

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET CHAN PART 33

Justice

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LEOPOLDO ISIDORO, JULIAN ISIDORO, FLORENCIO
MEJIA
Plaintiffs, INDEX NO. 450688/2020
MOTION DATE 08/20/2021
MOTION SEQ. NO. 003

- v -

TEAM PROPERTIES LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 79, 85, 87, 88

were read on this motion to/for

MISCELLANEOUS

In this action arising out of a dispute as to whether the apartments where plaintiffs reside are rent stabilized, defendant/building owner moves for an order compelling plaintiffs to pay past use and occupancy from March 1, 2021 through July 31, 2021, and ongoing use and occupancy from the time of this motion and continuing during the pendency of this action, with the amount of use and occupancy to be based on the last monthly rates in plaintiffs' respective leases. Plaintiffs oppose the motion.

Background

Each plaintiff resides in his separate apartment (the Apartments) in defendant's building located at 176 East 109th Street in the city, state, and county of New York (the Building). In November 2019, defendant served plaintiffs with 90-day notices of non-renewal advising them that their tenancies would not be renewed beyond February 29, 2020 (NYSCEF #'s 43-45). At the time the notices were served, plaintiffs were current on all payments and rental obligations through February 2020. After plaintiffs failed to vacate their respective Apartments, defendant commenced holdover proceedings in the Housing Part of the Civil Court seeking to evict the plaintiffs.

On February 19, 2020, plaintiffs commenced this action seeking a declaration that their leases were subject to the rent stabilization law, and injunctive relief requiring defendant to offer them rent-stabilized leases (NYSCEF #1). Instead of answering the complaint, defendant moved to dismiss it for failure to state a cause

of action (NYSCEF #'s 11-14). By Decision and Order dated February 23, 2021, this court denied defendant's motion (NYSCEF # 74).

Defendants thereafter filed an answer with counterclaims for a declaration that the Building is not subject to rent stabilization laws; for breach of contract; and for use and occupancy (NYSCEF # 52). Plaintiffs replied to the counterclaims (NYSCEF # 55). And discovery is proceeding (NYSCEF # 57).

Defendant now moves to compel plaintiffs to pay past and ongoing use and occupancy in the amount of the last rental rate in plaintiffs' respective leases. Defendant argues that under Real Property Law § 220, it is entitled to these amounts as it is undisputed that plaintiffs have not paid any money to defendant since March 1, 2020, even though they continue to occupy the Apartments, and that the amount owed should be determined based on plaintiffs' rent prior to termination of the leases (citing *Marbru Associates v White*, 114 AD3d 554 [1st Dept 2014]).

In support of the amounts alleged to be owed, defendant refers to the plaintiffs' most recent leases which show that Leopoldo Isidoro's last rental rate was \$877.20 per month; Julian Isidoro's last rental rate was \$884.69 per month; and Florencia Mejia's last rental rate was \$877.20 per month (NYSCEF # 40-42). Defendant also submits rent ledgers indicating that based on the rental rates in their respective leases, as of July 31, 2021, Leopoldo Isidoro and Florencia Mejia each owe defendant \$14,912.40, while Julian Isidoro owes defendant \$15,039.73 (NYSCEF #'s 61-63).

In opposition, plaintiffs submit their affidavits in which they state that defendant stopped accepting rent payments on February 29, 2020 (i.e., the date that the notices sent to plaintiffs stated that plaintiffs' tenancies would end), and after that date, defendant never resumed sending monthly bills or advised that it would resume accepting rent payments (NYSCEF # 66 - Aff. L. Isidoro, ¶ 3; NYSCEF # 67 - Aff. J. Isidoro, ¶ 3; NYSCEF # 68 - Aff. F. Mejia, ¶ 3). In addition, according to plaintiffs, because of the COVID-19 pandemic, which caused a loss of household income beginning in March 2020, they have been unable to pay the full rent and have applied for benefits through under COVID-19 Emergency Rental Assistance Program ("ERAP") (codified at L. 2021, c. 56, part BB, amended by L. 2021, c. 417, Part A) (NYSCEF # 66, ¶ 9; NYSCEF # 67, ¶ 9; NYSCEF #68, ¶ 9).¹

¹ Leopoldo Isidoro states he lost his job as restaurant worker in March 2020, due to the pandemic and while he has received unemployment benefits governmental assistance, it is not enough to pay rent and household expenses (NYSCEF #'s 66, ¶¶4-6). Julian Isidoro states that he lost his job as a restaurant worker in March 2020, and his wife also lost her job and that although he was able to find part time work in March 2021, his household income is much less than it was in March 2020, and that it would be a struggle to pay rent at the same rate as before the pandemic (NYSCEF # 67, ¶¶ 4-6). As for Florencia Mejia, he

Plaintiffs contend that under ERAP, a tenant or occupant who is eligible may receive benefit payments covering up to twelve months of rent arrears and three months of prospective rent payments, and urge that equitable considerations mandate that defendant's motion be denied without prejudice to refile pending a determination of plaintiffs' application for benefits under ERAP.

