

**Matter of Moveway Transfer & Storage, Inc. v
Thompson**

2008 NY Slip Op 33505(U)

December 19, 2008

Supreme Court, New York County

Docket Number: 107195/2007

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK
J.S.C. Justice

PART 2

Moveway Transfer & Storage

INDEX NO. 107195/07

MOTION DATE 11/30/08

- v -

William C. Thompsons Comptroller

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

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 (Room 141B).

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

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 (Room 141B).

Dated: 12/22/08

Ley
LOUIS B. YORK

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

-----X
In the Matter of the Application of

MOVEWAY TRANSFER & STORAGE, INC.

Index No.: 107195/2007

Petitioner,

For an Order Pursuant to CPLR § 2304 and 3103
Quashing or Modifying a Subpoena Duces Tecum /
Notice to Produce issued by Comptroller of the
City of New York, Bureau of Labor Law

- against -

WILLIAM C. THOMPSON, COMPTROLLER
OF THE CITY OF NEW YORK,

Respondent.

-----X
Louis B. York, J.:

Common Procedural Background

Before the Court are two Article 78 proceedings, which petitioner Moveway Transfer & Storage, Incorporated ("Moveway") commenced against respondent William C. Thompson, Comptroller of the City of New York ("the Comptroller"). In this proceeding, which bears the Index Number 107195/2007 ("Petition 1"), Moveway seeks to quash the Comptroller's Notice to Produce ("the Notice") dated April 25, 2007. The Notice requires Moveway to appear for an examination before the Comptroller and answer allegations that it did not pay the prevailing wages to its workers on certain public works projects. The Notice also requires Moveway to produce discovery at the examination, including payroll books and records, information relating to fringe benefits, and tax filings. The Comptroller has opposed the Petition, stating that Moveway must comply with the Notice, and also has filed an Answer to Petition 1.

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 (Room 1415).

In a separate petition, Moveway challenges the Comptroller's conduct after Moveway commenced Petition 1. Among other things, the Notice of Petition in Petition 1 contains the following language:

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR 3103(b) disclosure pursuant to the Subpoena/Notice to Produce is suspended pending this application for a protective order

Based on this language, Moveway did not respond to the Comptroller's Notice to Produce.

Around September 28, 2007, the Comptroller appealed the Court's order enjoining the Notice to Produce until it decided Petition 1. Under CPLR 5519(a)(1), this automatically stayed the order granting the stay. That is, the September 27, 2007 stay was rendered ineffective by the filing of the appeal. Moreover, according to the Comptroller, his power to conduct investigations and demand discovery arises under Article 9 of the Labor Law. Therefore, he argues, the power is not a discovery device subject to Article 31 of the CPLR and the automatic stay provision contained in CPLR § 3103 is inapplicable. Based on this analysis, the Comptroller determined that Moveway's obligation to comply with the Notice to Produce was ongoing despite the existence of Petition 1. When Moveway did not respond to the Notice, the Comptroller withheld contract payments due to Moveway. According to the Comptroller, this is also a legitimate exercise of its power under the Labor Law.

Moveway does not agree with the Comptroller's position and fiercely objects to the withholding of money due to it under contracts, especially those which are not directly at issue in the current dispute. According to Moveway, the withholding of its payments violates its property rights and is unconstitutional. Rather than challenge the Comptroller's conduct in the context of Petition 1, Moveway commenced a second Article 78 proceeding, filed under Index Number 112981/2007 ("Petition 2"). In Petition 2, Moveway asks this Court to annul or vacate

the Comptroller's determination that Moveway failed to comply with the Notice. In signing the original Order to Show Cause, the Court granted interim relief. Respondent appealed the Order to Show Cause and proceeded with its attempt to enforce the Notice. Subsequently, in addition to the Petition itself, Moveway moved for contempt against the Comptroller based on its alleged violation of the Order to Show Cause. Moreover, it seeks to annul or vacate the purported determination of the Comptroller to withhold wages.

Finally, as indicated above, Petition 2 raises the issue of the constitutionality of certain aspects of Labor Law 235(2). Therefore, the State of New York has intervened in Petition 2 for the limited purpose of arguing in support of the constitutionality of that statute. The State does not address or take a position as to the particulars of the dispute between Moveway and the Comptroller.

As there are two separate proceedings, the Court decides each petition separately. However, the discussion below addresses the facts and arguments in each, and the discussion is identical in each of the two decisions.

Common Factual Background

During the period in question, Moveway held contracts with various City agencies, including the City's Human Resources Administration ("HRA"). Because the contracts involved public agencies, Moveway was statutorily prohibited from paying its employees substandard wages for work for which there was a prevailing wage rate. The Comptroller determined that Moveway had to pay its employees \$28 per hour for work performed in connection with the HRA and other contracts. This was the prevailing wage for laborers who move furniture and equipment.

