent [the lawsuit requirement] (NYSCEF Doc No 12 at 1–2, 6).

Plaintiffs seek a preliminary injunction restraining enforcement of the lawsuit requirement on the grounds that defendants' enforcement of it violates their duty to provide an adequate shelter allowance because by the time eviction proceedings resume[2], many families will have become ineligible for FHEPS since their rent arrears will have exceeded the $9,000 limit (NYSCEF Doc No 9).

By letter dated March 2, 2021 OTDA advised plaintiffs that in light of the moratorium on new eviction proceedings contained in the EEFPA it would waive the lawsuit requirement until at least May 1, 2021 or until such time as the eviction moratorium is no longer in effect (NYSCEF Doc 37). Defendants argue in light of the waiver, plaintiffs' preliminary injunction request is now moot (NYSCEF Doc No 32 at 17-18). Plaintiffs counter that their request is not moot because, inter alia, they requested a stay for the pendency of this case and defendants' waiver does not offer relief to those who will be subject to eviction on May 2, 2021 whose arrears now exceed the $9,000 limit for FHEPS benefits.

DISCUSSION

Class Certification

The class action statute should be liberally construed (*Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 21 [1st Dept 1991]) and provides that a class action may be maintained if:

> (1) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4)

[2] On December 28, 2020 the State enacted the COVID-19 Emergency Eviction and Foreclosure Prevention Act (EEFPA) which established a moratorium on all evictions based on nonpayment of rent through February 26, 2021 and further prohibits through May 1, 2021 nonpayment eviction proceedings against tenants wo submit hardship declarations (2020 NY SB 9114 §§2 & 4).

> the representative parties will fairly and adequately protect the interests of the class; [and] (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy

(CPLR 901 [a]). Once these prerequisites are satisfied, the factors in CPLR 902 must be considered (*Ackerman v Price Waterhouse*, 252 AD2d 179, 191 [1st Dept 1998]).

A plaintiff must establish by competent evidence the requirements set forth in CPLR 901 and 902 for obtaining class certification (*see Ackerman*, 252 AD2d at 191) but a trial court has broad discretion in determining whether a matter qualifies as a class action (*Rabouin v Metropolitan Life Ins. Co.*, 25 AD3d 349, 350 [1st Dept 2006]).

Pursuant to CPLR § 902 plaintiffs' motion for class certification is premature. CPLR § 902 provides in relevant part that plaintiffs shall move for class certification within sixty days "after the time to serve a responsive pleading has expired for all persons named as defendants." The court signed plaintiffs' order to show cause on February 18, 2021 and defendants time to serve a responsive pleading was by March 11, 2021 which was then extended by stipulation to April 1, 2021. Therefore, plaintiffs' motion for class certification was premature since it was made before defendants' time to serve their answer had expired (*David B. Lee & Co. v Ryan*, 266 AD2d 811, 812 [4th dept 1999]). While plaintiffs are correct that this timing irregularity may be disregarded (*id.*), defendants have since moved to dismiss the complaint on various grounds (NYSCEF Doc No 57) and resolution of that motion may moot the class certification issue.

Accordingly, that branch of plaintiffs' order to show cause seeking class certification will be denied without prejudice to renew after a decision and order are issued on defendants' motion to dismiss (*id. cf Dabrowski v ABAX, Inc.*, 64 AD3d 426, 427 [1st Dept 2009]).

Preliminary Injunction

"A preliminary injunction is an extraordinary provisional remedy which will only issue where the proponent demonstrates (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) a balance of equities tipping in its favor" (*Harris v Patients Med., P.C.*, 169 AD3d 433, 434 [1st Dept 2019]).

In support of their preliminary injunction request, plaintiffs submit affidavits from each named plaintiff. Each plaintiff states that she owes rental arrears, is in need of rental assistance and that she would be eligible for the FHEPS program but has been prevented from applying because she has not been sued by her landlord (NYSCEF Doc Nos 20 and 21 ¶¶ 8 & 9).

