

**H&P 29th St. Assoc. LLC v Yagci**

2023 NY Slip Op 31098(U)

April 6, 2023

Supreme Court, New York County

Docket Number: Index No. 159321/2021

Judge: Paul A. Goetz

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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. PAUL A. GOETZ PART 47

Justice

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H&P 29TH STREET ASSOCIATES LLC,

Plaintiff,

- v -

EZGI YAGCI, BRAD EHRLICHMAN, DR. RICHARD EHRLICHMAN, JOHN DOE, JANE DOE,

Defendants.

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INDEX NO. 159321/2021

MOTION DATE 01/26/2023

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121

were read on this motion to/for JUDGMENT - DEFAULT

In this ejectment action, plaintiff-landlord H&P 29th Street Associates LLC moves (mot seq no 005): (1) pursuant to CPLR § 3025 [c], to amend the summons and verified complaint (NYSCEF Doc No 1) to include all amounts of use and occupancy due through December 31, 2022; (2) pursuant to Article 6 of Real Property Actions and Proceedings Law (RPAPL), for default judgment of possession and an issuance of an order of ejectment and writ of assistance in favor of plaintiff and against defendant-tenants Ezgi Yagci and Brad Ehrlichman; (3) pursuant to CPLR § 3215 [a], for default money judgment against defendant-tenants and defendant-guarantor Dr. Richard Ehrlichman for use and occupancy due and owing through December 31, 2022, in the amount of \$28,603.20 plus statutory interest; (4) pursuant to Real Property Law (RPL) § 220 and RPAPL § 601, for past, present, and prospective use and occupancy, pendente lite, at a monthly rate of not less than \$2,925.00 from defendant-tenant Ehrlichman; and (5) pursuant to Article 17 of the lease agreement (NYSCEF Doc No 98, ¶¶ 15.A.2., 17.E., G.), for attorneys' fees. Defendant-tenant Ehrlichman opposes the motion on the grounds that he was

successfully awarded Emergency Rental Assistance Program (ERAP) funds, and the terms were agreed-to and accepted by plaintiff, thereby barring any pending or future ejectment action for the twelve months following disbursement to plaintiff.

### BACKGROUND

Plaintiff as landlord and defendant-tenants Yagci and Ehrlichman entered into a lease for apartment 11J in the building located at 155 East 29<sup>th</sup> Street, New York, New York 10016 for the period commencing September 25, 2020, and expiring September 24, 2021, at a monthly rent of \$2,925.00 (Gross Aff, ¶¶ 4-5, NYSCEF Doc No 96; NYSCEF Doc No 98, p 1). Dr. Ehrlichman executed a guaranty with plaintiff on September 18, 2020 (NYSCEF Doc No 98, p 8). The lease agreement contains a provision entitled “Remedies of Owner and Tenant’s Liability,” which provides:

“If this Lease is ended by Owner because of a default, or if Tenant fails to give the Apartment back to Owner when the Lease Term is over:

- A. Tenant must pay Rent until this Lease is ended. Thereafter, Tenant must pay the greater of the amount set forth in the Lease as Rent, or the amount that Owner could have re-rented the apartment to a new tenant, assuming that Apartment was fully restored to its original condition. This is what the law calls ‘use and occupancy,’ which will be paid until the end of the month in which Owner recovers the Apartment free of all occupants and puts the same in condition that the same can be re-rented”

(*id.* at ¶ 15.A.).

On July 27, 2021, plaintiff sent a 60-day notice of termination to defendant-tenants to vacate the apartment on or before September 30, 2021 (NYSCEF Doc No 101). Plaintiff notes that Yagci vacated the apartment in 2021 but Ehrlichman remains (NYSCEF Doc No 96, ¶¶ 5, 19). Plaintiff asserts defendants owe it \$60,985.00 in unpaid rent through December 2022, but

only seek \$28,603.20 in use and occupancy through December 2022 (*id.* at ¶ 32). Plaintiff's reasoning for this discrepancy is as follows:

“During the pendency of this action, Brad Ehrlichman was approved for the Emergency Rental Assistance Program (“ERAP”). The ERAP approval was in the amount of \$32,381.80. Pursuant to Subpart A, Section 9(c) through 9(d) of the ERAP statute, Landlord exercised its option to refuse such payment, given that an acceptance of such payment would have resulted in an inability to proceed with this ejectment action for a period of twelve (12) months. Although this refusal results in Landlord being precluded from seeking said amounts, it is still permitted under ERAP to pursue the remainder of the amounts owed (\$60,985.00 - \$32,381.80 = \$28,603.20).”

(*id.* at FN 1).

On April 5, 2022, plaintiff moved unopposed for a default judgment against all defendants, which was granted on July 5, 2022, along with a judgment of ejectment, a default money judgment of \$5,203.20, and attorneys' fees (NYSCEF Doc No 71). Then defendant-tenant Ehrlichman moved by order to show cause to stay ejectment from his apartment and dismiss the action based on his approved ERAP application, arguing that plaintiff's initial acceptance of ERAP payments for rent stays his eviction proceedings for twelve months from the date of disbursement to plaintiff (NYSCEF Doc No 58, pp 1-2). On November 22, 2022, defendant-tenant Ehrlichman's motion was granted and the default judgment as against him was vacated (NYSCEF Doc No 93). On December 20, 2022, plaintiff filed this motion seeking once again ejectment, default money judgments, and use and occupancy (NYSCEF Doc No 94).

## DISCUSSION

### *Amending the Complaint*

Pursuant to CPLR § 3025 [c], “[t]he court may permit pleadings to be amended before or after judgment to conform to the evidence, upon such terms as may be just including the granting of costs and continuances.” The proponent of the amended pleading must show that the

amendment has merit, which can be demonstrated by an affidavit of merit “and evidentiary proof that could be considered upon a motion for summary judgment” (*see Boaz Bag Bag v Alcobi*, 129 AD3d 649, 649 [1st Dept 2015]). Absent undue prejudice, courts are free to permit pleadings to be amended (*see Kimso Apts., LLC v Gandhi*, 24 NY3d 403 [2014]).

Here, plaintiff produces sufficient evidence permitting the amendment of the complaint to include use and occupancy through December 31, 2022. Defendants agreed in writing to pay use and occupancy (*see* NYSCEF Doc No 98, ¶ 15.A.), defendants did not pay rent through December 2022 (*see* NYSCEF Doc No 106), and the amount of rent owed, not including ERAP money, is \$28,603.20 (*see* NYSCEF Doc No 96, ¶ 32, FN 1). Accordingly, plaintiff will be permitted to amend its complaint to reflect \$28,603.20 in use and occupancy that has accrued through December 31, 2022.

### *Ejectment*

Plaintiff argues it is entitled to a default judgment on its first cause of action, granting plaintiff a judgment of possession, order of ejectment, and writ of assistance against defendant-tenants. The decision and order dated November 22, 2022, only vacated the default judgment as against defendant-tenant Ehrlichman. Defendant-tenant Ehrlichman argues that since plaintiff accepted the ERAP funds he applied for, the statute places a stay on all ejectments for twelve months from the date of disbursement and therefore, plaintiff’s motion must be denied.

There is no dispute defendant-tenant Ehrlichman was approved for ERAP. Plaintiff asserts it declined ERAP and therefore, pursuant to ERAP § 9 [2] [c], it is merely deemed to have waived the rent for the period ERAP agreed to pay.<sup>1</sup> Defendant-tenant Ehrlichman claims

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<sup>1</sup> “If the landlord has not accepted such provisional payment within twelve months of the determination the landlord shall be deemed to have waived the amount of rent covered by such provisional payment, and shall be prevented from initiating a monetary action or proceeding, or collecting a judgment premised on the nonpayment of the

plaintiff accepted the ERAP payment and is therefore precluded from ejecting him for 12 months from the time the funds were accepted, pursuant to ERAP § 9 [2] [d].<sup>2</sup> Neither party provides proof whether the ERAP funds were accepted or not.

In light of the parties' dispute whether plaintiff accepted the ERAP funds, the burden is upon plaintiff "to demonstrate that it did not participate in the program and that it did not intend to be bound by the condition of accepting the payment" (*The Park Cent. I LLC v Price*, 2022 NY Slip Op 31909 [U], 2022 WL 2317182, \*3 [City Ct, Bronx County 2022]). However, plaintiff has not provided proof demonstrating that it declined to accept the ERAP funds approved for defendants while defendant-tenant Ehrlichman submitted his ERAP application approval form (see NYSCEF Doc No 87). Accordingly, plaintiff's application for default judgment of possession, order of ejectment, and writ of assistance against defendant-tenant Ehrlichman will be denied since a question of fact remains as to whether plaintiff accepted ERAP funds approved for him.

#### *Default*

Plaintiff's application for a default money judgment against defendant-tenant Ehrlichman will be denied because *pro se* defendant has shown his intent to defend this action. Since the default judgment against him was vacated, he will be directed to serve an answer within 20 days.