Moveway sought reconsideration of the wage from the HRA, arguing that under the HRA contract its employees would only be moving cartons of records inside of the HRA buildings. In response to the request, Raymond J. Frasene, who at the time was an administrator in the HRA Office of Contracts, agreed that there were no prevailing wage rates for individuals whose responsibility was limited to moving document cartons inside public buildings. Accordingly, Frasene concluded that although Moveway had to pay the foreman \$28 per hour it could pay its crew members \$20 per hour and \$28 per hour for overtime work. In addition, Frasene stated that Moveway did not have to generate payroll reports for the crew because of the absence of a prevailing wage rate. Frasene memorialized this understanding in an April 25, 2003 memorandum, which both parties have provided to the Court. However, it does not appear that the Comptroller altered his decision based on the Frasene memorandum.

Subsequently, in July, September and November of 2006 and in January of 2007, the Comptroller received sworn complaints from five Moveway employees. These individuals stated that (1) they had performed work for Moveway under the HRA and other public works contracts; and (2) their duties had included, inter alia, moving office furniture and equipment. Accordingly, they contended that they should have been paid the prevailing applicable wage rate for this type of labor.

In October 2006, following his receipt of some of these complaints, the Comptroller initiated an investigation to determine whether the prevailing wage rate schedule should have been applied. The office issued a Notice to Produce dated October 23, 2006, which required Moveway to appear for examination on December 11, 2006 and to produce payroll books and records, information concerning fringe benefits, and tax filings relating to Moveway's 2004-2006 public works contracts with the New York City HRA, Department of Education, School

Construction Authority, and Department of Aging. The Notice stated that it was issued under Labor Law § 230.

Moveway attempted to resolve the issue in its favor without the need of complying with the Notice. Around December 7, 2006, it contacted the Comptroller, relying on the April 25, 2003 memorandum for the proposition that the employees in question were exempt from the prevailing wage rate requirements. It also requested and received an adjournment of the Notice until January 8, 2007, while the Comptroller considered the memorandum. The parties agree that around December 19, 2006, the Notice to Produce was adjourned without a date. However, Moveway contends that the Comptroller's office indicated that it would not move forward with the Notice at all. The Comptroller instead asserts that during a January conversation, its office informed Moveway it was not ready to close the file as the investigation of Moveway had not concluded yet.

Jennifer Caroleo, the claims specialist who had issued the October 2006 Notice to Produce, went on long-term leave in the spring of 2007 and the matter was reassigned to another claims specialist, Dwayne E. Gibson. An attorney from the Comptroller's office informed counsel for Moveway of this development in the course of discussions in which they attempted to resolve their dispute. During their conversations, counsel for the Comptroller essentially stated the following: (1) the April 25, 2003 HRA memo was not binding on the Comptroller, as the latter has the exclusive authority to determine wage rate classifications under Labor Law § 230; (2) regardless, based on the employee complaints there was an issue as to whether Moveway had accurately described the scope of its work to the HRA in 2003; (3) even if Moveway's work for the HRA did not include moving furniture and office equipment, Moveway had other public works contracts for which it utilized its employees, and any purported

exemption would not apply to work performed under those other contracts¹; and (4) for all the above reasons and under its statutory powers, the Comptroller was empowered to conduct an investigation. The Comptroller initially attempted to resend and rely on the October 2006 Notice, but Moveway returned the October 2006 Notice and demanded that a new Notice be sent. As a result, Mr. Gibson of the Comptroller's office prepared and served the April 25, 2007 Notice which is the subject of these proceedings.

Analysis

I. Labor Law §§ 220, 220-b, 234, and 235.

Unlike the original Notice – which purported to be issued under Labor Law § 230 et. seq., and in particular, Labor Law §§ 234 and 235 – the April 25 Notice stated that it was issued under Labor Law § 220 (7). The Comptroller now characterizes this as a typographical error and has proceeded throughout these court proceedings as if the originally cited Labor Law sections were applicable. Initially, Moveway apparently did not notice the alteration, and its first papers argue the legitimacy of the Comptroller's actions under Labor Law §§ 234 and 235. Once the Comptroller pointed out the error and characterized it as a mere typographical error of no substantive import, Moveway argued that the Comptroller is bound by the reference to Section 220(7) contained in the Notice. Unfortunately, though the parties dispute this issue, neither one has provided legal authority or a cogent argument supporting their positions. Moreover, neither has attempted any comparison and contrast of the two statutes, which would have assisted the Court in its evaluation of the parties' positions. Finally, Moveway and the Comptroller argue along parallel tracks – the Comptroller under Labor Law §§ 235 and 234 and Moveway under

¹ Richard Carmel, an officer of petitioner, indicates that Moveway's counsel requested that the Notice be modified to apply to all contracts other than the HRA contract.

Labor Law § 220(7). Neither responds in any detail to the other side's arguments. Together, these shortcomings in the parties' papers overcomplicated these proceedings unnecessarily and made the Court's task in sifting through their positions vastly more cumbersome every step of the way.

At any rate, because the issue is raised and impacts on the resolution of the proceedings, the Court cannot ignore it. Because the parties talk at great length about whether the Comptroller is proceeding under Labor Law §§ 220 and 220-b or under Labor Law §§ 234 and 235, it is useful to include the text of these statutes here.

First, Labor Law § 220 applies to contracts to which a municipal corporation is a party and states, in pertinent part:

3. (a) The wages to be paid for a legal day's work . . . to laborers, workmen or mechanics upon such public works, shall be not less than the prevailing rate of wages The wages [for these laborers] . . . upon any material to be used upon or in connection therewith, shall be not less than the prevailing rate for a day's work in the same trade or occupation [Public works] contracts shall contain a provision that each laborer, workman or mechanic, employed by such contractor, subcontractor or other person about or upon such public work, shall be paid the wages herein provided.

...

(c) [Eff. until Oct. 27, 2012, pursuant to L.2007, c. 678, § 5. . . .] It shall be the duty of the fiscal officer, [in this context, the Comptroller], to ascertain and determine the schedules of supplements to be provided and wages to be paid workers, laborers and mechanics on such public work. . .

...

(d)(i) Any person that participates in a public works project in the capacity of a contractor or subcontractor and who wilfully fails to pay or provide the prevailing rate of wage or supplements [shall be subject to fines, penalties, and criminal liability, the scope of which depends upon the circumstances in the statute].

...

(iv) In addition to the penalties set forth above, every contract for a public work project shall contain a term stating that the filing of payrolls . . . is a condition precedent to payment of any sums due and owing to any person for work done upon the project.

...

3-a. a.

(ii) The contractor and every sub-contractor on public works contracts shall post . . . a legible statement of all wage rates and supplements as specified in the contract to be paid or provided. . . . The notice shall also inform each laborer, worker, or mechanic of his or her right to contact the fiscal officer . . . if, at any time . . . he or she does not receive the proper prevailing rate of wages or supplements for his or her particular job classification that he or she is entitled to receive under the contract. . . .

(iii) The contractor and every sub-contractor shall keep original payrolls or transcripts thereof, . . . All other contractors or sub-contractors shall produce . . . and upon formal order of the commissioner . . . such original payrolls or transcripts thereof

...

c. The fiscal officer may require any person or corporation performing such public work to file with the fiscal officer within ten days of receipt of said request, payroll records, sworn to as to their validity and accuracy, requested by the fiscal officer, for said public work or for any public or private work performed by said person or corporation during the same period of time as said public work. In the event said person or corporation fails to provide the requested information within the allotted ten days, the fiscal officer shall, within fifteen days, order the department of jurisdiction to immediately withhold from payment to said person or corporation up to twenty-five percent of the amount, not to exceed one hundred thousand dollars, to be paid to said person or corporation under the terms of the contract pursuant to which said public work is being performed. Said amount withheld shall be immediately released upon receipt by the department of jurisdiction of a notice from the fiscal officer indicating that the request for records had been satisfied.

...

5. Definitions.

e. The "fiscal officer," as used herein, shall be deemed to be, . . . on public work performed by or on behalf of a city with a population in excess of one million, the comptroller or other analogous officer of such city.

6. The fiscal officer, may, and on the written request of any interested person shall, require any person or corporation performing such public work to file with such fiscal officer schedules of the supplements to be provided and wages to be paid to such laborers, workmen or mechanics. Any such person or corporation shall, within ten days after the receipt of written notice of such requirement, file with the fiscal officer such schedules of wages and supplements. . . .

7. Compliance investigations. The fiscal officer . . . shall on a verified complaint in writing of any person . . . cause a compliance investigation to be made to determine whether the contractor or a subcontractor has paid the prevailing rate of wages The fiscal officer or his agents, examiners and inspectors may examine or cause to be examined the books and records pertaining to the rate of wages paid and supplements provided The fiscal officer in such investigation shall be deemed to be acting in a judicial capacity, and shall have the right to issue subpoenas, administer oaths and examine witnesses. The enforcement of a subpoena issued under this section shall be regulated by the civil practice law and rules. Such fiscal officer shall make either an order, determination or any other disposition, including but not limited to an agreed upon settlement and/or stipulation, within six months from the date of filing of such verified complaint. . . .

...

8. Hearings. Before issuing an order or determination . . . the fiscal officer shall order a hearing . . . and shall give notice thereof, together with a copy of such complaint or the purpose thereof, or a statement of the facts disclosed upon such investigation The fiscal officer in such hearing shall be deemed to be acting in a judicial capacity, and shall have the right to issue subpoenas, administer oaths and examine witnesses. The enforcement of a subpoena issued under this section shall be regulated by the civil practice law and rules. [U]pon such hearing the fiscal officer shall determine the issues raised thereon and shall make and file an order in the office of the fiscal officer stating such determination, and forthwith serve a copy of such order, with a notice of the filing

thereof, upon the parties to such proceeding, personally or by mail.

...

Upon the entry of such order any party aggrieved thereby may commence a proceeding for the review thereof pursuant to article seventy-eight of the civil practice law and rules within thirty days from the notice of the filing of the said order in the office of the fiscal officer. Said proceeding shall be commenced directly in the appellate division of the supreme court. . . .

Labor Law § 220-b allows the Comptroller to withhold payments to a contractor once an investigation has been initiated.

The Comptroller argues that although the Notice purportedly is based on Labor Law § 220, it actually is based on Labor Law § 230 et. seq. – in particular, Labor Law §§ 234 and 235 – and this is a nonprejudicial typographical error which this Court and Moveway should disregard. Labor Law § 234(1) confers upon the fiscal officer the power to conduct an investigation to determine “the wages prevailing in any locality in all crafts, trades and occupations involved in service work,” examine records “pertaining to the wages paid to, and the hours of work performed by, service employees,” and hold hearings, issue subpoenas, and otherwise utilize various specified quasi-judicial powers in order to enforce the provisions in this general section of the Labor Law. Labor Law § 235 states, in pertinent part,

1. Whenever . . . the fiscal officer has reason to believe that a service employee has been paid less than the wages prevailing for his craft, trade or occupation, the fiscal officer may, and upon receipt of a written complaint from an employee employed thereon, shall conduct a special investigation to determine the facts relating thereto.

2. a. At the start of such investigation the fiscal officer may notify the financial officer of the public agency interested who shall, at the direction of the fiscal officer, forthwith withhold from any payment due to the contractor executing the contract sufficient money to safeguard the rights of the service employees and to cover the civil penalty that may be assessed . . . or, if there are

insufficient moneys still due or earned . . . the financial officer of another civil division which has entered or subsequently enters into a building service work contract . . . who shall withhold from any payment due the contractor or subcontractor executing any building service work, sufficient moneys to safeguard the rights of the service employees and to cover the civil penalty that may be assessed as provided herein.

...

c. The notice of withholding shall provide that the fiscal officer intends to instruct the financial officer, not less than ten days following service of the notice by mail, to withhold sufficient moneys to safeguard the rights of the service employees and to cover the civil penalty that may be assessed as provided herein, from any payment due the notified party under any building service work contract pending final determination. The notice of withholding shall provide that within thirty days following the date of the notice of withholding the notified party may, contest the withholding on the basis that the notified party is not a partner or one of the five largest shareholders of the subcontractor or contractor, an officer of the contractor or subcontractor who knowingly participated in the violation of this article, a substantially-owned affiliated entity or successor. If the notified party fails to contest the notice of withholding, . . . the fiscal officer may instruct the financial officer to immediately withhold sufficient moneys to safeguard the rights of the service employees and to cover the civil penalty that may be assessed as provided herein from any payment due the notified party under any building service work contract pending the final determination.

d. The financial officer shall immediately implement the notice of withholding and confirm in writing to the fiscal officer the amount of money withheld.

....

f. The money shall be held in trust pending completion of the investigation.

...

4. In an investigation conducted under the provisions of this section, the inquiry of the fiscal officer shall not extend to work performed more than two years prior to: (a) the filing of the complaint, or (b) the commencement of the investigation upon the

fiscal officer's own volition, whichever is earlier in point of time.

5. a. The investigation and hearing shall be expeditiously conducted and upon the completion thereof the fiscal officer shall determine the issues raised and shall make and file an order in his office stating such determination and forthwith serve personally or by mail a copy of such order and determination together with a notice of filing upon all parties to the proceeding and upon the financial officer of the public agency involved.

c. . . . [T]he financial officer of such public agency shall, upon the service to him of such order, pay to such employees from the trust money withheld the amounts specified in such order and shall pay the civil penalty as provided herein, provided no review proceeding pursuant to the provisions of article seventy-eight of the civil practice law and rules is commenced within thirty days of the date said order was filed in the office of the fiscal officer. If such review is timely commenced, the money withheld shall remain in trust pending final disposition of the review proceeding.

b. In addition to directing payment of wages found to be due, such order of the fiscal officer may direct payment of a further sum as a civil penalty in an amount not exceeding twenty-five percent of the total amount found to be due. . . .

...

II. In re Moveway, Index No. 107195/2007: Proceeding to quash the subpoena.

Initially, the Court addresses the threshold issue of the timeliness of the investigation. As indicated above, the April 25 Notice asserts that it was issued under Labor Law § 220 (7). In its Answer to the Petition, the Comptroller states that this was a typographical error and that the Notice actually was issued under Labor Law § 230 et. seq. In particular, the Comptroller alleges that, as a fiscal officer as defined in Labor Law § 230, he has the power, under Labor Law § 234(1), to conduct this investigation and issue subpoenas.

According to Moveway, the Comptroller is bound by its initial reliance upon Labor Law § 220(7) in the April 2007 Notice. Moveway argues that the distinction here is critical, as Labor

Law § 220(7) requires the Comptroller to “make either an order, determination or any other disposition, including but not limited to an agreed upon settlement and/or stipulation, within six months from the date of filing of [the employee’s] verified complaint [to the Comptroller].” According to Moveway, the Comptroller’s failure to rule on the employee complaints within six months of their filing dates comprises fatal noncompliance with the statute and necessitates the termination of the investigation and the dismissal of the Notice to Produce.

Next the Court turns to the issue of whether the Comptroller is bound by the typographical error in the April 2007 Notice, which references Labor Law § 220(7) instead of Labor Law §§ 230 et. seq. The Comptroller cited Labor Law § 234(1) in its original Notice, set forth the wrong statute in the April 2007 Notice, and then corrected the defect by informing the Court and Moveway of the error in the papers currently before the Court. Ideally the Comptroller would have sought leave to amend the Notice, *nunc pro tunc*, and it has not done so. Indeed, the Court considered the argument asserted under Labor Law § 220(7) in order to ensure that Moveway did not suffer prejudice due to its confusion. Moveway has not articulated any prejudice resulting from the typographical error.

It also is clear that there is no prejudice. The parties do not address the distinctions between the two statutes in detail, but the Court notes that a withholding cap of \$100,000 exists in Labor Law § 220(7) and does not appear to exist in Labor Law § 234(1). However, this is not sufficient to show prejudice. Instead, it is clear that Moveway assumed that the Comptroller was proceeding under Labor Law § 234(1), because Moveway did not attempt to hold the Comptroller to the limitations period and other restrictions in Labor Law § 220(7) until the Comptroller pointed out and corrected his error. Because it assumed the Comptroller was proceeding under the original provision, and because it has challenged the Notice in a

convoluted fashion, commencing two separate proceedings, Moveway has had ample time to respond to assert any arguments under Labor Law § 234(1) and 220(7).

Finally, the Court notes that the two cited Labor Law provisions are similar almost to the point of being identical, and the investigatory powers of the Comptroller are equally broad under both. Therefore, the arguments the parties raise, and the authorities they cite, are virtually identical. Other courts discuss Labor Law §§ 220(7) and 234(1) interchangeably in determining the constitutionality and enforceability of the two statutes. This Court shall do the same.

The Court notes that even under Labor Law § 220(7), dismissal for untimeliness would not have been warranted.² Contrary to Moveway's contention, the limitations period in Labor Law § 220(7) is directory rather than mandatory. Giant Supply Corp. v. City of New York, 248 A.D.2d 231, 233, 670 N.Y.S.2d 29, 31 (1st Dept. 1998) (citing Guercio v. Gerosa, 8 A.D.2d 250, 255, 186 N.Y.S.2d 458, 464 (1st Dept. 1959)). Therefore, the Comptroller's failure to complete the investigation within six months would not have been fatal to the investigation. In addition, the Comptroller attempted to investigate and rule on the complaints within six months, directing Moveway to appear and to produce the requested documents on December 11, 2006, approximately five months after the filing of the first complaint. However, Moveway requested that the date of the first Notice be adjourned; and later it refused to comply with the Notice, demanding that the Comptroller serve the second Notice. Under the circumstances, it is

² Moveway raises this argument for the first time in its reply papers, but asserts that the Comptroller did not clarify its position that the Notice was issued pursuant to Labor Law § 230 until its Answer to Petition 1 and therefore Moveway could not raise the challenge to Labor Law § 220(7) until that time - an illogical argument which further underscores the fact that Moveway realized that Labor Law § 230 et. seq. were at issue.

especially inappropriate for Moveway to raise the untimeliness argument. Moreover, the Comptroller has not moved forward with complaints it deemed untimely.

Now, the Court turns to the enforceability of the Notice. As a matter of public policy, the State Legislature has determined that service employees who work for a contractor or subcontractor in connection with a contract with a public agency should not receive substandard wages. Feher Rubbish Removal, Inc. v. New York State Dept. of Labor, Bureau of Public Works, 28 A.D.3d 1, 6, 807 N.Y.S.2d 494, 497 (4th Dept. 2005)(quoting legislative history), lv denied, 6 N.Y.3d 711, 814 N.Y.S.2d 600 (2006). The statutory intent is to hold the State and its subdivisions “to a standard of social justice” in dealing with workers; the overriding goal is “the vindication of a public interest rather than just to provide a forum in a particular case. . . .” Cayuga-Onondaga Counties Bd. Of Coop. Educational Serv. v. Sweeney, 89 N.Y.2d 395, 401-02, 654 N.Y.S.2d 92, 95 (1996). In New York City, the Comptroller is charged with enforcement of this policy. Accordingly, he or she establishes the prevailing wage schedule. Tomcat Elec. Sec., Inc., No. 03-CV-5175(FB)(JO) (E.D.N.Y. August 27, 2007)(avail at 2007 WL 2461823, at * 3). Moreover, in order to enforce this rule, the Comptroller has “broad power to regulate in the public interest” and therefore “reasonable acts . . . designed to further the regulatory scheme have been upheld.” Local 32B-32J, Serv. Emp. Int’l Union, AFL-CIO v. Holtzman, 149 Misc. 2d 666, 670, 565 N.Y.S.2d 392, 395 (Sup. Ct. N.Y. County 1990).

The Comptroller argues that Moveway has no basis to bring this proceeding to quash its subpoena. The Court agrees. The Comptroller received five affidavits from Moveway employees that asserted that Moveway did not pay them the prevailing wage rates for their labor. Under the Labor Law the Comptroller not only has the power but the duty to commence an investigation because of these employee complaints. Moreover, the investigatory powers of the

Comptroller include the right to issue subpoenas compelling the production of the employer's "books and records pertaining to the rate of wages paid and supplements provided to laborers on a public work project." Hull-Hazard, Inc. v. Roberts, 120 A.D.2d 979, 980, 502 N.Y.S.2d 872, 873 (4th Dept. 1986).

In addition, the method by which Moveway challenges the Notice is improper and premature. Although the Court has the power to determine whether the Comptroller exceeded his authority in conducting an investigation, once a court reaches the conclusion that the Comptroller acted within his authority it is not appropriate to issue rulings as to the ongoing investigation. Because the primary enforcement of these Labor Law provisions lies with the fiscal officer, "there can be no judicial review until the fiscal officer acts." Brown v. Tomcat Electrical Security, Inc., No. 03-CV-5175 (FB)(JO) (E.D.N.Y. 2007)(avail at 2007 WL 2461823, at *3)(considering party's right to commence private action under Labor Law § 220). Thus, Moveway must wait until the Comptroller has completed its investigation to bring any challenges it might have. E.g., Kelly's Sheet Metal, Inc. v. Thompson, 52 A.D.3d 220, 859 N.Y.S.2d 82 (1st Dept. 2008).

However, the Court notes that if it were to reach the issue, it would determine that for all the reasons set forth by the counsel for Comptroller, see supra at pp 5-6, the Comptroller acted properly in issuing the first and second Notices to Produce. Therefore, the Court would have denied the first petition for these reasons had it ruled on the issue directly.

II. In re Moveway, Index No.: 112981/2007: Relating to Respondent's finding that Petitioner Refused to Comply with Subpoena and Respondent's Withholding of Wages.

Supplemental Factual Background

The Notice to Produce (“the Notice”) upon which both proceedings are based states it is issued pursuant to Labor Law § 220(7). In addition, the Notice states: “If you fail to appear or appear without the records requested . . . I will place a stop payment not to exceed \$100,000 against each public work contract listed herein.” (underlining in original). The list, which follows shortly after this provision, includes public works contracts between 2004 and 2006 for City of New York Department of Human Resources Administration, City of New York Department of Education, City of New York School Construction Authority, and City of New York Department of Aging.

In addition, in Petition 1, which is described and decided above, the Court signed the Order to Show Cause staying the Notice. However, immediately, the Comptroller filed a Notice of Appeal (“the Appeal”) with the First Department. Under CPLR 5519(a)(1), the Comptroller contends, this automatically stayed the effect of the Order to Show Cause. That is, this Court’s Order to Show Cause issuing the stay was itself stayed. Accordingly, when Moveway did not comply with the Notice, the Comptroller deemed Moveway in contempt of the Notice and instructed several City agencies that they should withhold payments to Moveway for contracted work.

Upon learning that its payments were being withheld by the various agencies, Moveway commenced the second proceeding, which this Court has referred to throughout this decision as Petition 2. In Petition 2, Moveway states that it challenges the Comptroller’s determination that Moveway violated the Labor Law and his determination to withhold payments from Moveway. The Comptroller counters that he made no determination but simply moved forward in the enforcement of the Notice. He also asserts that the Labor Law empowers him to withhold payments prior to any determination on the merits of employee wage claims against an employer

such as Moveway. Therefore, the Comptroller apparently contends, the proceeding – based on alleged determinations which have not occurred – is improper. To the extent that the Comptroller seeks dismissal of the proceeding on this basis, the Court rejects the argument as overly formalistic. Article 78 proceedings can be commenced to restrain an act as well as to challenge a determination. Although the parties have complicated their dispute – Moveway, by filing two proceedings; both parties, by submitting flurries of papers and responses to the papers of their adversaries; and both parties, by a lack of clarity and efficiency in some of their arguments – the Court shall not dismiss the Petition on the basis of a linguistic argument, where no prejudice is alleged, and thus insulate the Comptroller’s conduct from review.

A. Motion for Contempt.

Moveway argues that based on the Order to Show Cause which this Court signed in connection with Petition 1, the Notice to Produce was “given no force or effect and any sanction from such determination is stayed.” According to Moveway, this stayed the Comptroller from ordering Moveway to comply with the Notice and from directing various City agencies to withhold and cross-withhold Moveway’s payments. By finding Moveway in contempt of the Notice, Moveway argues, and by withholding its money, the Comptroller himself is in contempt of this Court’s order and he should be sanctioned.

The Comptroller opposes this motion. In particular, he points out that immediately following the signing of the Order to Show Cause, he filed an “Affirmation of Intention to Move for Leave to Appeal” (“the Affirmation of Intention”). Under CPLR § 5519(a)(1), he argues, this stayed the Order to Show Cause, thus vitiating the stay.

Under CPLR § 5519(a)(1), because the Comptroller is an officer of the City, his service of the Affirmation of Intention upon Moveway “stays all proceedings to enforce the judgment or

order appealed from pending the appeal or determination on the motion for permission to appeal.” As the language of the statute indicates, the stay does not apply to every part of the ongoing litigation but instead is limited to proceedings to enforce the judgment or order at issue. Applying this language to the situation at hand, Moveway is prevented from enforcing this Court’s order. That is, Moveway is prevented from moving for contempt based on the Comptroller’s failure to comply with this Court’s injunction. See Hicks v. Schoetz, 261 A.D.2d 944, 945, 691 N.Y.S.2d 219, 221 (4th Dept. 1999)(enforcement of order which is subject to CPLR § 5519(a)(a)through contempt motion is stayed by CPLR § 5519(a)(1)).

As Moveway correctly notes, in interpreting CPLR §5519(a)(1), some courts have distinguished between orders which are self-executing and those which are not. Moveway quotes Pokoik v. Dept. of Health Serv., 220 A.D.2d 13, 16, 641 N.Y.S.2d 881, 884 (2nd Dept. 1996):

Future acts which are not expressly directed by the order or judgment appealed from may nevertheless have the effect of changing the status quo and thereby defeating or impairing the efficacy of the order which will determine the appeal. In such cases, no automatic stay is available but the aggrieved party may apply to the appellate court to exercise either its inherent power to grant a stay of such acts in aid of aid of its appellate jurisdiction . . . or, in any case specified in CPLR 6301, its power to grant, limit, or modify a preliminary injunction or temporary restraining order pursuant to CPLR 5518.

(internal citations omitted). Moveway views the Order to Show Cause in Petition 1 as self-executing because by the language of the order it denies the Comptroller the right to enforce his Notice. Moveway further states that the back payments the Comptroller has effectively cross-withheld “flow as a consequence of the TRO” and also are part of the self-executing order, thus exempt from the automatic stay. Therefore, Moveway concludes that the Comptroller’s Affirmation of Intention did not trigger the automatic stay language in CPLR § 5519(a)(1).

The language of the September 26, 2007 Order to Show Cause, in pertinent part, states that

pending the Hearing and determination of this . . . Petition, the Respondents' *{sic}* determination that Petitioner failed to comply with Respondent's Notice to Produce and Examination, dated April 25, 2007; *{sic}* shall be given no force or effect and any sanction resulting from such determination is stayed.

The Court notes, initially, that the language, which is Moveway's, is less than clear. Apparently because of Moveway's desire to treat the Comptroller's enforcement of the Notice as "a determination" subject to Article 78, the language in the Order to Show Cause is framed in a way that stays, or temporarily nullifies, an existing determination; and stays any attempt by the Comptroller to sanction Moveway. In addition, in evaluating whether the order is self-executing, the parties have complicated the dispute unnecessarily. The Court does not address this dispute in detail or delve into the law in ways not addressed by the parties themselves. Instead, it notes that in other proceedings and actions in the First Department, preliminary injunctions have been enjoined by appeals. E.g., Putter v. City of New York, 27 A.D.3d 250, 252, 811 N.Y.S.2d 29, 31 (1st Dept. 2006)(noting that City's notice of appeal stayed court order enjoining vote by Department of City Planning, which then went on to hold the vote). In addition, when a notice of intent to appeal is filed, a CPLR 5519(a)(1) stay has enabled the government to collect money due to it under a challenged agency regulation or determination. E.g., Litod Paper Stock Corp. v. City of New York, 154 A.D.2d 280, 280, 546 N.Y.S.2d 361, 362 (1st Dept. 1989)("During an interim period from October 21 through November 3, 1988, the statutory stay pursuant to CPLR 5519(a)(1) was invoked by the City, and the increased fees were collected."). In another decision, a provision in a judgment directing the appellants, the board of trustees of an incorporated village, to issue a building permit to the petitioners, also is considered

executory and therefore subject to the automatic stay provision. Lombardi v. Habicht, 293 A.D.2d 476, 477, 740 N.Y.S.2d 103, 104 (2nd Dept. 2002). Accordingly, the Court finds that the Comptroller acted reasonably in deeming the Court's prior order to be stayed.

The Court further notes that, in light of the above, the Comptroller's conduct does not warrant a contempt ruling. At the very least, he had a good faith basis for reaching this conclusion. "It is enough to preclude a finding of contempt that the issue as to whether such stay applied was sharply disputed on a good faith basis. No contempt, civil or criminal, can be founded upon such a record." Sentry Armored Courier Corp. v. New York City Off-Track Betting Corp., 75 A.D.2d 344, 344, 429 N.Y.S.2d 902, 903 (1st Dept. 1980). Therefore, the Court denies the application for a finding of contempt against the Comptroller.

B. Cross-Withholding and Withholding Beyond \$100,000 and/or Withholding Contractual Payments not Listed in the Notice.

Finally, the Court finds that the Comptroller has not adequately asserted a basis for cross-withholding or for withholding in excess of \$100,000. As indicated, under Labor Law § 230 et. seq., the Comptroller can withhold payments in excess of \$100,000. The Court notes that cross-withholding is permissible under the Labor Law if the Comptroller or Commissioner of Labor cannot satisfy the potential judgment based on the contracts in question. Pav-Lak Contracting, Inc. v. McGowan, 184 Misc. 2d 386, 389, 714 N.Y.S.2d 855, 858 (Sup. Ct. Nassau County 2000)(finding that Commissioner of Labor had right to cross-withhold under Labor Law § 220-b). Instead, the Court again quotes a portion of the April Notice that the Comptroller did not amend, but simply ignored in these proceedings:

“If you fail to appear or appear without the records requested . . . I will place a stop payment not to exceed \$100,000 against each public work contract listed herein.” (underlining in original).

As this Court also noted previously, the list of public works contracts, which follows shortly after this provision, includes contracts entered into between 2004 and 2006 and involving Moveway and City of New York Department of Human Resources Administration, City of New York Department of Education, City of New York School Construction Authority, and City of New York Department of Aging. The Comptroller is bound by his own Notice on these issues. Therefore, to the extent that the Comptroller seeks to go beyond the scope of his own Notice, these attempts are improper. However, this does not prevent the Comptroller from attempting to amend the Notice, or from withholding and/or cross-withholding to satisfy any deficiencies and fines once his investigation has been completed.

C. Constitutional Challenge.

In addition, contrary to Moveway’s argument, it was not unconstitutional for the Comptroller to direct various city agencies to withhold or cross-withhold payments. Article 8 of the Labor Law does not simply endow the fiscal officer – here, the Comptroller – with statutory powers. Instead, the statutory scheme “implements the State constitutional requirement that laborers engaged in the performance of a public work be paid prevailing wages.” Brian Hoxie’s Painting Co. v. Cato-Meridian Cent. Sch. Dist., 79 N.Y.2d 207, 210, 557 N.Y.S.2d 280, 281 (1990); accord Lantry v. State, 6 N.Y.3d 49, 54, 810 N.Y.S.2d 729, 732 (2005). Thus, there is a strong social purpose to the scheme: to hold the subdivisions of the State “to a standard of social justice in their dealings with laborers, workmen and mechanics.” Chesterfield Assoc. v. New York State Dept. of Labor, 4 N.Y.3d 597, 601, 797 N.Y.S.2d 389, 391 (2005)(citation and internal quotation marks omitted). Both Labor Law § 220 and § 234 should be “liberally

construed to effectuate [their] beneficent purposes.” Earth Tech, Inc. v. Angello, 47 A.D.3d 1080, 1082, 851 N.Y.S.2d 658, 660 (3rd Dept. 2008).

Under Labor Law § 235 (1), whenever the fiscal officer believes a contractor holding a public works contract has paid its employees less than the prevailing wage rate, “upon receipt of a written complaint from an employee employed thereon, [the fiscal officer] shall conduct a special investigation to determine the facts relating thereto.” Under Labor Law §§ 234(1)(c) and (f), the fiscal officer may examine the books, records and other documents necessary to investigate the issue of wages fully. See Hull-Hazard, Inc., 120 A.D.2d at 980, 502 N.Y.S.2d at 873 . Finally, under Labor Law § 235(2)(a), the fiscal officer “may notify the financial officer of the public agency interested who shall, at the direction of the fiscal officer, forthwith withhold from any payment due to the contractor executing the contract sufficient money to safeguard the rights of the service employees and to cover the civil penalty that may be assessed as provided herein.” There is no prerequisite in the statute that a company first be found guilty of the alleged offense in question.

Moreover, the Comptroller’s decision to direct various agencies to withhold payments otherwise due to Moveway does not violate the State Constitution. In so holding, the Court has considered the thorough and persuasive brief of the State in support of a finding of constitutionality. In particular, the Court also notes that Labor Law § 235(2)(a) expressly permits the fiscal office to “notify the financial officer of the public agency interested who shall, at the direction of the fiscal officer, forthwith withhold from any payment due to the contractor executing the contract sufficient money to safeguard the rights of the service employees and to cover the civil penalty that may be assessed.” In addition, the Court of Appeals has held that cross-withholding of money due under other government contracts with the contractor is

permissible under the statutory scheme. RLI Ins. Co. v. New York State Dept. Of Labor, 97 N.Y.2d 256, 740 N.Y.S.2d 272 (2002). Under the law, the Comptroller is not diverting or seizing funds, but holding them in trust so they will be available for disbursement to the workers if and when the Comptroller determines that unpaid wages or supplements are outstanding. Palmer Construction, Inc. v. Hines, 154 Misc. 2d 248, 251, 584 N.Y.S.2d 271, 273 (Sup. Ct. Albany County 1992). Finally, the Court emphasizes that there is a constitutional right of laborers carrying out public works contracts to receive the prevailing wage rates for their services. N.Y. Const. Art. 1, § 17; see Feher Rubbish Removal, Inc., 28 A.D.3d at 6, 807 N.Y.S.2d at 497.

CONCLUSION

The Court has considered all other arguments raised by the parties.

Accordingly, it is

ORDERED and ADJUDGED that Petition 1 is dismissed; and it is further

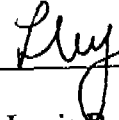
ORDERED and ADJUDGED that Petition 2 is granted to the limited extent that the Comptroller is bound by his own Notice to (1) limit withholdings to \$100,000 and (2) limit withholdings to the contracts specified in the Notice, unless the Comptroller amends his Notice, or unless and until the Comptroller's investigation concludes that Moveway owes more than \$100,000 due to Labor Law violations and determines that cross-withholding is necessary to satisfy Moveway's fines and deficiencies in wage payments, and is otherwise denied, severed and dismissed; and it is further

ORDERED that the Comptroller is granted costs and disbursements as taxed by the Clerk upon the presentation of a Bill of Costs; and it is further

ORDERED that the motion for contempt is denied.

ORDERED:

Dated: December 19, 2008



Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.

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 (Room 141B).