

**Rhino Assets, LLC v New York City Department for
the Aging**

2005 NY Slip Op 30115(U)

April 8, 2005

Supreme Court, New York County

Docket Number: 0116414/2004

Judge: Karen Smith

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Interim Order

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

PRESENT: KAREN SMITH

PART 44

0116414/2004

RHINO ASSETS, LLC.
vs
NYC DEPARTMENT OF AGING

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ 1

ARTICLE 78

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

See unindexed memorandum interim order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 4/8/05

KSS
KAREN SMITH c.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 44

-----X
RHINO ASSETS, LLC, *et al.*,

Petitioners,
-against-

Index no.: 116414/2004
Motion seq.: 001
Motion date: February 7, 2005

NEW YORK CITY DEPARTMENT FOR
THE AGING, SCRIE PROGRAM

INTERIM DECISION AND ORDER

Respondent.

-----X
PRESENT: KAREN S. SMITH, J.S.C.:

Respondent New York City Department for the Aging's motion, pursuant to CPLR §§ 7804(f) and 3211(a)(7), seeking an order dismissing the petition is denied on the grounds set forth by the movant but is converted into a motion for summary judgment and parties are given time to furnish the court with additional submissions.

Petitioners, a group of corporate entities that own apartment buildings in New York City, brought this Article 78 to appeal respondent's failure to produce documents pertaining to certain individuals who are beneficiaries of the Senior Citizen Rent Increase Exemption (SCRIE) program. Respondent now moves to dismiss the proceeding, on the ground that disclosure of the documents in question would constitute an invasion of the rights of those individuals.

The relevant facts are contained in the moving papers and are not in dispute. The SCRIE program, codified in New York Real Property Tax Law § 467-b and Title 26, Chapter 7 of the Administrative Code of the City of New York, benefits certain rent-regulated tenants sixty-two years of age or older, who are eligible heads of households and whose total household income is less than \$24,000.00 a year. The program insures that rent for qualifying tenants will never exceed one third of that tenant's total household income. The owner of the dwelling unit occupied by the tenant receiving the rent abatement receives a property tax abatement in an amount equal to the amount of the tenant's rent abatement.

Respondent administers the SCRIE program for rent-controlled and rent-stabilized tenants. To be considered for the program, tenants must submit an application to respondent, disclosing, among other things, the names, social security numbers, and the total income, including public

assistance benefits, for all individuals living in the premises. If respondent determines that the tenant qualifies, it issues an Initial Approval Order to both the tenant and the landlord, which sets out the amounts of rent exemption for the tenant and the tax abatement for the landlord. The tenant must reapply for the benefit every two years.

Respondent maintains a file for each tenant who receives benefits under the SCRIE program. The file contains the tenants application, income verification documents, documents showing proof of the tenants age, and rental documents.

On September 23, 2004, by way of a letter to respondent, petitioners filed a request, pursuant to New York Public Officer's Law (NYPOL) § 87, seeking all records in respondent's possession concerning tenants in petitioners' buildings who receive rent abatements through the SCRIE program. Respondent failed to respond. On October 4, 2004, petitioners sent a second letter to Jack Kupferman, respondent's Director of Policy and Litigation. Respondent never produced either the records or a formal denial. On November 19, 2004, petitioners initiated the instant Article 78 proceeding.

In the underlying Article 78 proceeding, petitioners argue that the documents they seek are public records and, as such, respondent must produce them pursuant to New York Public Officer's Law § 87. Respondent now moves to dismiss the proceeding, on the grounds that disclosing the documents would result in an unwarranted invasion of the subject tenant's privacy and that, therefore, those documents are exempt from disclosure.

In a motion to dismiss a proceeding, brought under CPLR § 7804(f), the court's review is limited to examining the petition to determine whether it states a cause of action. (*Matter of Board of Education*, 116 AD2d 939, 941 [3rd Dept 1986]). The court must consider the facts contained in the petition as true and interpret them in a light most favorable to the petitioner. (*Id.*) The court can only consider affidavits submitted by petitioner and not those submitted by respondent. (*Id.*) Applying that rule in this case, respondent's motion fails. Petitioners have alleged, and respondent does not contest, that the petitioners' request for the documents was made pursuant to NYPOL § 87, that these documents are in the possession of a public agency, and that respondent has failed to produce them. As such, petitioners have stated a sufficient basis for their proceeding. The arguments respondent raises, for the first time in the present motion, are not properly before the court on such a motion. As such, respondent's motion to dismiss the complaint is denied.

However, when the respondent lays out its arguments against the petition on its merits in a motion to dismiss, the court need not give respondent leave to serve an answer and may proceed to determine the matter on the merits. (See *Davila v. New York City Housing Authority* 190 AD2d 511, 512 [1st Dept., 1993]; *Briedis v. Village of Tuxedo Park* 156 AD2d 744, 746 [2nd Dept., 1989], *appeal denied* 78 NY2d 852; *DeVito v. Nyquist* 56 AD2d 159, 161 [3rd Dept., 1977], *affirmed* 43 NY2d 681). Here, while respondent's motion does not put forth adequate grounds to dismiss the petition on its face, it sets forth sufficient grounds to deny the relief sought in the petition as a matter of law. Petitioners' papers in opposition to the motion address the merits of the arguments raised by respondents. As such, neither party will be unfairly prejudiced if the court were to convert the motion into one for summary judgment proceed to a determination on the merits. Requiring respondents to file an answer at this point would delay the proceedings unnecessarily. However, as CPLR § 3211 (c) requires that, if the court intends to convert a motion to dismiss into one for summary judgment, the court must provide parties adequate notice and the opportunity to submit any additional papers they wish the court to consider in rendering its judgment. Accordingly, parties have 20 days from the date of this order to submit to the court, upon notice to the opposing party, any additional papers.

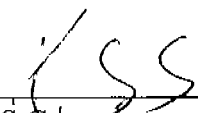
Accordingly, it is hereby

ORDERED that respondent's motion to dismiss is converted into a motion for summary judgment, and it is further

ORDERED that parties shall submit, upon service to the opposing party, any additional papers they wish the court to consider within 20 days of the date of this order.

Dated: April 8, 2005
New York, New York

ENTER:



J.S.C.