

Harlem 133 Owner, LLC v Jimenez

2023 NY Slip Op 30850(U)

March 21, 2023

Supreme Court, New York County

Docket Number: Index No. 152456/2022

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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HARLEM 133 OWNER, LLC F/K/A HARLEM 133
LENDER, LLC,

Plaintiff,

- v -

ROSA JIMENEZ, LOURDES AQUINO, MEDELINE
BURDIER, BLANCA MOLINUEVO, KEVIN SCOTT,
KATRINA WILEY, MARIO FLORES, ALBAR IRIS
FLORES, DEBBIE LIMA, AMANDA DEVALLE, YVONNE
GARCIA, JOCLYN GARCIA, REEM MARBROUK,
GISELLE PENA, YARLIN PENA, JENNIFER AVILA,
KARINA MARTINEZ, CRISTO REYES, OLIVIA
JOHNSON, GABRIEL JAMES, JAZZMIN ROSARIA,
ABDULLAH RASHID, SHARNASIA VANCE, GEORGETTE
HYMAN, GREGORY GADSEN, SHAKIA JOHNSON,
DWAYNE SEIFFORTH, PAULETTE CRAWFORD,
WISMIDE LOUIS, TONIA VAIL, TYSHEFF BROWN,
JAZMINE GUZMAN, JARILZA CORUJO, SONYA JAMES,
EPPY DAVIS, and JOHN AND JANE DOES 1-26,

Defendants.

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 173, 174, 175, 176,
177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 201

were read on this motion to/for STAY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 195, 196, 197, 198,
199, 200, 202

were read on this motion to/for STAY.

Upon the foregoing documents, it is

In motion sequence number 003, defendants Dwayne Seifforth, Tonia Vail,
Blanca Molinuevo, Madeline Burdier, Debbie Lima, Wismide Louis, and Georgette
Hyman move, pursuant to CPLR 2201, RPAPL §§ 749(3) and 753 and the court's
inherent authority, to stay the ejectment, eviction, and execution of the judgment against

defendants. Prior to the return date of this OSC, Vail and Mollinedo moved out of the premises rendering the motion moot as to those defendants.

In motion sequence number 004, defendant Jennifer Avila also moves to stay the ejectment, eviction, and execution of the judgment against her. According to counsels for plaintiff and Avila, motion 004 was resolved prior to argument on the OSC.

(NYSCEF __, tr__.)¹

The background of this case is set forth in the court's prior decision granting plaintiff's motion for a default judgment² against the moving defendants, among others. (NYSCEF 164, Decision and Order [Motion Seq. No. 001].) The court stayed the default judgment based on CPLR 2201 for the purpose of providing defendants time to search for new housing. (*Id.*) This is defendants' second request for a stay but on a different legal theory.

This tragic case is described in Mihir Zaveri's article *They Were Promised an End to Homelessness. Now They Face Eviction*, NY Times, Dec. 30, 2022, available at <https://www.nytimes.com/2022/12/30/nyregion/homeless-harlem-vouchers.html> (last accessed March 21, 2023). During the height of COVID, defendants were lured by Levi Balkany from Department of Homeless Services (DHS) shelters into housing at 308-310 West 133rd Street, New York, New York. However, the March 2019 loan agreement for \$26 million to renovate the building barred Balkany from leasing the units and certainly not while the building was under construction and uninsured for occupancy. (See Index

¹ Plaintiff is directed to file the transcript of the March 6, 2023 argument.

² Legal Aid's attacks on the default judgment in footnote 3 of its memo of law should have been raised in their opposition to the default judgment and are now woefully late. (NYSCEF 201, Alvarez Reply aff.)

