

Lai v Muamba

2022 NY Slip Op 31763(U)

June 3, 2022

Supreme Court, New York County

Docket Number: Index No. 154278/2021

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

INDEX NO. 154278/2021

DAVID LAI,

Plaintiff,

MOTION SEQ. NO. 002

- v -

CONSTANTIN MUAMBA, DENA MULLER, JOHN DOE,
JANE DOE

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75

were read on this motion to/for SUMMARY JUDGMENT.

In this action seeking, inter alia, declaratory relief, plaintiff/landlord David Lai moves, pursuant to CPLR 3212, for summary judgment against defendants/tenants Constantin Muamba and Dena Muller. Defendants oppose the motion and cross-move, inter alia, for an order pursuant to CPLR 3212, denying plaintiff’s motion for summary judgment and granting them a judgment restoring them legal and actual possession of apartment 3 at 33 West 127th Street in Manhattan (“the premises” or “the apartment”), which they rented from plaintiff. Plaintiff opposes the cross motion. After consideration of the parties’ contentions, as well as a review of the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case are set forth in detail in the decision, judgment and order of this Court entered October 28, 2021 (“the 10/28/21 order”). Doc. 32. In the 10/28/21 order, which granted plaintiff’s previous motion for summary judgment in part, this Court, among other things:

- 1) denied the branch of plaintiff's motion seeking a judgment of possession and writs of assistance as against defendants without prejudice to re-file when the moratorium/stay on evictions then in effect expired;
- 2) denied the branch of plaintiff's motion seeking reimbursement of attorneys' fees he incurred in this action without prejudice to re-file after defendants were evicted from the premises and the total amount of such fees could be calculated;
- 3) granted the branch of plaintiff's motion seeking a declaration that the lease between plaintiff and defendants was terminated as of March 31, 2021;
- 4) awarded a money judgment against defendants in the total amount of \$44,950, representing unpaid monthly rent from April 1, 2020 (the date on which defendants stopped paying rent) until March 31, 2021 (the day the defendants' lease was canceled) in the amount of \$23,250, as well as use and occupancy from April 1, 2021 until October 31, 2021, in the amount of \$21,700, plus pre-judgment interest from April 1, 2020, costs, and disbursements to be calculated by the Clerk; and
- 5) Directed defendants to pay plaintiff the sum of \$44,950 by December 1, 2021, and, commencing November 1, 2021, to pay use and occupancy to plaintiff in the amount of \$3,100 per month on a foregoing basis, *pendente lite*.

Defendants did not move to reargue the order and did not appeal the same, and their time to do so has expired.

On or about November 16, 2021, the New York State Emergency Rental Assistance Program ("ERAP") advised defendant Muamba that he was "provisionally approved" for emergency rental assistance. Doc. 46. The notice further advised that if Muamba's landlord (plaintiff) did not provide certain documentation regarding arrears owed within 180 days, "funds in the amount provisionally approved will no longer be held, and after 12 months, the maximum amounts may be deemed waived by [plaintiff]." Doc. 46. Additionally, the notice read that, if plaintiff "refuse[d] to cooperate within the 180 days, [Muamba would] continue to be protected after the 180 days. [Plaintiff] cannot evict you or get a money judgment against you for the months covered by this notice." Doc. 46. ERAP also represented that it had sent a notice to plaintiff to advise him of the provisional approval. Doc. 46.

On November 16, 2021, plaintiff wrote to defendants to advise them that he would not be participating in the ERAP program. Doc. 47.

It is undisputed that the moratorium on residential evictions expired on January 15, 2022. Almost immediately thereafter, on February 4, 2022, plaintiff moved, pursuant to CPLR 3212, for an order:

- a) Pursuant to CPLR 3212, granting him summary judgment on his first cause of action for an order and judgment of ejectment restoring him legal and actual possession of the premises;
- b) Issuing a writ of assistance in favor of plaintiff and against defendants directing that defendants be removed from the premises and that possession be immediately restored to him; and
- c) For such other and further relief as this Court deemed just and proper.¹

Doc. 35.

In support of the motion, plaintiff argues that, since he was granted leave to renew his motion for summary judgment when the moratorium on evictions expired, and the said moratorium expired on January 15, 2022, he is now entitled to seek a judgment of ejectment and possession and writs of assistance enabling him to remove defendants from the premises. Doc. 36.

Defendants oppose the motion, arguing that, since Muamba applied for Emergency Rental Assistance Program (“ERAP”)² benefits, he cannot be evicted from the premises. Doc. 40. They further assert, in effect, that plaintiff is not entitled to summary judgment since he has created an undue hardship for them by failing to participate in the ERAP program. Doc. 40. Additionally, defendants assert that they are entitled to a credit for any amount of fair use and occupancy they

¹ The notice of motion reflected that the application was to be returnable on February 16, 2022 and that any cross motion was to be served at least two days prior to the return date. Doc. 35. The motion was then adjourned by stipulation until February 25, 2022, with the proviso that any answering papers be served on plaintiff by February 18, 2022. Doc. 39.

² ERAP was codified at L. 2021, c. 56, part BB, amended by L. 2021, c. 417, Part A.

owe since plaintiff breached the warranty of habitability by failing to remediate a hazardous mold condition at the premises. Doc. 40.

In reply, plaintiff asserts that defendants are not entitled to a stay of their eviction based on their ERAP application since they did not move for this relief. Doc. 41. Even if defendants did move for a stay, argues plaintiff, he was still entitled to possession of the premises. Doc. 41. Plaintiff concedes that he did not provide the information requested by ERAP but insists that he did not do so “due to the express restrictions and waivers of rights involved.” Doc. 41.

In a memorandum of law in support of the motion, plaintiff argues that defendants are not entitled to any further stay of this action. Doc. 42. He maintains, inter alia, that defendants have failed to provide any documentation reflecting that they are entitled to protection by ERAP and that, if there is a question regarding their eligibility for the program, this Court conduct should conduct a hearing on this issue. Doc. 42. Further, plaintiff insists that, if a stay is granted, defendants must be directed to post a bond for the amount of outstanding rent and use and occupancy. Doc. 42.

On March 7, 2022, defendants filed a cross motion seeking an order:

- a) Pursuant to CPLR 3212, denying plaintiff’s motion for summary judgment on his first cause of action, which seeks an order and judgment of ejectment restoring legal and actual possession of the premises to plaintiff;
- b) Denying plaintiff damages for past due rent, a/k/a “fair use and occupancy”, due to his refusal to accept reimbursement pursuant to ERAP; and
- c) Granting damages to defendants due based on plaintiff’s breach of the warranty of habitability, specifically his failure to prevent mold from forming at the premises and also failing to remediate the problem.

Doc. 44.

Filed concomitantly with defendant’s cross motion is a document entitled “Affirmation of Attorney in Support of Cross Motion [and] in Opposition to Motion for Summary Judgment”, in

which defendants assert that they cannot be evicted because they were awarded an ERAP grant; plaintiff failed to maintain the premises in a safe condition; and plaintiff engaged in a pattern of harassment by, inter alia, refusing to accept the money offered by ERAP. Doc. 50. However, since these arguments are responsive to plaintiff's motion for summary judgment, this document is actually an improper sur-reply affirmation which is hereby disregarded.³ Defendants also argue that this Court erred by granting summary judgment to plaintiff in the 10/28/21 order because plaintiff failed to establish that he served them with a hardship declaration along with the notice to terminate their tenancy. However, since defendants did not move to reargue that order, and did not appeal from the same, the findings therein are now law of the case.

