

Nartov v 137 Rivington, LLC
2022 NY Slip Op 33947(U)
November 22, 2022
Supreme Court, New York County
Docket Number: Index No. 159588/2019
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN

PART 58

Justice

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INDEX NO. 159588/2019

YURIY NARTOV, MARGARET KIEU, HANNAH MENSCH,
TAL S. KESTENBERG, FRED EGLER, EMILY RUSSELL,
ERIC BARTHOLOMAE, and SHEEZAN BAKALI,

MOTION SEQ. NO. 004

Plaintiffs,

- v -

137 RIVINGTON, LLC and 137 RIVINGTON STREET LLC,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 106, 107, 109, 111, 112, 113

were read on this motion to/for AMEND/MODIFY DECISION/ORDER/JUDGMENT .

Plaintiffs' move to "take into account" defendant's alleged receipt of Covid-19 Emergency Rental Assistance Program ("ERAP") payments from the State of New York (motion sequence no. 004) and defendant's cross motion (erroneously identified on defendant's notice of cross motion as motion sequence no. 005) to set the amount of a money judgment against plaintiffs. For the reasons stated below, this Court grants plaintiffs' motion and denies defendant's cross-motion.

FACTUAL AND PROCEDURAL BACKGROUND

This is an action by eight tenants at 137 Rivington Street to recover for alleged rent overcharges for what they say was an improper effort by defendant, 137 Rivington Street LLC, and defendant's predecessor owner, 137 Rivington, LLC, to decontrol plaintiffs' apartments from rent stabilization by incorrectly asserting that the apartments had major capital improvement upgrades. Defendants moved for summary judgment. This Court granted their motions in part,

dismissing plaintiffs' cause of action for business fraud under Section 349 of the General Business Law; claims against the prior owner, 137 Rivington, LLC because the current owner was liable for rent overcharge claims; and otherwise denying the motions (Doc. 63). Defendant then moved to obtain payment for use and occupancy pendente lite, which this Court granted (Doc. 88). Familiarity with these prior decisions is assumed.

While there are eight named plaintiffs in the caption, there were only five apartments originally at issue (B, 2, 3, 9 and 11), and only three of those remain relevant to the issues herein. Eric Bartholomae vacated Apartment B in July 2019, and Fred Egler and Emily Russell vacated Apartment 9 in September 2020. (Dwork Aff., ¶¶37-43, Doc. 17)

In the case of Sheezan Bakali, in Apartment 2, the monthly rent was \$2750; the Court set reasonable use and occupancy at \$2100; and no rent has been paid since May 2020. This Court ordered the payment of rent through April 2022 for 24 months totaling \$50,400, plus monthly use and occupancy thereafter (Doc. 88).

In the case of Hannah Mensch and Tal Kestenber, in Apartment 3, the monthly rent was \$2800; the Court set reasonable use and occupancy at \$2100; and no rent has been paid since May 2020. This Court therefore ordered the payment of rent through April 30, 2022 for 24 months totaling \$50,400, plus monthly use and occupancy thereafter (*id.*).

In the case of Yuri Nartov and Margaret Kieu, in apartment 11, the monthly rent was \$347.51 (per plaintiffs' representation); this Court set reasonable use and occupancy at \$347.51; and no rent has been paid since September 2019. This Court therefore awarded rent through April 2022 for 31 months totaling \$10,772.81, plus monthly use and occupancy at the stated rental rate thereafter (*id.*).

Plaintiffs now submit two letters, which this Court did not have when making the aforementioned calculations regarding use and occupancy. In the case of Ms. Bakali (Apt. #2), a letter dated December 6, 2001 indicates that the New York State Office of Temporary and Disability Assistance ("OTDA") paid 12 months of rent, from April 2020 through March 2021, at the rate of \$2750 per month, to 137 Rivington Street LLC, for a total of \$33,000, pursuant to the State's Landlord Rental Assistance Program ("LRAP"). (Lester Aff., ¶¶6-12 and Ex. A, Docs. 94-95). In the case of Mr. Nartov and Ms. Kieu (Apt. #11), a letter to Mr. Nartov dated January 24, 2022 indicates that OTDA paid 11 months of rent, from November 2020 through September 2021, at the rate of \$2695 per month, to 137 Rivington Street LLC, for a total of \$29,645, also pursuant to LRAP (Lester Aff., Ex. B, Doc. 96). Both parties had these letters, yet neither side submitted them on the prior motion.

LEGAL CONCLUSIONS

ERAP was one of a number of Covid relief programs administered by the State of New York. Enacted in 2021 (A. 40001/S. 50001), the Program grants tenants rent subsidies provided they meet certain criteria, including that the tenant have less than 80% of average area income, measured by county and size of household (Lester Aff., ¶¶6-10, Doc. 94). LRAP allows landlords to apply on behalf of qualifying tenants who have not already applied for ERAP for themselves. Each Program is administered by OTDA. Subject to certain exceptions not applicable here, while the ERAP application is pending, tenant evictions are stayed (*See Lai v. Muamba*, 2022 N.Y. Misc. LEXIS 3855 [Sup Ct New York County 2022] [D. Cohen, J.]; *215 W. 84th St Owner LLC v. Bailey*, 2022 N.Y. Misc. LEXIS 1717 [Sup Ct New York County 2022] [Kraus, J.]). Until this motion, neither plaintiffs nor defendant advised this Court that three of the plaintiffs were eligible for ERAP funds. However, equity does not permit landlord a double

recovery of use and occupancy from a tenant for periods of time during which the tenant has established that rental amounts were paid by a third party. Thus, defendants' arguments - - that plaintiffs' motion is not a proper motion to reargue pursuant to CPLR 2221(d) or to renew pursuant to CPLR 2221(e) - - are unpersuasive.

CPLR 2221 also governs motions to "modify" as well, and this is plainly an appropriate case in which to modify this Court's prior order based on the failure by the parties to present all relevant facts. As plaintiff argues:

“Although renewal motions generally should be based on newly discovered facts that could not be offered on the prior motion (*see* CPLR 2221[e]), courts have discretion to relax this requirement and to grant such a motion in the interest of justice (*see e.g., Daniels v City of New York*, 291 AD2d 260; *Strong v Brookhaven Mem. Hosp. Med. Ctr.*, 240 AD2d 726).”

Mejia v Nanni, 307 AD2d 870 (1st Dep't 2002). Further, defendant concedes, this motion could also be construed to be a motion to resettle an order pursuant to CPLR 5517(a).

This Court calculated Ms. Bakali's arrearage for apartment 2 at \$50,400 through April 2022, based on use and occupancy of \$2100 per month during the 24 months following May 2020. Since this Court now knows that the defendant landlord received \$33,000 in ERAP/LRAP funds for twelve months, from April 2020 through March 2021, at the stated rental rate of \$2750, as of April 2022 she owes \$25,200 (twelve months at \$2,100 per month) and additional use and occupancy at the rate of \$2100 per month for the additional seven months from May-November 2022, or \$14,700, for a total due of \$39,900 through November 30, 2022. Subtracting the \$23,700 which defendant has received from Ms. Bakali (Cohen Aff., ¶6, Doc. 100), leaves \$16,200 due and outstanding.

This Court also calculated Ms. Mensch's and Mr. Kestenberg's arrearage for apartment 3 to be \$50,400 through April 2022 on the same basis. Their counsel now advises this Court that

Ms. Mensch and Mr. Kestenberg had an ERAP/LRAP application pending which, if granted, would reduce their arrearage by twelve months. Their attorney advises that their application may have been granted, but asserts that defendant has declined to confirm whether it received LRAP monies for them. (Lester Aff., ¶14 and Ex C, Docs. 94, 97). Defendant claims Ms. Mensch and Mr. Kestenberg were denied LRAP funds on January 11, 2022 (Cohen Aff., ¶9, docket no. 100), but provide no written evidence to that effect. Regarding apartment 3 movant has failed to meet their burden of establishing a basis for the court to modify its rulings or calculations, accordingly, this motion is denied without prejudice to renew upon evidence that the landlord in fact received ERAP/LRAP funds.

This Court calculated Mr. Nartov's and Ms. Kieu's arrearage for apartment 11 at \$10,772.81, based on use and occupancy value of \$347.51 per month, over a 31-month period, which was the stated rental rate provided by the parties without any objection. Defendant asserts that Mr. Nartov and Ms. Kieu tendered two checks, each for \$347.51, for May-June 2022 use and occupancy. Since this Court now knows that the defendant landlord received \$29,645 in ERAP/LRAP funds for eleven months at the rate of \$2695 per month, they now owe \$6,950.20 (twenty months at \$347.51 per month) and additional use and occupancy at the rate of \$347.51 per month for the additional seven months from May-November 2022, or \$2,432.57, for a total due of \$9,382.77 through November 30, 2022. Subtracting the \$695.02 which defendant has received from Mr. Nartov and Ms. Kieu, leaves \$8,687.75 due and outstanding through November 30, 2022.

This Court also rejects the defendant's contention that the plaintiffs' motion was untimely (Kosar Aff., ¶¶20-23, Doc. 99). This Court's prior decision was dated April 28, 2022, entered on May 4, 2022, and Notice of Entry was served on May 4, 2022. The order stated that, if any party

wished to dispute the amounts set forth in the order, it could do so by moving within 30 days (Docs. 88-91). Measured from the date of entry, plaintiffs' May 31, 2022 motion was timely.

In light of the need to recalculate and reconcile as a result of the undisclosed ERAP/LRAP payments, this Court denies defendant's cross-motion for the entry of an immediate money judgment against any of the plaintiffs, without prejudice to move for the same relief in the event plaintiff fail to make any of the payments set forth below.

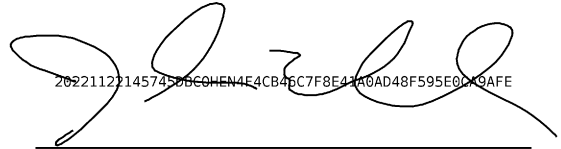
Accordingly, it is hereby:

ORDERED, that the tenant of Apartment 2, Sheezan Bakali, is ordered to pay use and occupancy *pendente lite* at a rate of \$2,100 per month. She shall pay all back use and occupancy due through November 30, 2022 totaling \$16,200 by November 30, 2022, and thereafter shall pay ongoing, beginning in December 2022, monthly by the 10th day of each month; and it is further

ORDERED, that the tenants of Apartment 3, Hannah Mensch and Tal S. Kestenberg, are ordered to pay use and occupancy *pendente lite* at a rate of \$2,100 per month. They shall pay all back use and occupancy due through November 30, 2022 as per this Courts prior order by November 30, 2022, and thereafter shall pay ongoing, beginning in December 2022, monthly by the 10th day of each month; and it is further

ORDERED, that the tenants of Apartment 11, Yuri Nartov and Margaret Kieu, are ordered to pay use and occupancy *pendente lite* at a rate of \$347.51 per month. They shall pay all back use and occupancy due through November 30, 2022 totaling \$8,687.75 by November 30, 2022, and thereafter shall pay ongoing, beginning in December 2022, monthly by the 10th day of each month; and it is further

ORDERED that defendant’s cross-motion is denied without prejudice upon any of plaintiff’s failure to make any of the payments set forth herein.



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11/22/2022
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE