

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

2005 NY Slip Op 30116(U)

June 27, 2005

Supreme Court, New York County

Docket Number: 0116414/2004

Judge: Karen Smith

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

PRESENT: KAREN SMITH
Justice

PART 44

Rhvo Assets, LLC

INDEX NO. 116414

MOTION DATE 4/28/05

- v -

NYC Dept. of Aging

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion to/for _____

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

PAPERS NUMBERED

1

Answering Affidavits - Exhibits _____

2

Replying Affidavits _____

3-5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ petitions and the cross motions are decided in accordance with the annexed memorandum decision and judgment.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Rm 141B).

Dated: 6/27/05

KBS
KAREN SMITH J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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: April 28, 2005

NEW YORK CITY DEPARTMENT FOR
THE AGING, SCRIE PROGRAM

DECISION AND JUDGMENT

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 3212, seeking an order dismissing the petition is granted.

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, pursuant to New York Public Officer's Law (NYPOL) § 87, 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 this court's order of April 8, 2005. In that order, the court converted respondent's motion to dismiss into one for summary judgment. Now, having given both parties adequate opportunity to submit further materials in support of their claims, the court shall proceed to determine the merits of respondent's motion.

The court determines that the disclosure petitioners seek would constitute an unwarranted invasion of privacy and, as such, petitioners application must be denied. State and municipal public agencies must make all records available for public inspection and copying, unless disclosure would constitute an unwarranted invasion of privacy pursuant to NYPOL § 89 (2). (NYPOL § 87 [2][b]). When an agency declines to disclose documents on the grounds set forth in NYPOL § 87 (2), that agency bears the burden of demonstrating that the disclosure would create an unwarranted invasion of privacy. (NYPOL § 89 [5][f]). NYPOL § 89 (2)(b) provides that

- An unwarranted invasion of personal privacy includes, but shall not be limited to:
- i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
 - ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;
 - iii. sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes;
 - iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or
 - v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency; or
 - iv. information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law.

Due to the language "[a]n unwarranted invasion of personal privacy includes, but shall not be limited to", the six scenarios described are not an exhaustive list of "unwarranted invasion[s] of privacy". (*New York Times Co. v. City of New York Fire Department* 195 Misc2d 119, 126 [Sup. Ct., N.Y. Co. 2003]). In determining whether disclosure of information would constitute an unwarranted invasion of privacy, the court must consider whether the release would be offensive and objectionable to a reasonable person of ordinary sensibilities. (*Empire Realty Corporation v. New York State Division of the Lottery*, 230 AD2d 270, 273 [3rd Dept. 1997]). In making its determination, the court must balance the privacy interests of the individual against the public's interest in access to the information in question. (*Id.*).

The documents contained in respondent's files contain the identity of individuals who receive SCRIE benefits, the composition of their households, and the amount of their annual income and the annual income of those individuals who reside with them, including income from social security and other public assistance programs. The identity of people who receive state sponsored housing benefits and information concerning their income levels is clearly private and personal information, and a reasonable person would find disclosure of such information objectionable. This conclusion is supported by three advisory opinions issued by the New York State Committee on Open Government, each of which found that releasing records containing income levels for individuals would constitute an unwarranted invasion of privacy under NYPOL § 89 (2)(b). (N.Y. State comm. Open Govt. AO 10747 [April 8, 1998], AO 13758 [December 11, 2002], and AO 8001 [December

21, 1993]). Two of the advisory opinions, AO 10747 and AO 13758, deal specifically with the release of applications for affordable housing or housing assistance benefits that contain information regarding income levels. As a rule, courts should defer to the advisory opinions from the Committee on Open Government on questions of whether or not disclosures constitute unwarranted violations of privacy. (*Kwasnik v. City of New York*, 262 AD2d 171, 172 [1st Dept., 1999]).

On balance, while transparency of the conduct of government agencies is an important concern, there is nothing in the record that indicates that the benefit to the public from the disclosure sought will outweigh the harm to the SCRIE beneficiaries. Petitioners make the valid claim that they have a right to know respondent's decision making process in awarding SCRIE benefits. However, the rules respondent follows in making its determinations are laid out in New York Real Property Tax Law § 467-b and Title 26, Chapter 7 of the Administrative Code of the City of New York. Knowledge of the identity of specific beneficiaries and their income levels is not so essential to understanding that process that disclosure is warranted in light of the injury it may cause those beneficiaries. As such, the documents petitioners seek are properly exempt from disclosure.

Petitioners' arguments against exemption are unconvincing. Petitioner argues that release of such records would not constitute an invasion of privacy under NYPOL § 89 (2) (b), because the specific language of subsection iv of that section requires both hardship to the individual whose information is being released and that said information is not relevant to the work of the agency releasing it. Petitioners argue that the records in question are clearly relevant to respondent's work, and therefore do not fall under NYPOL § 89 (2) (b) (iv). This argument ignores the language of NYPOL § 89 (2) (b), which clearly does not limit the definition of "unwarranted invasion of privacy" to the specific instances listed therein. While respondent's grounds for non-disclosure do not fit squarely within subsection iv, they are still sufficient to bar release.

The case cited by petitioner, *New York Association of Homes and Services for the Aging, Inc. v. Novello*, (13 AD3d 958 [3rd Dept. 2004]) is not controlling in the present circumstances. In that case, petitioner sought records from the New York State Department of Health (DOH) nursing homes patients whose "net available monthly income", as recorded in their Medicaid files, did not correspond to amounts deducted by their care providers. (*Id* at 959). The Appellate Division, Third Department, held that DOH had failed to establish that disclosing the patients medical and personal

records would constitute an unwarranted invasion of privacy. (Id at 960). However, the decision does not indicate what showing DOH had made that releasing the records sought would constitute an unwarranted invasion of privacy. Moreover, the Appellate Division stated specifically that it was the harm from disclosure of *medical* records that was the issue before them. In this case, respondent seeks to avoid the disclosure of *financial* information, and has made a specific showing that disclosure of that information would constitute an unwarranted invasion of privacy. Thus, the Appellate Division's determination in *Novello* is not be controlling in this one.

Petitioners' argument that, by participating in the SCRIE program, the tenants have opened their income status to public inspection is unconvincing. Petitioners have put forth nothing that indicates that such information is generally made available to the public, or that applicants for SCRIE benefits should expect that their identities and income information would be disclosed.

Finally, the fact that respondent failed to respond to petitioners' initial requests is of no moment. That respondent may not have complied with the procedural requirements of NYPOL § 87 does not create a right for petitioners to acquire records that would otherwise be exempt from disclosure.

Accordingly, it is hereby

ORDERED and ADJUDGED that respondents motion is granted and the petition is dismissed.

This constitutes the decision and judgment of the court.

Dated: June 27, 2005
New York, New York

ENTER:



J.S.C. **KAREN SMITH**