No. 652300/2020, *Harlem 133 Lender, LLC v W133 Owner, LLC and Levi Balkany* [Sup Ct, NY County], NYSCEF 2, Loan Agreement §§5.1.17[a], 5.1.24, 5.1.33, 5.2.3.) Moreover, based on the loan agreement, this court directed Balkany not to lease the apartments. (See Index No. 652300/2020, *Harlem 133 Lender, LLC v W133 Owner, LLC and Levi Balkany* [Sup Ct, NY County], NYSCEF 35, Order to Show Cause with TRO.) DHS negotiated leases for defendants with Balkany using resources from Housing Resources Administration (HRA). (NYSCEF 175, Lima aff ¶3; NYSCEF 176, Seifforth aff ¶3; NYSCEF 177, Hyman aff ¶3; NYSCEF 178, Burdier aff ¶3; NYSCEF 179, Louis aff ¶3.) Apparently, the City failed to investigate Balkany's authority, or the lack thereof, to lease the apartments to defendants. Except for the five remaining defendants here, 26³ other families residing at the property have relocated, some with the help of plaintiff's broker Staci Reed. (NYSCEF ___,⁴ Staci Reed aff ¶4.) The court confirmed on the record that Reed has been and continues to be available to help defendants search for apartments.

This is an ejectment action where defendants never had valid leases. Defendants do not seek to vacate their defaults.⁵ Rather, defendants simply seek more time until they find suitable housing. Defendants were served by the New York County Sheriff with five-day notices dated February 15, 2023. (NYSCEF 174, Alvarez aff

³ 31 units were initially occupied. (NYSCEF 192, Martinez aff ¶4.)

⁴ Plaintiff shall file the affidavit of Staci Reed in NYSCEF.

⁵ Such a motion by a different defaulting defendant was denied for failure to satisfy the requirements of CPLR 5015. (NYSCEF 162, Decision and Order [Motion Seq. No. 002].)

pursuant to CPLR 2217[b] ¶7.)⁶ Defendants assert that City agencies HRA, SUS,⁷ HomeBase or CityFHEPS have delayed defendants' relocations. In New York City, the onerous process to find housing using vouchers begins with obtaining the "housing subsidy vouchers, then find a landlord willing to rent an apartment to them with their voucher, then receive agency approval for that apartment after an inspection is done, and then seek assistance with their physical relocation." (NYSCEF 201, Alvarez reply aff ¶18.)⁸ Defendants assert that they may risk losing their housing subsidies if they are evicted prior to moving into new apartments. (NYSCEF 174, Alvarez aff ¶28.) The Public Emergency Unit of the Mayor's Office is now assisting Louis, Seifforth, Lima, and Burdier in their housing search.⁹ (NYSCEF 201, Alvarez reply aff ¶11.)

Madeline Burdier has a Section 8 voucher. (NYSCEF 178, Burdier aff ¶2.) She spoke with SUS in September 2021 and provided requested documents. (*Id.* ¶5.) "Months later"¹⁰ a different SUS caseworker requested the identical documents. (*Id.*) In September 2022, SUS directed Burdier to speak to a NYCHA caseworker who helped her complete a Section 8 application. (*Id.*) Burdier asserts discrimination by brokers but fails to state whether she has requested assistance from plaintiff's broker Reed who

⁶ Alvarez filed two affidavits under NYSCEF 174. He is directed to file this affidavit separately and properly labeled in NYSCEF.

⁷ Services for the Underserved, the homebase office that services defendants. Only Homebase offices can process FHEPS applications. (NYSCEF 174, Alvarez aff ¶¶10-11.)

⁸ The court credits Alvarez's description of the process based on Legal Aid's leadership in navigating the CityFHEPS program. (NYSCEF 201, Alvarez reply aff ¶25.)

⁹ Given the City's involvement in this debacle, the court implores the City to move these families to temporary housing, such as a hotel, until they can find permanent housing and to take all necessary steps to ensure that these families retain their housing vouchers.

¹⁰ Burdier does not state how many months later or what prompted the communciation.

has successfully assisted other families in the building. (*Id.* ¶10.) Burdier received a transfer voucher on December 10, 2022 which allows her to keep her subsidy and demonstrate to prospective landlords that she can pay the rent. (*Id.* ¶4.)

Georgette Hyman has a Section 8 voucher and has identified an apartment. (NYSCEF 177, Hyman aff ¶2.) However, Hyman does not state when she obtained the voucher or when she began her housing search. She has been represented by Legal Aid in this action since June 9, 2022. (NYSCEF Case Detail.) On the record on March 6, 2023, plaintiff agreed to pay Hyman's reasonable moving expenses. (NYSCEF ___, tr ___.)¹¹

Debbie Lima received housing assistance approval on February 10, 2023. (NYSCEF 174, Alvarez aff ¶27.) Lima asks for more time since she has not been able to obtain a shopping letter from HRA. (NYSCEF 175, Lima aff ¶2.) Lima states that she initially contacted HRA and requested assistance in August 2022. (*Id.* ¶5.) After Legal Aid's January 2023 intervention,¹² she was assigned a caseworker. (*Id.*) She has been represented by Legal Aid in this action since June 9, 2022.¹³ (NYSCEF Case Detail.) Despite not having a letter, Lima has been inspecting apartments. (*Id.* ¶7.) However, it is unstated when her search commenced. (*Id.*)

Wismide Louis moved into the premises with the assistance of the City FHEPS program for which she remains eligible. (NYSCEF 179, Louis aff ¶¶3-4.) She asks for more time since she was "just recently approved for a housing subsidy" that will help her find a new apartment. (*Id.* ¶2.) Again, it is unclear when she was approved, but she

¹¹ Plaintiff is directed to file the transcript in NYSCEF.

¹² Legal Aid fails to explain why it took until January 2023 for it to intervene.

¹³ Legal Aid fails to explain why it took until January 2023 for it to intervene.

has had a shopping letter since December 8, 2022. (*Id.* ¶4.) She states that she contacted HRA and requested assistance in August 2022. (*Id.* ¶5.) She called HRA “many times”¹⁴ and after Legal Aid’s January 2023 intervention,¹⁵ she was assigned a different caseworker. (*Id.*) She has been represented by Legal Aid in this action since June 9, 2022. (NYSCEF Case Detail.) She states that she inspected an apartment in February 2023. (NYSCEF 179, Louis aff ¶7.)

Dwayne Seifforth moved into the premises with the assistance of the City FHEPS program for which he remains eligible. (NYSCEF 176, Seifforth aff ¶¶3-4.) He asks for more time since he was “just recently approved for a housing subsidy” that will help him find a new apartment. (*Id.* ¶2.) Seifforth does not give the date of the approval, but he states that he received a shopping letter on January 17, 2023. (*Id.* ¶4.) He states that he contacted HRA and requested assistance in January 2022. (*Id.* ¶5.) He called HRA “many times”¹⁶, and after Legal Aid’s December 2022 intervention,¹⁷ he was assigned a caseworker in December 2022, who submitted an application for a voucher in January 2023. (*Id.*) He has been represented by Legal Aid in this action since July 11, 2022. (NYSCEF Case Detail.)

The court acknowledges defendants’ challenging personal circumstances and the significant hardship on defendants caused by Balkany’s fraud.

Defendants move pursuant to CPLR 2201 for a stay to allow them to find new housing. Defendants assert that they have demonstrated good cause because they

¹⁴ Louis fails to state when she called.

¹⁵ Legal Aid fails to explain why it took until January 2023 for it to intervene.

¹⁶ Seifforth fails to state when he called.

¹⁷ Legal Aid fails to explain why it took until December 2022 for it to intervene.

