Bank of N.Y. Trust Co., N.A. v Courtney
2022 NY Slip Op 34539(U)
August 15, 2022
Civil Court of the City of New York, New York County
Docket Number: Index No. 59953/19
Judge: Karen May Bacdayan
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART F

THE BANK OF NEW YORK TRUST COMPANY, N.A. AS TRUSTEE FOR AND FOR THE BENEFIT OF THE CERTIFICATE HOLDERS OF MULTI-CLASS MORTGAGE PASS-THROUGH CERTIFICATES, CHASEFLEX TRUST SERIES 2007-M1

Petitioner,

-against-

TODD COURTNEY, CAROLINE DAVIS, CARSON, PASCAL AKA PASCAL CARSON, CAROLINE CONNOR, LISA FORSBERG, JOHN DOE-JANE DOE

Respondents.

Index No. 59953/19

DECISION/ORDER

Motion Sequence Nos. 1 and 2

HON KAREN MAY BACDAYAN, JHC

Hinshaw & Culbertson LLP(Mitchell Zipkin, Esq.), for the petitioner
Aaron Morris Schlossberg, Esq., for the respondent-Todd Courtney

Recitation, as required by CPLR 2219 (a) of the papers considered in review of this motion by NYSCEF Doc No: 4-41.

PROCEDURAL HISTORY AND BACKGROUND

This is a summary holdover proceeding following the completion of a foreclosure action. The proceeding is predicated on a 90-day notice to quit pursuant to RPAPL 1305 and RPAPL 713 (5). There is a long and storied history to the proceeding which was commenced in the spring of 2019. The proceeding was previously sent to the trial part, where it was returned to the resolution part to be calendared for a traverse hearing. There have been numerous delays including those occasioned by necessary alterations to court procedures during the height of the COVID-19 pandemic, the filing of a Covid Emergency Eviction and Foreclosure Prevention Act (CEEFPA) hardship declaration which occasioned a stay of the proceeding until January 15, 2022, and currently the automatic statutory stay imposed by the filing of an Emergency Rental Assistance Program ("ERAP") application in March 2022. (L 2021, c 56, part BB, subpart A, § 8, as amended by L 2021, c 417, part A, § 4; Admin Order of Chief Admin Judge of Cts AO/34/22.)

Petitioner has moved to vacate the automatic stay as, by the plain language of the statute, respondent is not entitled its benefit. Respondent has opposed petitioner's motion as procedurally defective in that petitioner's attorney proffers legal arguments in his affirmation in support of the motion. Respondent also substantively opposes petitioner's motion countering that the Office of Temporary and Disability Assistance ("OTDA") alone, and not this court, has the authority to determine whether an applicant is eligible for the program or not, which, in either case would result in dissolution of the stay. Respondent argues that, *assuming arguendo* that the court does have such authority, as an "occupant," the plain language of the statute brings him under the protective umbra of the automatic stay. Respondent further argues that the stay should remain in effect because the stay applies to occupants in both holdover and nonpayment proceedings and "[a]ny ambiguity in eligibility criteria promulgated by the commissioner shall be resolved in favor of the applicant when determining eligibility" (internal quotations omitted)." (NYSCEF Doc No. 35, respondent's memorandum of law at 6.)

At the outset, the court gives little weight to respondent's argument that petitioner's motion is fatally defective for want of a separate memorandum of law. The court will overlook this common practice as a nonprejudicial irregularity which does not deprive respondent of any substantive rights. (CPLR 2001.) Moreover, respondent did not object to the form of petitioner's papers until July 4, 2022 when opposition to the motion was filed, well past the 15 day window during which to object to defects, which defects shall be deemed waived if, as here, no prejudice befalls a party. (CPLR 2101 [f].)

DISCUSSION

This court has previously held that it has the authority to consider whether or not to vacate an ERAP stay. (*5th & 106th St. Assoc., LP v Hunt,* 2022 NY Slip Op 22205 [Civ Ct, New York County 2022]; *see also Laporte v Garcia*, 2022 NY Slip Op 22126, *1 [Civ Ct, Bronx County 2022]; *2986 Briggs LLC v Evans*, 2022 NY Slip Op. 50215 [U] [Civ Ct, Bronx County 2022].) The court respectfully disagrees with courts of concurrent jurisdiction, cited by respondent, which have held to the contrary. Indeed, to find otherwise would raise constitutional issues analogous to those at issue in *Chrysafis v Marks*, 594 --US --, 141 S Ct 2482 (2021). In *Chrysafis*, the Covid Emergency Eviction and Foreclosure Prevention Act ("CEEFPA") was enjoined because it did not allow a landlord to challenge a tenant's self-certified experience of a hardship which resulted in an automatic stay of proceedings. CEEFPA as modified by the L

2021, c 417, passed just three weeks after the decision in *Chrysafis*, addressed the Supreme Court's due process concerns and allowed for a motion to be made before the court to determine whether the tenant was, in fact, entitled to the continuation of an automatic stay occasioned by the filing of a hardship declaration.

Petitioner argues: ". . . [I] in contradiction of the decision in *Chrysafis* . . . [r]espondent has become a 'judge in his own case,' and created an artificial and indefinite stay which only serves to preclude property owners, such as Petitioner, from timely completing eviction actions." (NYSCEF Doc No. 5, petitioner's attorney's affirmation in support ¶ 48.) Similarly, this court has found, in the context of ERAP, the tenant "self-attest[s]" to eligibility for ERAP funding and receives an automatic stay of litigation in a proceeding as a result. (L 2021, c 56, part BB, subpart A, § 6 [6].) This stay could conceivably extend until September 30, 2025 when the ERAP statute expires. (NY State Finance Law § 99-mm, as amended by the L 2021, ch 56, Part BB, supart A, § 3.) Thus, a landlord must be able to challenge the automatic ERAP stay, and the court must determine upon that motion whether the tenant has made a showing that it is entitled to the stay, or risk infringing on petitioner's due process rights.

Respondent's reliance on *Barton v Bixler*, 2022 NY Slip Op 50228 (U), 74 Misc 3d 1226(A) (Dist Ct, Nassau County 2022) is misplaced. *Bixler* involved two questions: 1) Whether an unfunded agency is constitutionally sustainable; and 2) whether an alternative remedy program such as ERAP, which temporarily limits access to court and diverts litigation to an administrative agency, violates due process. Only the second issue is relevant here. Respondent argues that *Bixler* has "debunked" petitioner's argument that this court may hear a motion to vacate an ERAP stay and that only OTDA shall be the arbiter of eligibility. (NYSCEF Doc No. 35, respondent's memorandum of law, at 8.)

Notably missing from respondent's extensive block quote from *Bixler* is the language immediately following the sentence to which respondent cites which states in relevant part:

> ". . . [T]he Court ... opine[s] that any alternative remedy program *must still comport* with the [cases] defining *due process* as requiring 'an opportunity to be heard wherein an adverse litigant must receive a hearing before a neutral tribunal 'in a meaningful time' and in a 'meaningful manner'." (*Id.* *2.)

Bixler does not stand for the proposition that respondent asks this court to believe.

To be eligible for ERAP funds an applicant must be "a tenant or occupant *obligated to pay rent* (emphasis added)." (L 2021, c 56, part BB, subpart A, § 5 [1] [a] [i].) Definitions in

the original ERAP statute, relevant here, remained unchanged when the statute was amended by L 2021, ch 417. "Occupant" has the same meaning as under Real Property Law (RPL) Section 235-f. (L 2021, c 56, part BB, subpart A, § 2 [7].) RPL 235-f defines "occupant" as "a person, other than a tenant or a member of a tenant's immediate family, occupying a premises with the consent of the tenant or tenants." "Rent" is as defined under Real Property Actions and Proceedings Law (RPAPL) Section 702. (2021, c 56, part BB, subpart A, § 2 [9].) RPAPL 702 defines "rent" as "the monthly or weekly amount charged in consideration for the use and occupation of a dwelling pursuant to a written or oral rental agreement."

Respondent's argument that, simply because the statute applies to both holdover and nonpayment proceedings the stay must remain in effect, disregards the fact that respondent is neither a tenant nor an occupant as defined by the statute. Respondent is not possession with the permission of the tenant; rather, respondent is at risk of eviction because the property has been foreclosed upon.

Regardless, respondent is an individual without permission from the tenant to reside in the premises *and who has no obligation to pay rent*. The plain language of the eligibility factors, which are not ambiguous as respondent posits, renders respondent ineligible for the stay. The court respectfully diverges from opinions of concurrent jurisdiction which hold otherwise. That respondent is not eligible for the protections of the automatic stay under the plain language of the statute does not portend that respondent will *not* be approved; the court cannot pretend to fully understand the mysterious review process employed by OTDA once an application is accepted for filing. However, as the court has the ability to parse respondent's eligibility for the stay, and an agency is not estopped by an error, *B & H Check Cashing Serv. of Brooklyn, Inc. v. Superintendent of Banks of State of NY.*, 261 AD2d 249 (1999), and is certainly not estopped by an error that may occur at some future time, the court sees no reason to continue the stay. If respondent is ultimately approved, petitioner could decide that it will, after all, accept the approved monies. But petitioner is under no obligation under the law, the facts, the circumstances, and procedural posture of this case to do so. If petitioner accepts any ERAP funding, petitioner would be precluded from evicting respondent for 12 months since the date of

first acceptance, but that is the only consequence petitioner would face unless petitioner decides to create a landlord-tenant relationship with respondent, which is not present here.[1]

CONCLUSION

Accordingly, it is

ORDERED that petitioner's motion is GRANTED and the automatic stay occasioned by the filing of respondent's ERAP application is vacated.

The parties are to appear in Part F, Room 523 of the New York City Civil Courthouse on November 3, 2022, at 2:30 p.m. for a traverse hearing which, under the circumstances if a *FINAL* date for traverse. If for *any reason* the respondent is not prepared to go forward, the court will conduct another pre-trial conference and transfer the proceeding to a trial part for trial.

This constitutes the decision and order of this court.

Dated: August 15, 2022
New York, NY

So Ordered:

Hon. Karen May Bacdayan

HON. KAREN MAY BACDAYAN
Judge, Housing Part

[1] L 2021, c 56, part BB, subpart A, § 9 (2) (d) states: "*Acceptance of payment* for rent or rental arrears from this program shall constitute agreement by the recipient landlord or property owner: (i) that the arrears covered by this payment are satisfied and will not be used as the basis for a non-payment eviction; (ii) to waive any late fees due on any rental arrears paid pursuant to this program; (iii) to not increase the monthly rent due for the dwelling unit such that it shall not be greater than the amount that was due at the time of application to the program for any and all months for which rental assistance is received and for one year after the first rental assistance payment is received; (iv) 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."