

Cook v Wittreich

2022 NY Slip Op 32915(U)

July 26, 2022

Civil Court of the City of New York, Queens County

Docket Number: L&T Index No. 54283/20

Judge: Clifton A. Nembhard

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This opinion is uncorrected and not selected for official publication.

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART B

<p>JEANINE COOK Petitioner-Landlord</p> <p>-against-</p> <p>JAMES WITTREICH 86-81 77TH Street All rooms, 2nd Floor, Rear Apartment Woodhaven, New York 11421 Respondent-Tenant</p> <p>CHRISTINE DINICOLANTONIO "JOHN DOE" and "JANE DOE" Respondents-Undertenants</p>
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L&T Index #54283/20

DECISION/ORDER

Hon. Clifton A. Nembhard

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of petitioner’s motion.

Papers	Numbered
Notice of Motion and Affidavits Annexed	
Order to Show Cause and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	

Upon the foregoing cited papers, the decision/order on this order to show cause to vacate the ERAP stay is as follows:

Petitioner Jeanine Cook commenced the underlying month-to-month holdover proceeding on March 6, 2020. On May 13, 2021, petitioner filed a motion seeking an inquest, entry of final judgment of possession and a monetary judgment for all arrears through May 2021 in the sum of \$17,100.00 amongst other relief. The motion was calendared and adjourned several times. Respondent James Wittreich then filed a hardship declaration on July 27, 2021. The matter was moved to the Court’s administrative calendar. Upon the expiration of CEEFPA the matter was calendared for April 19, 2022. Respondent then filed an ERAP application, and the matter was once again moved to the Court’s administrative calendar. Petitioner filed an order to show cause seeking to vacate the ERAP stay, entry of a final judgment of possession and the issuance of a warrant of eviction. Respondent filed opposition papers and the court heard oral argument on June 21, 2022.

Petitioner argues the ERAP stay is not applicable in this matter because of alleged nuisance behavior since the service of the preliminary notices. Petitioner informs the court they are no longer interested in seeking use and occupancy and that the landlord tenant relationship terminated upon service of the notice of termination. Petitioner avers the respondent is not eligible for the program as respondent continued to work through the pandemic. Petitioner argues that this is a unique case because of the issued order of protection.

Respondent opposes the motion arguing that the ERAP stay should remain in effect because the proceeding was not commenced as a nuisance holdover, and the allegations are conclusory, baseless, and false. Respondent argues they would be eligible for ERAP payment as he had reduced hours during the pandemic but that this court does not have the power to decide eligibility. Finally, even though petitioner no longer seeks use and occupancy the filed petition did.

The court finds that although there may be a colorable claim of nuisance type behavior, the ERAP stay in this proceeding must remain in effect. *Sec. 8 of subpart A of part BB of Chapter 56 of the Laws of 2021 as modified by L. 2021, c. 417.* requires a stay in a holdover action commenced as an expired lease holdover, as is the case in this proceeding. The statute applies irrespective of whether the application was filed prior to or after the commencement of the action. The stay remains in effect until a determination of eligibility has been made. The statute carves out an exception for cases that fall within section nine-a of the act. Section nine-a of the act permits the commencement of a holdover, notwithstanding an ERAP application where a “tenant intentionally causes significant damage to the property or is persistently and unreasonably engaging in behavior that substantially infringes on the use and enjoyment of other tenants or occupants or causes a substantial safety hazard to others.” In this situation the Petitioner is required to file an affidavit attesting to the allegations along with the petition. Here, petitioner alleges the nuisance commenced after the service of the pleadings. Section nine-a subsection 2 requires that in pending holdovers where petitioner did not previously allege the pertinent nuisance behavior, the petitioner is required to file a new petition with such allegations and comply with all notice and service requirements. Petitioner is not without available remedy, as they may commence a new proceeding following the required steps of the statute.

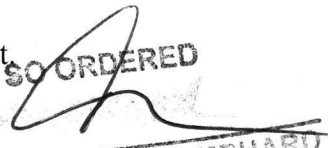
Petitioner’s argument that the ERAP stay should be lifted as they are only seeking a judgment of possession and are not interested in use and occupancy is without merit. The petitioner’s pleadings set forth the existence of a landlord-tenant relationship, which would entitle petitioner to use and occupancy. Moreover, not only does the petition seek use and occupancy but the motion filed by petitioner on May 13, 2021, also seeks a monetary judgment for all use and occupancy owed to date.

Petitioner also contends that the applicant would not be eligible for the program as they were employed throughout the pandemic, respondent alleges their income was reduced. This is not a determination to be made by this court. The court is not presented with a question of whether the applicant would be a person eligible for a stay under the statute, but instead is the person eligible for the program based on their financial status. The duty to make this type of determination falls on the Office of Temporary and Disability Assistance (OTDA) not this court. *Carbrook Assoc. v. Farhang, L & T# 71923-19 (Civ Ct, Kings Co, Feb 22, 2022) 204 W. 55 Street LLC v. Mackler,*

et. al. NY Slip Op 32901(u) (Civ Ct, New York Co Dec. 2, 2021). To make this determination the court would require an inquiry into the applicant's financial history. The plain language reading of the statute does not permit this court to undertake such investigation. *Matter of Raynor v. Landmark Chrysler* 18 N.Y.3d 48 (CT. of App. 2011)

Based on the foregoing, the order to show cause is denied, and the matter will remain on the ERAP administrative calendar pending an OTDA determination.

This constitutes the decision and order of the Court.

SO ORDERED

CLIFTON A. NEMBHARD

Date: July 26, 2022
Queens, New York

Hon. Clifton A. Nembhard, JHC