Plaintiff's motion for a default money judgment against defendant-tenant Yagci and defendant-guarantor Ehrlichman will also be denied because the decision and order dated

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amount of rent covered by such provisional payment" (L 2021, ch 56, part BB, subpart A, § 9 [2] [c], as amended by L 2021, ch 417, part A, § 5).

<sup>2</sup> "Acceptance of payment for rent or rental arrears from this program . . . shall constitute agreement by the recipient landlord or property owner: . . . not to evict for reason of expired lease or holdover tenancy any household on behalf of whom rental assistance is received for 12 months after the first rental assistance payment is received" (*id.* § 9 [2] [d] [iv])

November 22, 2022, only vacated the default as against defendant-tenant Ehrlichman, not as against defendant-tenant Yagci and defendant-guarantor Ehrlichman.

### *Use and Occupancy*

RPL § 220 provides that a landlord “may recover a reasonable compensation for the use and occupation of real property, by any person, under an agreement.” The court has broad discretion to award use and occupancy *pendente lite* (*Alphonse Hotel Corp. v 76 Corp.*, 273 AD2d 124, 124 [1st Dept 2000]). An award of use and occupancy *pendente lite* accommodates the parties' competing interests by preserving the status quo until final resolution (*MMB Assocs. v Dayan*, 169 AD2d 422, 422 [1st Dept 1991]). Recovery for use and occupancy allows a landlord to recover only “reasonable compensation” of the fair market value of the premises after the lease expires (*see Mushlam, Inc. v Nazor*, 80 AD3d 471, 471 [1st Dept 2011]). The rent value under the lease is probative in determining the reasonable value (*id.*). Further, the court may award plaintiff past and *pendente lite* use and occupancy as provided for in RPL § 220 (*see 862 Second Ave. LLC v 2 Dag Hammar skjold Plaza Condo.*, 185 AD3d 421 [1st Dept 2020]; *Marbru Assocs. v White*, 114 AD3d 554, 555 [1st Dept 2014]; *Levinson v 390 W. End Assocs., L.L.C.*, 22 AD3d 397, 403 [1st Dept 2005]).

Here, pursuant to the express terms of the lease, defendant-tenant Ehrlichman contracted with plaintiff to pay for his use and occupancy of the apartment (*see* NYSCEF Doc No 98, ¶ 15.A) and it is undisputed that he is still in possession of the apartment. Additionally, defendant-tenant Ehrlichman does not dispute the outstanding amount of rent arrears owed. Accordingly, defendant will be directed to pay plaintiff the undisputed amount of \$28,603.20 in arrears as well as \$2,925.00 per month use and occupancy *pendente lite*.

*Attorneys' Fees*

“[O]nly a prevailing party, who has achieved ‘the central relief sought,’ is entitled to attorneys’ fees” (*Graham Ct. Owner’s Corp. v Taylor*, 24 NY3d 742, 752 [2015] [internal citation omitted]). Additionally, a “landlord may not recover attorneys’ fees upon a default judgment. Any waiver of this section shall be void as against public policy” (RPL § 234 [1]). Here, plaintiff is authorized to collect attorneys’ fees from defendants pursuant to the lease (*see* NYSCEF Doc No 98, ¶ 15.A.2); however, since there remain unresolved issues an award of attorneys’ fees at this stage is premature. Accordingly, plaintiff’s application for attorneys’ fees will be denied with leave to renew.

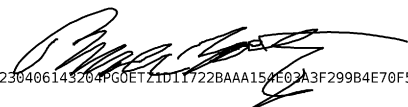
Accordingly, it is hereby

ORDERED that plaintiff’s motion is granted to the extent that it is permitted to amend its complaint to include all amounts of use and occupancy due through December 31, 2022; and it is further

ORDERED that the amended complaint, in the form annexed to the motion papers, shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; and it is further

ORDERED that plaintiff’s motion is further granted to the extent that within 30 days of service of notice of entry of this order, defendant-tenant Ehrlichman shall pay plaintiff the undisputed amount of past due use and occupancy in the amount \$28,603.20 and ongoing use and occupancy on the first day of each month in the amount of \$2,925.00 and plaintiff’s motion is otherwise denied; and it is further

ORDERED that defendant-tenant Ehrlichman is directed to serve and file his answer within 20 days of notice of entry of this order.

  
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4/6/2023  
DATE

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PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION  
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER  
 INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER  
 FIDUCIARY APPOINTMENT

REFERENCE

CHECK IF APPROPRIATE: