

**Matter of Zimak Co. v Division of Hous. &  
Community Renewal**

2004 NY Slip Op 30337(U)

May 13, 2004

Supreme Court, New York County

Docket Number: 100613/03

Judge: Herman Cahn

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publication.

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY  
PRESENT: Hon. Herman Cahn PART 49

Justice

Zimark Company

Plaintiff,

- v -

DHCA et al

Defendants.

INDEX NO.

100613/03

MOTION DATE

9/19/03

MOTION SEQ. NO.

003

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

J.S.C.

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE . . . . .**

**FILED**

**MAY 20 2004**

NEW YORK COUNTY CLERK'S OFFICE

Dated: 5/13/04

Herman Cahn

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 49

-----X  
In the Matter of the Application of :  
ZIMAK COMPANY,

Petitioner,

Index No.100613/03

For a Judgment under Article 78 of the Civil  
Practice Law and Rules,

- against -

DIVISION OF HOUSING AND COMMUNITY :  
RENEWAL, GRACE BEACHAM and  
ROBERT BEACHAM,

Respondents. :

-----X

Herman Cahn, J.

Petitioner, Ziniak Company, is the owner of a residential building at 1290  
Madison Avenuc, in Manhattan. Respondents Grace and Robert Beacham occupy Apartment 3N  
at the premises. The Beachams' apartment is covered by the rent stabilization laws.

Zimak filed a petition with respondent Division of Housing and Community  
Renewal ("DHCR") on April 17, 2001, seeking decontrol under the Rent Stabilization Law of  
1969 ("RSL") (Administrative Code of City of NY, tit 26, ch 4 [Cumulative Supp. 2003])<sup>1</sup> of the

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<sup>1</sup> The Rent Stabilization Law of 1969 is codified in Sections 26-501 through 26-520  
of the Administrative Code of the City of New York (Cumulative Supp. 2003), and is also found  
in McKinney's Unconsolidated Laws, Book 65, §§ 8601-8700, at 157-264 (2002). The pertinent  
provision states:

"housing accommodations" shall not include housing accommodations which:  
(1) are occupied by persons who have a total annual income in excess of one  
hundred seventy-five thousand dollars per annum for each of the two preceding calendar  
years, as defined in and subject to the limitations and process set forth in section  
26-504.3 of this chapter; and (2) have a legal regulated rent of two thousand

subject apartment on the basis that the legal regulated rent was \$2,000.00 or more (*id.* § 26-504.1 through 26-504.3). Zimak requested verification of the tenants' annual income for the previous two years, to establish that it was in excess of \$175,000.00 per annum, a prerequisite to decontrol (*id.*).

In their answer to the application, the tenants stated that their total annual household income was less than \$175,000.00 annually for one or both of the prior two years. In accord with DHCR's printed instructions, the tenants also submitted copies of the first pages of their New York State tax returns, deleting all income information (Petition Ex. C).<sup>2</sup>

DHCR sought verification of the tenants' income from the State Department of Taxation and Finance ("DTF"). DTF replied that it could not locate the tenants' returns in its files. Thereupon, DHCR's Administrator issued an order denying the application on the ground that:

[T]he sum of the annual incomes of all persons whose names are recited as the tenant . . . who occupied this housing accommodation . . . was not determined because the DTF was unable to match a tax return for any such person ~~for~~ either or both of the two preceding calendar years. Where income in excess of \$175,000.00 for both preceding years is not confirmed by DTF, deregulation is not warranted.

(Petition Ex. D.)

Zimak thereupon filed a Petition for Administrative Review ("PAR"), which was denied. Thereupon the instant proceeding was commenced.

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dollars or more per month. . . . (RSL § 26-504.1 [effective Jan. 1, 1998].)

<sup>2</sup> DHCR's Answer Form contains the following instruction: "**The tenant(s) must delete all social security numbers and income figures from all preprinted mailing labels or tax returns submitted.**" (Petition Ex. B [emphasis in original].)

DHCR's regulations (the "Rent Stabilization Code" ["RSC"]), promulgated under the KSL (McKinney's Unconsol Laws, Book 65, §§ 8601-8700, at 482-671 [2002]), state that "[i]f the DTF cannot ascertain whether the threshold has been met, the DHCR may issue an order denying the OPD [i.e., Owner's Petition for Decontrol], or request additional information." (RSC § 2531.5.)

Here, DHCR did not possess income information from the tenants (other than their conclusory statement that the household income was less than \$175,000.00 per annum) when it summarily denied the owner's petition. The statutory scheme of the luxury decontrol legislation is to afford DHCR an opportunity to confirm the amount of tenants' total annual income, and to make a decision based on such information. Where, as here, DTF cannot confirm the amount, it is irrational to deny the decontrol petition without further effort to gain access to documentation of tenants' income. In essence, DHCR has simply denied the petition out of hand, because DTF has not been able to find a return for the tenants. This is a violation of the parties' rights to have the petition considered on its merits. DHCR should either make another effort, possibly after obtaining more information from the tenants and to have DTF provide the necessary information. If this is not possible, it should obtain a complete copy of the tax returns from tenants, certified by them, and afford petitioner some opportunity to depose the tenants as to the matters at issue. This can be done, while still safeguarding the necessary confidentiality to the tenants' return. To simply deny the petition because one state agency could not furnish the required data, is a violation of the parties' right to a reasoned decision. The court notes that the statute does not limit DHCR to making a request of DTF for matching tax returns in order to obtain the information. DHCR's decision to deny the petition without the benefit of any facts is

not in compliance with the intent of the high-income decontrol legislation, and was arbitrary and capricious (*Matter of Classic Realty LLC v New York State Div. of Hous. & Community Renewal*, Ct App, Mar. 30, 2004, 2004 WL 609400).

Accordingly, it is

ORDERED that the Petition is granted; and it is further

ORDERED that respondent DHCR's denial of petitioner's PAR is nullified; and it

is further

ORDERED that the inatter is remanded to respondent DHCR for further consideration; and it is further

ORDERED that respondent DHCR is directed to make further inquiry into the total annual income of respondents Grace and Robert Beacham for the two calendar years preceding petitioner's petition for decontrol; and it is further

ORDERED that respondents Grace and Robert Beacham are directed to cooperate with DHCR's aforesaid inquiry.

Dated: May 13, 2004

**FILED**

ENTER:

**MAY 20 2004**



J. S. C.

NEW YORK COUNTY CLERK'S OFFICE