Defendants also submit a document written by Muller and entitled "Defendant's [sic] Supplemental Affidavit in Opposition to the Plaintiff's Motion for Summary Judgment and In Support of Cross Motion." Doc. 45. This document is also rejected insofar as opposes plaintiff's motion, having been submitted after the return date thereof, and is, in essence, a sur-reply affirmation. Annexed to the affirmation is a memorandum from Hon. Lawrence K. Marks, dated January 16, 2022, in which he states, inter alia, that "[e]viction matters with a related pending ERAP application continue to be stayed until a final determination of eligibility for rental assistance is issued by the Office of Temporary and Disability Assistance (OTDA)." Doc. 51. Muller reiterates her argument that defendants are entitled to a credit due to plaintiff's breach of the warranty of habitability. Doc. 45. In support of this argument, she submits an unsworn report by Joshua Mickens of HEMC Environmental, LLC ("HEMC"), dated September 9, 2021, who represents that there was mold at the premises. Docs. 45, 49.

³ The document is also untimely, having been filed March 7, 2022, after the stipulated submission date of February 26, 2022.

In an affidavit in opposition to the cross motion, plaintiff asserts that, during the preceding four years, defendants never advised him of any unsafe condition in their apartment but merely advised him that a washing machine needed to be replaced. Doc. 54. Although defendants had HEMC inspect their apartment in September 2021, they did not advise him of this fact until they disclosed the company's report during the instant motion practice. Doc. 54. Plaintiff further asserts that defendants' ERAP application does not prevent him from seeking an eviction since his inability to do so would lead to the absurd result of leaving defendants in possession despite the fact that their tenancy has been terminated. Doc. 54.

In an affirmation in opposition to the cross motion, plaintiff's counsel argues that the cross motion is: untimely; in effect, an improper attempt at a sur-reply; and is an improper attempt to reargue plaintiff's initial motion for summary judgment. Plaintiff's counsel further asserts that the cross motion does not seek any affirmative relief; that defendants are not entitled to a stay based on ERAP; and that defendants failed to establish a breach of the warranty of habitability. Doc. 55.

On March 21 and 24, 2022, defendants filed documents entitled "Defendant's [sic] Supplemental Affidavit in Opposition to the Plaintiff's Motion for Summary Judgment and In Support of Cross Motion." Docs. 61 and 72. In these affidavits, written by Muller, defendants argue, inter alia, that plaintiff knew about issues relating to plaintiff's breach of the warranty of habitability, including the mold problem in their apartment, as early as 2018. Docs. 61 and 72. They further assert that they are entitled to an automatic stay due to their application for ERAP funds. Docs. 61 and 72. To the extent this document is a sur-reply in further opposition to plaintiff's motion for summary judgment, it is clearly untimely.

In a "Supplemental Affirmation of Attorney in Support of Cross Motion [and] in Opposition to Motion for Summary Judgment", defendants' attorney argues that the cross motion

was untimely due to personal issues he had to address and he requests that defendants be granted leave to re-file the cross motion in a timely fashion. Doc. 74. Counsel further asserts that “the equitable administration of justice” requires this Court to know about plaintiff’s breach of the warranty of habitability and that defendants are not trying to reargue plaintiff’s initial motion for summary judgment. Doc. 74.

LEGAL CONCLUSIONS

Plaintiff’s Motion For Summary Judgment

Plaintiff is not entitled to a judgment of possession or writ of assistance at this time since the defendants’ eviction is stayed by their ERAP application. Section 8 of subpart A of part CC of chapter 56 of the law of 2021 provides, inter alia, that, with certain exceptions inapplicable here, “any pending eviction proceeding, whether filed prior to, on, or after the effective date of this act . . . shall be stayed pending a determination of eligibility [for ERAP benefits].” Thus, “[t]he plain language of the statute clearly indicates that any pending ERAP application stays a proceedings [sic] until an eligibility determination is made” (*Sea Park E. L.P. v Foster*, 74 Misc 3d 213, 216 [Civ Ct, New York County 2021]). Additionally, the automatic stay is triggered where a tenant seeks “funds to cover all or part of the arrears claimed by the petitioner.” (*Papandrea-Zavaglia v Hernandez-Arroyave*, ___Misc 3d___, 2022 NY Slip Op 22109, *3 [Civil Court Kings County 2022]). Here, as noted previously, Muamba was advised that he had been provisionally approved for ERAP benefits. Therefore, plaintiff’s motion is again denied without prejudice to renew once a final determination of eligibility has been made.

Although plaintiff relies, inter alia, on *Actie v Gregory*, 74 Misc3d 1213(A) (Civ Ct Kings County 2022) in support of his argument that defendants are not entitled to a stay, his reliance is misplaced and somewhat disingenuous. In *Actie*, the court indeed stated that, “even if respondents’

ERAP application is approved and petitioner accepted the funds, the payment of funds through the ERAP program would not reinstate the landlord-tenant relationship” and that “[c]onsequently, allowing the stay to continue is an exercise in futility and prejudicial to petitioner.” However, in *Actie*, the court noted that the petitioner sought to avail himself of section 8(iv) of ERAP, which provides that a property owner who accepts ERAP payment for rent or arrears “may decline to extend the lease or tenancy if the landlord intends to immediately occupy the unit for the landlord’s personal use as a primary residence or the use of an immediate family member as a primary residence.” Here, plaintiff did not represent that he intended to use the apartment for such purpose. Additionally, plaintiff makes it clear that, although ERAP might be able to reimburse him for at least a portion of defendants’ arrears, he refused to provide it with the documentation needed to entitle him to this money because it would allow defendants to remain in possession “for a full year against [his] will.” Doc. 54 at par. 18.

Defendants’ Cross Motion for Summary Judgment

Although defendants’ cross motion was filed after the return date of plaintiff’s motion, and was thus untimely, this Court will consider the same since the issues raised therein are related to those in the main motion (*See Belgium v Mateo Prods., Inc.*, 138 AD3d 479, 480 [1st Dept 2016]).

Since plaintiff’s motion for summary judgment is denied without prejudice, the branch of defendants’ cross motion seeking the denial of plaintiff’s motion is denied as moot.

Defendants submit no authority for their argument that they are not required to pay past due rent or use and occupancy simply because plaintiff refuses to cooperate with, or participate in, ERAP. On the contrary, a landlord “may elect to not participate in the ERAP program so long as it is willing to accept the financial repercussions of declining [to do so]” (*178 Broadway Realty Corp. v Charles*, ___ Misc 3d ___, 2022 NY Slip Op 22164, *3 [Civil Court Kings County, May

23, 2022]). Thus, this Court denies the branch of defendants' motion which, in effect, seeks to prevent plaintiff from obtaining such relief.

Finally, the branch of defendants' cross motion seeking damages from plaintiff based on the latter's alleged breach of the warranty of habitability is denied insofar as they have failed to adduce any competent and/or admissible proof of such breach. The environmental report they submit is unsworn and, in any event, was not written until after the complaint in this action was filed.

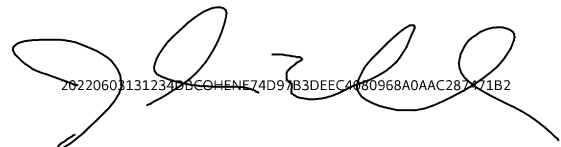
The remainder of the parties' contentions are either without merit or need not be addressed given the conclusions reached above.

Accordingly, it is hereby:

ORDERED that the motion by plaintiff David Lai, seeking summary judgment pursuant to CPLR 3212 on its first cause of action (ejectment) is denied without prejudice to renew upon the expiration of the automatic stay in effect pursuant to ERAP; and it is further

ORDERED that the cross motion by defendants Constantin Muamba and Dena Muller is denied in all respects.

6/3/2022
DATE



DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: