Columbus Manor LLC v Weisselberg
2023 NY Slip Op 30437(U)
February 10, 2023
Supreme Court, New York County
Docket Number: Index No. 154828/2021
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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COLUMBUS MANOR LLC

Plaintiff,

- v -

JENNIFER WEISSELBERG,

Defendant.

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INDEX NO. 154828/2021

MOTION DATE 02/07/2023

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 76, 77, 78, 79, 80, 81, 82, 83

were read on this motion to/for STAY.

In this ejectment action, defendant moves for an order staying the execution of the judgment of possession and writ of eviction until a final determination is made on her pending Emergency Rental Assistance Program (ERAP) application, cancelling the plaintiff's five-day notice of eviction, and restoring the proceeding for all purposes. Plaintiff opposes and, by notice of cross motion, moves for an order vacating any ERAP stay. Defendant opposes the cross motion.

I. PERTINENT BACKGROUND

In May 2021, plaintiff commenced the instant action, alleging that it leased residential premises to defendant, that the lease expired on April 30, 2021, that defendant has refused to vacate the premises, and that she owes plaintiff use and occupancy and attorney fees (NYSCEF 1).

Defendant retained her first counsel and, in June 2021, plaintiff's counsel and defendant's counsel agreed to provide defendant with an extension of time to serve her answer to July 8, 2021 (NYSCEF 3). On June 25, 2021 (prior to the July 8, 2021 deadline to answer), defense

counsel withdrew from representing defendant with defendant's consent, and with defendant representing herself (NYSCEF 4).

In July 2021, plaintiff moved for a default judgment against defendant as she had failed to answer or take any other action after her lawyer withdrew. The motion was returnable in August 2021, and plaintiff served a copy of it on defendant by mail; defendant did not oppose the motion (NYSCEF 5, 8).

On August 23, 2021, a second lawyer filed a notice of appearance for defendant, but took no other action on defendant's behalf (NYSCEF 16).

By decision and order dated October 27, 2021, plaintiff's default judgment motion was denied on procedural grounds without prejudice to renew (NYSCEF 17).

Thereafter, plaintiff moved to reargue its motion for a default judgment (NYSCEF 18), and the motion was adjourned to January 19, 2022 (NYSCEF 27).

In December 2021, defendant's second attorney moved for leave to withdraw as her counsel, which was granted without opposition on February 3, 2022. In the order, the action was stayed for 20 days, plaintiff's motion to reargue was adjourned to March 3, 2022, and defendant was directed to submit opposition thereto by February 28, 2022 (NYSCEF 33).

Defendant's second and now-former attorney filed and served notice of entry of the withdrawal order and notice to appoint a substitute attorney on defendant on February 4, 2022 by certified mail return receipt requested and by email (NYSCEF 35, 37).

As of November 2022, no new attorney had filed a notice of appearance on defendant's behalf, nor had she submitted opposition to plaintiff's motion to reargue. Thus, by decision and order dated November 17, 2022, plaintiff's motion for leave to reargue was granted, and upon reargument, plaintiff was granted a default judgment against defendant on its first claim for an

ejectment/possession, and its remaining claims for a money judgment and attorney fees were severed for determination by a Judicial Hearing Officer or Special Referee (NYSCEF 40).

On January 19, 2023, a third attorney filed a notice of appearance for defendant, and on January 20, 2023, filed the instant order to show cause (NYSCEF 44, 45). After hearing the parties on defendant's request for a temporary stay pending a determination on the motion for a stay, a temporary stay was granted and the motion was scheduled for oral argument on February 7, 2023 (NYSCEF 54).

Plaintiff then filed a cross motion, seeking to vacate the stay (NYSCEF 57), and both motions were orally argued on February 7, 2023, with defendant's attorney granted leave to submit opposition to the cross motion by February 10, 2023, which was then timely submitted (NYSCEF 80).

On February 3, 2023, defendant also filed a motion to vacate the default judgment issued against her, which has not yet been submitted and is not before the Court (NYSCEF 65).

II. ANALYSIS

Defendant argues that her ERAP application mandates a stay of her eviction from the premises, and that as plaintiff failed to provide notice related to her renewal lease as required by Real Property Law (RPL) 226-c, her tenancy exists and is continuing, thus rendering her eligible to receive ERAP assistance (NYSCEF 80).

Plaintiff contends that as defendant's tenancy was terminated when she refused to sign a renewal lease and again when the default judgment was granted against her, she is not eligible for ERAP, as she is no longer a tenant nor lawful occupant of the premises, nor is she obligated to pay rent. It asserts that even if a stay applies in this context, it may be vacated upon certain

grounds, including where the approval of an ERAP application will not reinstate a tenancy, citing in support several lower court cases (NYSCEF 58).

By its terms, the ERAP program and its stay mechanism applies to all proceedings seeking the eviction of a tenant, including holdovers and ejectments, and a stay is mandated upon the filing of an ERAP application (*see Lai v Muaumba*, 2022 WL 1837560 [Sup Ct, New York County 2022] [staying ejectment of tenants based on pending ERAP application]; *Isidoro v Team Props. LLC*, 2021 WL 5850027 [Sup Ct, New York County 2021] [same]).

However, that a stay is required in the first instance does not mean that it cannot be vacated upon an appropriate showing, which, as other courts have held, includes a determination as to whether the granting of an ERAP application will have an impact on the parties' dispute or if the defendant is eligible for the funds (*see e.g. LSG* 365 *Bond St. LLC v Cusumano et al.*, Index No. 311058/21 [Civ Ct, Kings County, April 8, 2022, Donoghue, J.]).

The cases cited by plaintiff do differ factually from the instant action -- which involves a holdover tenancy resulting from the expiration of defendant's lease and failure to renew it -- but the reasoning of those Courts is still applicable to this case. In some of the cited cases, the premises' occupants were building superintendents who occupied apartments in residential buildings as an incident of their employment, with the courts finding that they were never "tenants" who were legally obligated to pay "rent" and would thus be ineligible for ERAP, and, moreover, that the payment of ERAP funds would not reinstate a landlord-tenant relationship that never exists (*see id.*; *Karan Realty Assocs. LLC v Perez*, 75 Misc 3d 499 [Civ Ct, Queens County 2022]). Others arose from holdovers where a tenancy was terminated by the landlord's desire to take possession of the premises for the landlord's personal use (*see Actie v Gregory*, 2022 NY Slip Op 50117[U] [Civ Ct, Kings County 2022]) or to sell the building (*Papandrea-*

Zavaglia v Arroyave, 75 Misc 3d 541 [Civ Ct, Kings County 2022]), and therefore the landlord had no desire to restart a landlord-tenant relationship. In *2986 Briggs LLC v Evans*, the occupant of an apartment was denied an ERAP stay as his license to reside in the premises expired upon the death of the tenant of record (2022 NY Slip Op 50215[U] [Civ Ct, Bronx County 2022]), and in *Abuelafiya v Orena*, the court found that the tenants would not be eligible for ERAP as they owned a second home to which they could relocate (73 Misc 3d 576 [Dist Ct, Suffolk County 2021]). Finally, in *Kelly v Doe*, the occupants were squatters who never had the legal right to occupy the premises (75 Misc 3d 197 [Civ Ct, Kings County 2022]).

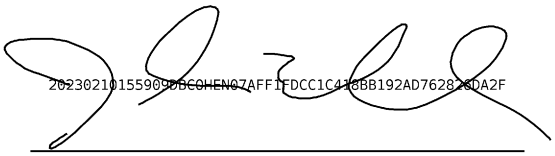
Nevertheless, the rationale relied on in the above cases to vacate an ERAP stay is applicable here. Defendant's tenancy ended when her lease expired at the end of April 2021 and she did not renew it. In any event, any tenancy rights were extinguished when this Court entered the judgment of possession and writ or ejectment in November 2022. Thus, even if defendant was eligible for ERAP, the payment of ERAP funds would not reinstate the parties' landlord-tenant relationship (*see e.g., Papandrea-Zavaglia*, 75 Misc 3d at 545-546 ["The ERAP statute . . . is not a measure designed to protect litigants where rent is not the basis for seeking possession. A stay under the ERAP statute is appropriate only when the benefit provided could potentially resolve litigation."]).

While defendant has moved to vacate the default judgment, that motion is not yet before this Court. That defendant was aware of this ejectment action from the start, has paid no rent or use and occupancy since May 2021, and only applied for ERAP in January 2023 after receiving an eviction notice, are also factors that weigh significantly in favor of vacating the ERAP stay.

Accordingly, it is hereby

ORDERED, that defendant's motion for an ERAP stay is granted, however, plaintiff's cross motion to vacate the ERAP stay is also granted; and it is hereby

ORDERED, that any and all stays of ejectment previously imposed by this Court are hereby vacated.



2/10/2023
DATE

DAVID B. COHEN, J.S.C.

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