have engaged in a good faith diligent search for alternative housing. Good cause factors to be considered by the court “include the length of the tenancy, the tenant's payment history, the circumstances and severity of the rent defaults, and the tenant's present financial status.” (*140 W. End Ave. Owners Corp. v Dinah L*, 66 Misc. 3d 555 [Civ Ct, NY County 2019] [staying eviction of 72 year-old cooperative tenant of 10 years to avoid a lease forfeiture in a holdover proceeding] [citation omitted].) Courts have stayed evictions under CPLR 2201 to prevent loss of tenants' leases. (*326-330 East 35th Street Assoc. v Sofizade*, 191 Misc 2d 329 [App Term, 1st Dept 2002] [issuing discretionary stay after hearing to prevent leasehold forfeiture of tenant of eight years in rent stabilized apartment]; see also *Rich v Rich*, 9 Misc 3d 1124[A], 2005 NY Slip Op 51780[U] [Sup Ct, Rockland County 2005] [granting discretionary stay to 25-year resident of family home contingent on payment of \$3,126 mortgage and \$3,000 undertaking].) Implicit in these cases is that the occupant is a tenant pursuant to a lease who has paid rent in the past. As defendants' cases establish, good cause has been found to stay evictions where the delay in paying rent is due to a bureaucratic snafu. (*835 Carroll Street Corp. v Reap*, 11 Misc 3d 132[A], 2006 NY Slip Op 50354[U] [App Term, 2d Dept 2006] [DSS delayed rent payment]; *Lindsay Park Houses v Greer*, 128 Misc 2d 775 [Civ Ct, Kings County 1985] [agency delayed rent payment]; *Parkchester Apts. v Heim*, 158 Misc 2d 982 [App Term, 1st Dept 1993][rejecting landlord's objection to court signing OSCs when parties stipulate to settle nonpayment proceeding, but deadline for payment expires before agency makes payment].)¹⁸

¹⁸ Parties are advised that the court no longer has access to NYLJ cases that are not published on Lexis. Accordingly, the court could not access *St. Marks Place Associates v Lissitz*, N.Y.L.J. August 26, 1986, p.6 c.4 (Civ Ct, NY County); *Riverview*

However, defendants are not evicted here for nonpayment of rent; they have no leases to save from forfeiture.¹⁹

Defendants also rely on the RPAPL which establishes the procedures for summary proceedings. The protections set forth in the RPAPL may be applied to this ejectment action. (*Nestor v McDowell*, 81 NY2d 410 [1993].) RPAPL §749(3) allows for a stay upon a showing of good cause and provides:

“Nothing contained herein shall deprive the court of the power to stay or vacate such warrant for good cause shown prior to the execution thereof, or to restore the tenant to possession subsequent to execution of the warrant. In a judgment for non-payment of rent, the court shall vacate a warrant upon tender or deposit with the court of the full rent due at any time prior to its execution, unless the petitioner establishes that the tenant withheld the rent due in bad faith. Petitioner may recover by action any sum of money which was payable at the time when the special proceeding was commenced and the reasonable value of the use and occupation to the time when the warrant was issued, for any period of time with respect to which the agreement does not make any provision for payment of rent.”

However, RPAPL §749(3) clearly aims to protect forfeiture of leases which is not the issue in this case. RPAPL §753(1) provides:

“In a proceeding to recover the possession of premises occupied for dwelling purposes, other than a room or rooms in an hotel, lodging house, or rooming house, the court, on application of the occupant, may stay the issuance of a warrant and also stay any execution to collect the costs of the proceeding for a period of not more than one year, if it appears that the premises are used for

Redevelopment Corp. v Batts, N.Y.L.J. January 15, 1986, p.13 c. 6 (Civ Ct, Bronx County); *Devito v Kuuse*, N.Y.L.J. March 15, 1991, p.21, c.3 (App Term, 1st Dept). Best practice is to provide a copy of unpublished opinions to the court. (See Commercial Division Rule 16[a] [“Whenever reliance is placed upon a decision or other authority not readily available to the court, the court may direct counsel to submit a copy and counsel shall otherwise follow Rule 6 with respect to hyperlinking.”].)

¹⁹ Indeed, this case is distinguished from *Friedman Residence LLC v Denson*, 2021 NYLJ Lexis 1316 (Sup Ct, NY County 2022) because it arises from a breach of a loan agreement for \$26 million where plaintiff is a lender not a landlord. Further, unlike the *Friedman* case, defendants here have counsel.

dwelling purposes; that the application is made in good faith; that the applicant cannot within the neighborhood secure suitable premises similar to those occupied by the applicant and that the applicant made due and reasonable efforts to secure such other premises, or that by reason of other facts it would occasion extreme hardship to the applicant or the applicant's family if the stay were not granted. In determining whether refusal to grant a stay would occasion extreme hardship, the court shall consider serious ill health, significant exacerbation of an ongoing condition, a child's enrollment in a local school, and any other extenuating life circumstances affecting the ability of the applicant or the applicant's family to relocate and maintain quality of life. The court shall consider any substantial hardship the stay may impose on the landlord in determining whether to grant the stay or in setting the length or other terms of the stay."

Defendants ask the court to be guided by the Housing Stability and Tenant Protection Act of 2019 (HSTPA) which expanded tenant protections statewide and enlarged time periods for statutory stays of evictions. "The justification behind these expanded timeframes is to allow more leniency throughout any eviction proceeding, including stays of eviction and executions of warrants; and ensure that any eviction that is executed is done so in the interests of justice." (*E & V Acquisition, LLC v Margaret H.*, 65 Misc 3d 944, 953 [Civ Ct, NY County 2019] [citing Legis. Mem. In Support of NY State Senate Bill, 2019 Sess. Law News of NY Ch 36 (S. 6458)].)

As an initial matter, the court rejects plaintiff's equitable arguments suggesting that defendants are responsible for Balkany's fraud. (NYSCEF 193, Memo of Law at 1-2.) As between the parties here, it is the City of New York that should be held responsible for failing to investigate Balkany's authority to lease the apartments. Indeed, the court acknowledges that the Mayor's Office has recently intervened in this tragic situation.

Nevertheless, defendants have not established good cause that New York City agencies delayed their relocations. While it is undeniable that HRA and Homeless Services share some responsibility for defendants moving into the premises in violation of the loan agreement and this court's order, defendants have not established that HRA and Homeless Services caused the departure delay. Defendants' vague affidavits have not established a diligent search since they became aware of the eviction proceedings. Defendants also fail to state when they became aware of Balkany's fraud. The court notes that they were served with process in this action in March 2022 and the summary proceedings began in Housing Court in February 2022. (NYSCEF 13, Lima's Affidavit of Service; NYSCEF 39, Seifforth's Affidavit of Service; NYSCEF 40, Louis's Affidavit of Service; NYSCEF 22, Burdier's Affidavit of Service; NYSCEF 15, Hyman's Affidavit of Service.) While defendants²⁰ state when they initiated contacted HRA or SUS,²¹ they fail to state any efforts to communicate again until December 2022, when their attorney intervened, one month after this court's default judgment against defendants and the conclusion of this court's stay of that November 2022 decision. The court must also acknowledge that the other families have vacated the premises. The court finds that the extreme hardship analysis is not triggered because defendants are required to show that they "made due and reasonable efforts to secure such other premises" (RPAPL §751[3]), and they have failed to make that showing.

²⁰ Hyman's affidavit is devoid of any statements as to when, or if, she contacted HRA or SUS. (NYSCEF 177, Hyman aff.)

²¹ Louis and Lima initiated contact in August 2022. (NYSCEF 175, Lima aff ¶5; NYSCEF 179, Louis aff ¶5.) Seifforth initiated contact in January 2022. (NYSCEF 175, Seifforth aff ¶5.) Burdier initiated contact in September 2021. (NYSCEF 178, Burdier aff ¶5.)

The court declines to exercise its discretion to issue an unlimited stay of the evictions up to one year except to stay this decision until March 29, 2023.

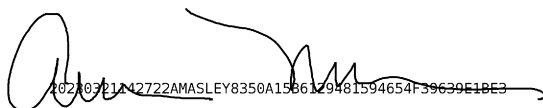
Accordingly, it is

ORDERED that motion sequence number 004 is permitted to be withdrawn.

Parties shall file a stipulate in NYSCEF within 10 days of this decision; and it is further

ORDERED that motion sequence number 003 is denied; and it is further

ORDERED that this decision is stayed until March 29, 2023.



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3/21/2023

DATE

ANDREA MASLEY, 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