Plaintiffs further argue that defendant's motion must be denied as there is no claim for possession in this action and its possessory claims are pending in the summary holdover proceedings, citing *Matera v Stram* (27 Misc 3d 1, 3 [App Term 1st Dept 2010]). In addition, they contend that because the claims for possession are pending in the summary holdover proceedings, defendant's counterclaim for use and occupancy here should be dismissed as duplicative (citing CPLR 3211[a][4]).

Defendant counters in its reply (NYSCEF # 79) that contrary to plaintiffs' position, *Matera v Stram* (27 Misc 3d 1) is distinguishable on its facts. As to plaintiffs' applications under ERAP, defendant asserts that since plaintiffs' tenancies were terminated in February 2020, they have no right to relief under the program.

After oral argument, by interim order dated August 20, 2021, the court permitted plaintiffs to submit a sur-reply and defendant a sur-sur reply as to the applicability of ERAP (NYSCEF # 85).

Discussion

Real Property Law § 220 provides that in an action for use and occupancy:

The landlord may recover a reasonable compensation for the use and occupation of real property, by any person, under an agreement, not made by deed; and a parol lease or other agreement may be used as evidence of the amount to which [the landlord] is entitled.

"Consistent with Real Property Law § 220, it has long been held that a dispute concerning the amount of rent owed is no reason to allow a tenant to occupy the landlord's real property gratis" (*Levinson v 390 West End Associates, LLC*, 22 AD3d 397, 403 [1st Dept 2005] [internal citations omitted]). Thus, in accordance with this section, landlords have been granted past and ongoing use and occupancy pending the outcome of an action (*id.*; *Oxford Towers Co., LLC v Wagner*, 58 AD3d 422, 423 [1st Dept 2009]). Additionally, in determining the reasonable value of use

states that he is retired and receives SSI benefits and lives with his wife, daughter, son-in-law and granddaughter; that his son-in-law lost his job in March 2020 and unemployment benefits are inadequate to pay rent at the same rate as the household was previously paying (NYSCEF # 68, ¶¶ 5-7).

and occupancy following the expiration of the lease, it has been held that “the rent reserved under the lease, while not necessarily conclusive, is probative” (*Mushlam, Inc. v Nazor*, 80 AD3d 471, 472 [1st Dept 2011]).

Here, as there is no dispute that plaintiffs are occupying the Apartments, defendants would presumably have a right to past and prospective use and occupancy in the amount consistent with that charged under plaintiffs’ respective leases.

Moreover, contrary to plaintiffs’ argument, *Matera v Stram*, (27 Misc 3d 1), is not controlling here. In *Matera*, the landlord filed a 2004 plenary action for breach of contract in Civil Court seeking to recover rent arrears against tenant dating back to September 1999 and did not file a nonpayment or eviction summary proceeding to adjudicate the rental dispute in an expedited manner. After the case had been before the Civil Court for several years, the Civil Court granted landlord’s motion to compel payment of use and occupancy. On appeal, the Appellate Term reversed, reasoning that the landlord could not seek use and occupancy “having elected to pursue their rent claims, sans any possessory remedy by way of a pure breach of contract action [and that] [i]n this posture, plaintiff may not be heard to complain of any perceived unfairness in having to await the final outcome of the litigation before receiving the rental amounts [sought]” (*id.*, at 3). In contrast, in this case, defendant timely sought possession of the Apartments by commencing holdover proceedings, which proceedings were stayed as a result of emergency legislation enacted in the light of the COVID-19 pandemic.

As for plaintiffs’ argument that the counterclaim for use and occupancy should be dismissed under CPLR 3211(a)(4) on the ground of another action pending, the court notes that it has broad discretion in determining whether dismissal is warranted on this ground (*see Whitney v Whitney*, 57 NY2d 731, 732 [1984][finding that the Appellate Division erred in reversing trial court’s denial of motion to dismiss on the ground of another action pending between the same parties on the same cause of action, writing that “CPLR 3211(a)(4) vests a court with broad discretion in considering whether to dismiss on [this] ground...”]). Here, although defendant previously sought money judgments for use and occupancy from plaintiffs for March 2020 to July 2020 in connection with the holdover proceedings, the circumstances here do not warrant dismissal of the counterclaim for use and occupancy particularly since at the time the counterclaim was asserted those proceedings were stayed. Moreover, the counterclaim seeks relief not only for past use and occupancy but use and occupancy during the pendency of this action.

The remaining issues concern whether plaintiffs’ pending applications under the ERAP impact the defendant’s request for use and occupancy. In this connection, defendant has raised the issue of whether plaintiffs are eligible for assistance under the program.

Section 5 of the ERAP statutory provision, which is titled “Eligibility,” concerns a household’s eligibility under the ERAP program, and provides that:

A household, regardless of immigration status, shall be eligible for emergency rental assistance, or both rental assistance and utility assistance. Such household shall be eligible if it: (i) is a tenant or occupant obligated to pay rent in their primary residence in the state of New York, including both tenants and occupants of dwelling units and manufactured home tenants, provided however that occupants of federal or state funded subsidized public housing authorities or other federal or state funded subsidized housing that limits the household's share of the rent to a set percentage of income shall only be eligible to the extent that funds are remaining after serving all other eligible populations; (ii) includes an individual who has qualified for unemployment or experienced a reduction in household income, incurred significant costs, or experienced other financial hardship due, directly or indirectly, to the COVID-19 outbreak; (iii) demonstrates a risk of experiencing homelessness or housing instability; and (iv) has a household income at or below 80% of the area median income, adjusted for household size.

“Rent” is defined in the ERAP Statutory Provisions, by referencing Real Property and Proceedings Law (“RPAPL”) section 702, which states that:

In a proceeding relating to a residential dwelling or housing accommodation, the term “rent” shall mean the monthly or weekly amount charged in consideration for the use and occupation of a dwelling pursuant to a written or oral rental agreement. No fees, charges or penalties other than rent may be sought in a summary proceeding pursuant to this article, notwithstanding any language to the contrary in any lease or rental agreement.

Defendant argues that by defining rent with reference to RPAPL § 702, the Legislature intended to limit the households eligible for the program to those that had a written or oral agreement. In other words, defendant asserts that plaintiffs are ineligible as their lease agreements expired and were not renewed by defendant.

Plaintiffs counter that the reference to RPAPL § 702 was intended to define rent to exclude certain non-rent fees so to protect tenants from eviction based on a failure to pay such fees. Plaintiffs proffer that by referencing the section, the Legislature intended to prevent ERAP awards from being applied to such fees, as opposed to defining rent to exclude tenants paying rent in the form of use and occupancy. Plaintiffs also argue that defendants’ interpretation is contrary to the legislative intent of ERAP to protect households from eviction during the COVID-19

pandemic, including evictions due to expired leases within one-year of the landlord accepting payments.

Here, since the underlying dispute concerns whether defendant's refusal to renew plaintiffs' leases is legally permissible under the rent stabilization laws, the court declines to reach the issue of whether plaintiffs are ineligible for ERAP benefits on the grounds that plaintiffs' lease agreements have expired. Under these circumstances, as plaintiffs' application for relief is pending before the Office of Temporary Disability Assistance, plaintiffs' eligibility for ERAP relief is best determined by the agency in the first instance (*Harbor Tech LLC v Correa*, 73 Misc 3d 1211(a), 2021 WL 4945158, * 2 [Civ. Ct. Kings Co., Oct 25, 2021][Stoller, J.], citing L. 2021, c. 56, Part BB, § 5).

At the same time, while plaintiffs argue that the equities weigh in favor of delaying an award of use and occupancy until the determination of their ERAP applications, it is undisputed that plaintiffs' potential eligibility for ERAP does not preclude an award of use and occupancy during the pendency of this action, and that plaintiffs have occupied the Apartments since March 2020 without paying for such occupancy. That said, the court has taken into consideration plaintiffs' outstanding applications for relief under ERAP for twelve months of rent arrears and three month prospective payments, and plaintiffs' affidavits averring to the loss of employment and resultant economic difficulties to their households due to the pandemic.

Accordingly, defendant's motion for use and occupancy is granted to the extent of requiring plaintiffs to pay use and occupancy consistent with the amounts in their lease agreements, except for the fifteen-month period for which ERAP relief is sought, that is, from March 2020 through May 2021. Upon determination of plaintiffs' eligibility for ERAP, the court will address whether use and occupancy for this fifteen-month period should also be granted.

Conclusion

Accordingly, it is

ORDERED that defendant's motion to compel plaintiffs to pay use and occupancy is granted to the extent of directing that (i) within 30 days of service of a copy of this order with notice of entry, plaintiffs shall pay or post a bond for past use and occupancy from June 2021 to December 2021 in the following amounts: Leopoldo Isidoro-\$ 6,140.40; Florencia Mejia- \$ 6,140.40; and Julian Isidoro-\$6,192.83, and (ii) on or before January 1, 2022, plaintiffs shall pay prospective use and occupancy pendente lite at a rate of \$877.20 per month for plaintiffs Leopoldo Isidoro and Florencia Mejia, and at a rate of \$884.69 per month for plaintiff Julian Isidoro until further order of the court; and it is further

ORDERED that this order is without prejudice to defendant's request to renew its motion to seek use and occupancy for the period from March 2020 through May 2021.

This constitutes the Decision and Order of this court.

<u>12/8/2021</u> DATE			 MARGARET CHAN, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE