

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

NAFISSATOU DIALLO

Plaintiff,

-against-

DOMINIQUE STRAUSS-KAHN

Defendant.

AFFIRMATION AND

MEMORANDUM OF LAW

IN OPPOSITION TO PLAINTIFF'S

MOTION SEEKING ISSUANCE OF A
JUDICIAL SUBPOENA

Index No. 307065/11

LAURA GREENBERG, an attorney duly admitted to practice law before the courts of this State, affirms, under penalties of perjury, that:

1. I am an Assistant District Attorney, of counsel to CYRUS R. VANCE, JR., the District Attorney for New York County ("DANY"). The factual allegations made herein are based upon my conversations with members of DANY, as well as my review of plaintiff's moving papers.
2. This affirmation and accompanying memorandum of law are made in opposition to plaintiff's Civil Practice Law & Rules ("CPLR") §2307 application seeking issuance of a judicial subpoena *duces tecum*.
3. Plaintiff's Notice of Motion, and annexed 10-page proposed subpoena *duces tecum*, dated May 18, 2012, served on DANY May 22, 2012, and returnable June 11, 2012, seeks, *inter alia*, "[t]he entire file maintained and/or prepared by the NY County DA's Office concerning the

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investigation and/or criminal prosecution of Defendant Strauss-Kahn, including any physical evidence collected and maintained by the NY County DA's Office.”

4. The criminal investigation and prosecution referred to in the proposed subpoena relates to New York County Indictment No. 2526/2011.
5. On or about August 22, 2011, Indictment No. 2526/2011 was dismissed and, thereafter, the matter was sealed, in accordance with Criminal Procedure Law (“CPL”) §160.50. The case remains sealed. For this and other reasons set forth below, DANY opposes issuance of the proposed subpoena and disclosure of said files.

MEMORANDUM OF LAW

This memorandum of law is submitted in opposition to plaintiff's motion seeking issuance of a judicial subpoena *duces tecum*, served upon the New York County District Attorney's Office (“DANY”) on May 22, 2012. The proposed subpoena demands *inter alia*, “[t]he entire file maintained and/or prepared by the NY County DA's Office concerning the investigation and/or criminal prosecution of Defendant Strauss-Kahn, including any physical evidence collected and maintained by the NY County DA's Office.”

For several reasons, DANY submits that the plaintiff's motion should be denied in its entirety. To begin, the underlying criminal prosecution is both dismissed and sealed in accordance with CPL § 160.50. As such, the requested documents - to the extent they exist - are not reviewable, let alone obtainable, pursuant to subpoena without an unsealing order from the Court where the criminal matter was pending or, in the alternative, a waiver from Dominique Strauss-Kahn, the criminal defendant. Therefore, DANY is prohibited from disclosing materials from the file at issue. Additionally, the subpoena, in its all-inclusive demand for materials, is overly broad, and seeks materials that are barred from disclosure on grounds of privilege or other legal restrictions.

1. The District Attorney's Case File is Sealed Pursuant to CPL § 160.50.

On or about August 22, 2011, New York County Indictment No. 2526/2011 was dismissed. As such, all official records and documents pertaining to the underlying criminal proceeding were, and remain, sealed pursuant to CPL §160.50. Once a case is sealed, it is only the court which heard the criminal action that has jurisdiction over the criminal matter, and it is only that court that has the authority to unseal its own records or that of the District Attorney. See Wilson v. City of New York, 240 A.D.2d 266, 267 (1st Dept. 1997). However, CPL §160.50(1)(d)(i)-(vi) provides that such records can only be unsealed by the court in a few, narrowly defined instances, *e.g.* upon request of the person accused or his designated agent, and to six enumerated categories of law enforcement-related persons or agencies.

Plaintiff has neither moved for, nor obtained, the necessary order from the New York County Supreme Court, Criminal Term, to unseal DANY's files. Indeed, it is unlikely that plaintiff could even obtain such an order since she does not fall within any of the designated categories statutorily permitted to seek an unsealing of a criminal matter. Put simply, plaintiff does not have standing to seek an unsealing order. See generally CPL §160.50; see also Wilson, 240 A.D.2d at 267 (civil plaintiff was not the criminal defendant, nor one of the persons or institutions to which the statutory exceptions pertained under CPL §160.50); Matter of Hynes v. Karassik, 47 N.Y.2d 659, 663 (1979) (grievance committee investigating whether to bring professional disciplinary charges against an attorney, who had been acquitted of criminal charges, did not have standing under CPL § 160.50 to seek unsealing); Matter of Joseph M., 82 N.Y. 2d 128, 133 (1993) (Board of Education not entitled to obtain sealed records of a criminal action that terminated in favor of accused, a tenured teacher, for use in disciplinary proceeding).

In the alternative, plaintiff has also not provided DANY with the criminal defendant's, Dominique Strauss-Kahn, written waiver of CPL §160.50 sealing. Having failed to provide DANY,

or this Court, with defendant Strauss-Kahn's written waiver of sealing, and having failed to move before the criminal term of the New York County Supreme Court for an order unsealing DANY's case file, New York County Supreme Court Indictment No. 2526/2011 remains sealed and inaccessible for review or disclosure.

Owing to DANY's files being sealed, your affiant has not been able to review the case documents, nor access any potentially responsive information. As such, the objections to disclosure raised below are, of necessity, general in nature and based on my experience as a prosecutor and my knowledge of the types of documents typically found in a DANY case file. Additionally, to the extent plaintiff asserts that DANY is in possession of certain items and/or documents, your affiant is not able to confirm whether DANY is indeed in possession of such items.

2. The Disclosure Requested Would Violate the Grand Jury Secrecy Laws.

Much of the materials gathered after a defendant's arrest and resulting in an indictment by a grand jury is protected by certain secrecy provisions. In New York, disclosure of grand jury materials is governed by statute and, absent special circumstances not present here, such materials may not be disclosed. CPL § 190.25(4)(a) provides in pertinent part that: "[g]rand jury proceedings are secret and no ... [person] may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or the substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding." Indeed, it is a felony under New York law to disclose information concerning a grand jury proceeding absent the written order of the court. Penal Law ("PL") § 215.70; see Melendez v. City of New York, 109 A.D.2d 13, 21 (1st Dept 1985)(tape recorded statement of police officer taken by District Attorney in conjunction with official investigation of incident should be treated in the same manner as Grand Jury testimony for the purposes of disclosure).

The proper method for obtaining grand jury materials and evidence is by application - on notice to DANY - to the Criminal Term judge supervising the grand jury in New York County or to the Court which over saw the prosecution while it still was pending. See Matter of Lungen v. Kane, 217 A.D.2d 849, 850 (3d Dept 1995), aff'd, 88 N.Y.2d 861 (1996); see also People v. Astacio, 173 A.D.2d 834 (2d Dept 1991); Ivev v. State of New York, 38 A.D.2d 962 (4th Dept 1988), aff'd, 80 N.Y.2d 474 (1992); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 224-30 (1979). In any such application, plaintiff must demonstrate a compelling and particularized need for the materials in order for the Court to consider releasing grand jury evidence. See People v. Fetcho, 91 N.Y.2d 765, 769 (1998); see also, Lungen v. Kane, 88 N.Y.2d 861 (1996); District Attorney of Suffolk County, 58 N.Y.2d 436 (1983).

Thus, even assuming plaintiff is successful in unsealing DANY's criminal case file, plaintiff must then seek another court order from the New York County State Supreme Court, Criminal Term, releasing the grand jury materials. Plaintiff has not done so.

3. Disclosure is prohibited by Civil Rights Law § 50-b.

By her proposed subpoena, plaintiff seeks “[a]ll documents concerning the identities of any other claimed victims of sexual assault inflicted by defendant Strauss-Kahn.” Such information, should it exist, is not discoverable. Section 50-b of the Civil Rights Law (“CRL”) provides, in pertinent part, that “[n]o report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such a victim [of a sex offense] shall be made available for public inspection.” The statute further states that, “[n]o such public officer or employee shall disclose any portion of any police report, court file, or other document which tends to identify such a victim,” except as provided in certain enumerated instances. CRL §50-b(1). Moreover, damage suits may be brought by those victims whose identities are wrongly disclosed. CRL §50-c.

Thus, the disclosure of information or documentation tending to identify a victim of a sexual offense is prohibited by law.

Similarly, given the allegations set forth in plaintiff's pending civil suit, until she provides her sworn, written authorization showing that she is aware of her CRL 50-b privacy rights and that she has knowingly and voluntarily decided to waive those rights, DANY is prohibited from disclosing any materials in its possession concerning the underlying criminal investigation.

4. The subpoena is overbroad and burdensome.

Even if plaintiff is able to overcome the statutory bars discussed above, DANY further objects to issuance of the subpoena on the ground that it is overbroad. Plaintiff's proposed subpoena seeks access to our entire file. Indeed, plaintiff specifically requests that DANY disclose "[t]he entire file maintained and/or prepared by the NY County DA's Office concerning the investigation and/or criminal prosecution of Defendant Strauss-Kahn, including any physical evidence collected and maintained by the NY County DA's Office." In addition to this overbroad request, plaintiff goes on to make 59 more demands. The demand, as it stands, in its request for unrestricted access to the file of a non-party state prosecutor, is manifestly overbroad on its face, and compliance with it would place an undue burden on DANY. That being so, the law plainly calls for it to be denied. See, e.g., Oak Beach Inn Corp. et. al. v. Town of Babylon, 239 A.D.2d 568 (2nd Dept. 1997) (a subpoena *duces tecum* directed at the New York State Police seeking all documents and records concerning its investigation of the plaintiff is over broad).

It is well settled that an overbroad request is not cured by requesting specific categories of documents while simultaneously requesting the entire file, and a civil litigant is not entitled to unrestricted access to the entire investigative file of a non-party state prosecutor. See, e.g., Mestel & Co. v. Smythe Masterson & Judd, Inc., 215 A.D.2d 329 (1st Dept 1995); Grotallio v. Soft Drink Leasing Corp., 97 A.D.2d 383 (1st Dept. 1983); Hudson Valley Tree, Inc. v. Barcana, Inc., 114

A.D.2d 400 (2d Dept. 1985); Bair v. City of New York, 131 Misc.2d 743 (Sup. Ct. Kings Co. 1986). Faced with such an overbroad request, DANY is not and should not be required to “prune the requests to ‘cull the good from the bad.’” West 16th Realty Co. v. Ali, 176 Misc.2d 978 (N.Y. City Civ. Ct., April 29, 1998) (J. Friedman) quoting Grotallio v. Soft Drink Leasing Corp., 97 A.D.2d 383, supra (1st Dept. 1983).

Plaintiff has made no attempt to focus the request. If civil litigants could issue overbroad discovery demands on a prosecutor’s office and the office had to cull through any potentially responsive documents and assert a privilege as to each document it wanted to withhold, the time and resources devoted to such tasks would divert attention away from the primary goals of such an office – to investigate community complaints, to work with the police in their investigations of crime and ultimately, upon a finding of wrongdoing, to prosecute offenders.

5. Plaintiff seek Documents Which are Not Material and Relevant

It is long settled that the purpose of a subpoena is to compel the production of specific documents that are *relevant and material* to facts at issue in a pending judicial proceeding. “[C]ourts have imposed limitations on the use of subpoena power. Generally, a subpoena *duces tecum* may not be used for the purpose of discovery or to ascertain the existence of evidence.” Matter of Terry D., 81 N.Y.2d 1042, 1044 (1997) (internal citations omitted). Plaintiff’s overly broad request amounts to no more than the use of the procedural mechanism of a subpoena to expand the bounds of permissible discovery.

6. Privileged Materials

Many of the documents contained in our file are privileged, confidential, and otherwise not subject to disclosure. Outlined below are some of the applicable privileges and objections to disclosure. However, given your affiant’s inability to review the file, I have not and cannot assert all relevant privileges, and reserve the right to do so, if and when plaintiff cures the defects discussed above.