Defendants argue that plaintiffs' request for a preliminary injunction is now moot in light of the March 2, 2021 waiver of the lawsuit requirement (NYSCEF Doc No 32 at 10). In reply, plaintiffs aver that their request is not moot because their request for a preliminary injunction is for the duration of this court case and defendants' waiver of the lawsuit requirement is only in effect until May 1, 2021 and as of May 2nd without a preliminary injunction there will be no protection for plaintiffs [or any putative class member] (NYSCEF Doc No 53 at 3).

Plaintiffs request for a preliminary injunction is indeed moot. Plaintiffs state that they would have applied for FHEPS benefits but for the lawsuit requirement, as of March 2nd that requirement is waived. Plaintiffs can now apply for FHEPS benefits. Notwithstanding the waiver of the lawsuit requirement plaintiffs reply affidavits dated March 22, 2021 (Soriano at NYSCEF Doc No 52) and March 23, 2021 (Smith at NYSCEF Doc No 51) do not indicate whether they applied for FHEPS benefits after defendants issued the waiver. Because plaintiffs received the relief they need to apply for FHEPS benefits their request for a preliminary injunction is now moot (*See, e.g. In re Javier R.*, 43 AD3d 1, 3 [1st Dept 2007]).

Plaintiffs also argue in reply that their arrears now exceed the $9,000 limit on rental arrears making them ineligible for FHEPS benefits (NYSCEF Doc No 53 at 4). Significantly, neither plaintiff states the amount of her rental arrears in her initial affidavit. It is only in their reply affidavits that each of the plaintiffs states the amount of her arrears. Plaintiff Maoli Soriano states in her reply affidavit that when she first sought rental assistance her arrears were under $9,000 but now her arrears are $13,046.71 through March 31, 2021 (NYSCEF Doc No 52 ¶ 3). Plaintiff Shealean Smith states in her reply affidavit that when she first sought rental assistance her arrears were under $9,000 but are now $11,292.46 through March 31, 2021 (NYSCEF Doc No 51 ¶ 3). However, plaintiffs did not request an increase in the rental arrears limit, they only requested an order enjoining the enforcement of the lawsuit requirement.

"The court may grant relief that is warranted pursuant to a general prayer for relief contained in a notice of motion if the relief granted is not dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party" (*USAA Fed. Sav. Bank v Calvin*, 145 AD3d 704, 706 [2nd Dept 2016]). Increasing the rental arrears limit above $9,000 would be "dramatically unlike" the relief sought in the order to show cause. Moreover, "[t]he function of reply papers is to address arguments made in opposition to the motion the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion" (*All State Flooring Distribs., LP v MD Floors, LLC*, 131 AD3d 834, 836 [1st Dept 2015]). Plaintiffs' reply papers include new arguments, grounds and evidence in support of their order to show cause, and expressly requests relief that is dramatically unlike the relief sought in the original motion and are therefore, not properly before the court (*Calvin*, 145 AD3d at 706).

Moreover, plaintiffs do not dispute that DSS has the discretion to increase the rental arrears cap on a case-by-case basis (NYSCEF Doc No 35 ¶ 26). Yet neither plaintiff states in her reply affidavit that she applied for FHEPS after OTDA issued the waiver of the lawsuit requirement and was rejected because her arrears exceeded the $9,000 limit (NYSCEF Doc Nos 52 & 51). Even if the newly proffered arguments, evidence and grounds contained in plaintiffs reply papers were considered, they have failed to show they were rejected for FHEPs after OTDA issued the waiver of the lawsuit requirement, therefore, they have failed to establish any imminent and non-speculative harm that would befall them in the absence of the preliminary injunction (*Family-Friendly Media, Inc. v Recorder Tel. Network*, 74 AD3d 738, 740 [2nd Dept 2010]).

Accordingly, that branch of plaintiffs' order to show cause seeking a preliminary injunction will be denied.

CONCLUSION

Based on the foregoing it is,

ORDERED that that branch of plaintiffs' order to show cause seeking class certification is denied without prejudice; and it is further

ORDERED that that branch of plaintiffs' order to show cause for a preliminary injunction is denied.

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4/22/2021
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE