

**Matter of Condon v Inter-religious Found. for
Community Org., Inc.**

2009 NY Slip Op 31098(U)

May 7, 2009

Supreme Court, New York County

Docket Number: 406703/07

Judge: Judith J. Gische

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

PRESENT: J. GISCHE

PART 10

Index Number : 406703/2007
CONDON, RICHARD J.
 VS.
INTER-RELIGIOUS FOUNDATION
 SEQUENCE NUMBER : 006
 PUNISH FOR CONTEMPT

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No


Upon the foregoing papers, it is ordered that this motion

FILED
 MAY 11 2009
 NEW YORK
 COUNTY CLERK'S OFFICE

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

*See accompanying
 memorandum decision/order.*

Dated: 5/7/09



 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

Supreme Court of the State of New York
County of New York, IAS 10

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In the Matter of

Richard J. Condon, in his official capacity as
Special Commissioner of Investigation for the
New York City School District,

Petitioner,

-against-

The Inter-religious Foundation for
Community Organization, Inc.,

Respondent.

Decision/Order

Index # 406703/07

Mot. Seq. # 006

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In the Matter of

Richard J. Condon, in his official capacity as
Special Commissioner of Investigation for the
New York City School District,

Petitioner,

-against-

Lucius Walker, Jr.,

Respondent.

Decision/Order

Index # 406704/07

Mot. Seq. # 006

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Pursuant to CPLR § 2219(A) the following papers were considered by the court
in connection with these petitions and/or motions:

PAPERS	NUMBERED
Index # 406703/07	
Pet's n/m.....	1
AR affirm, exhs.....	2
TES affid.....	3
PH affid, exhs.....	4
AER reply affirm, exhs.....	5

Index # 406704/07

Pet's n/m.....1

AR affirm, exhs.....2

TES affid.....3

PH affid, exhs.....4

AER reply affirm, exhs.....5

Stenographic record of oral argument.....6

Hon. Judith J. Gische:

Upon the foregoing papers, the decision and order of the court is as follows:

Petitioner, Richard J. Condon, is the Deputy Commissioner of Office of Special Investigation for the New York City School District ("SCI"). On or about September 10, 2007, SCI served two separate subpoenas on the custodian of records for the Inter-Religious Foundation for Community Organization, Inc. ("IFCO") and Reverend Lucius Walker, Jr. Reverend Walker is the founder and Executive Director of IFCO (collectively "respondents"). IFCO and Reverend Walker are jointly represented.

SCI now separately moves to hold both IFCO and Reverend Walker in contempt for failing to comply with the subpoenas as directed to do so in this court's decision and order dated January 11, 2008 (the "prior order"). The motions involve the same facts and circumstances and are consolidated for consideration and disposition in this single decision.

In the prior order, this court granted petitioner's motions to compel compliance with subpoenas issued by SCI demanding the testimony of, and the production of documents by IFCO and Reverend Walker, in connection with an ongoing investigation into allegations of misconduct by certain New York City Department of Education ("DOE") employees. The custodian of records for IFCO was to appear with the

subpoenaed documents and give testimony at the SCI offices on February 5, 2008.

Similarly, Reverend Walker was directed to appear with documents and give testimony. The court ordered that to the extent Reverend Walker was asserting a Fifth Amendment privilege as a basis for withholding any of the requested documents, Reverend Walker was to produce a privilege log. The court also noted that Reverend Walker may assert a Fifth Amendment privilege as to questions put to him personally during his testimony.

On February 4, 2008, respondents served and filed a motion in the Appellate Division, First Department, for a stay pending appeal. Respondents also sought interim relief staying the prior order, pending a decision by the Appellate Division on the underlying motion for a stay. The interim stay was denied on the same day.

Consequently, on February 5, 2008, respondents collectively produced one privilege log describing two documents and asserting various privileges on both their behalf. The log does not specify whether the documents identified belong to IFCO or Reverend Walker. The grounds asserted for withholding these documents are as follows: that the production of the documents is barred by the Supremacy Clause, and the First, Fourth and Fifth Amendments of the United States Constitution. Petitioner objected to the privilege log claiming it was not in compliance with this court's prior decision.

On February 7, 2008, Reverend Walker appeared at SCI's offices with an attorney and submitted to questioning. Reverend Walker raised various objections, including relevancy, the Supremacy Clause, and the First and Fifth Amendments. In response to the subpoena issued to IFCO, Reverend Walker stated that he had been designated as the custodian of records. He was asked as custodian of records whether

he had located any of the records called for in the subpoena. He responded that he did a thorough search and located two documents, which were then given to his attorneys. Reverend Walker stated that one document was a one-page blank form and the other was two or two and a half pages long. Reverend Walker asserted the Fifth Amendment with respect to questions regarding what steps he took to locate the documents, where he located the documents, and whether he requested or directed anyone other than his attorneys to take steps to gather the documents.

Reverend Walker was then questioned with respect to the subpoena issued to him, personally. Reverend Walker invoked the Fifth Amendment to many of these questions. A transcript of Reverend Walker's testimony that was prepared and reviewed by SCI staff has been provided to the court. At oral argument, respondents withdrew any objections they had with respect to the accuracy and completeness of this transcript.

On March 4, 2008, the Appellate Division, First Department denied the motion for a stay pending appeal of the prior order pending appeal. On May 6, 2008, the Appellate Division, First Department unanimously affirmed the prior order.¹ Also in May, petitioner previously moved to hold each respondent in contempt of the prior order. On December 11, 2008, petitioner withdrew those earlier contempt motions without prejudice, pursuant to a stipulation signed by the parties.

Arguments of the parties

Petitioner maintains that it has not concluded its investigation, and is unable to

¹Respondents sought to appeal the First Department's May 6, 2008 affirmance of the prior decision to the Court of Appeals. The Court of Appeals declined to hear the appeal.

do so, until respondents comply with the prior order and the subpoenas. Petitioner objects to the privilege log because the log fails to identify whether the documents belong to IFCO or to Reverend Walker, personally. Petitioner argues that the documents sought “could still contain evidentiary leads which SCI would need to explore” and that “[f]urther delay increases the likelihood that fading recollections and lost or discarded evidence would impair a possible prosecution or a disciplinary administrative proceeding.”

At oral argument, respondents abandoned a number of arguments raised in their opposition papers.² The only arguments that remain for consideration by the court are those based upon the Fifth Amendment privilege and that petitioner has failed to demonstrate prejudice to warrant the drastic remedy of contempt.

Discussion

To prevail on a motion to punish a party for civil contempt, the movant must demonstrate that the alleged contemnor has violated a clear and unequivocal court order, known to the parties. DRL §245; Judiciary Law § 753[A][3]; See also: McCormick v. Axelrod, 59 NY2d 574, 583 *amended* 69 NY2d 652 (1983); Puro v. Puro, 39 AD2d 873 (1st Dept 1990). The actions of the alleged contemnor must have been calculated to, or actually defeated, impaired, impeded or prejudiced the rights or remedies of the other side. Farkas v. Farkas, 209 AD2d 316 (1st Dept 1994). A party seeking contempt must show that there are no alternative effective remedies available. Farkas v. Farkas, 201 AD2d 440 (1st Dept 1994).

² See 3/12/09 Transcript, pages 20 and 21.

The Fifth Amendment's Self-Incrimination Clause of the United States Constitution provides that "No person ... shall be compelled in any criminal case to be a witness against himself..." This privilege against self-incrimination applies only to compelled incriminating communications that are testimonial in character, and does not prohibit requiring a person to exhibit physical characteristics or to produce incriminating documents whose creation was not compelled. U.S. v. Hubbell, 530 US 27 (2000).

Reverend Walker, as custodian of records for IFCO, may not withhold the documents, if they are IFCO's property, on grounds that their contents may incriminate Reverend Walker personally. This is because such documents are not his and any incrimination would not be self-incrimination. Matter of Grand Jury Subpoenas Dated Oct. 22, 1991, and Nov. 1, 1991, 959 F2d 1158 (2d Cir 1992). However, respondents argue that the act of production itself may be incriminatory, and therefore, Reverend Walker in his representative capacity, cannot be compelled to produce the documents.

An individual may claim an "act of production privilege" to decline to produce documents, even if the contents of the documents are not otherwise privileged. An act of production privilege may be claimed when the act is: (1) compelled, (2) testimonial, and (3) incriminating. In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999, 191 F.3d 173 (2d Cir 1999). In order to qualify for the act of production privilege, the production process must elicit not simply responses which are also communications, but communicative responses tending to incriminate the producer. U.S. v. Beattie, 522 F2d 267 (2d Cir. 1975). The act of producing documents in response to a subpoena may require incriminating testimony in two situations: (1) "if the existence and location of the subpoenaed papers are unknown to the government"; or

(2) where production would "implicitly authenticate" the documents. United States v. Fox, 721 F2d 32, 36 (2d Cir 1983) (citations omitted). The contents of the documents should not be taken into account in evaluating whether the act of production privilege applies. In re Grand Jury Subpoena Duces Tecum Dated October 29, 1992, 1 F3d at 93 (2d Cir 1993).

Here, there is no dispute that in the absence of further testimony, the government was not aware of the existence and did not know the location of the subpoenaed papers (see 3/12/09 Transcript, pg. 8, lines 2-14). Moreover, Reverend Walker's compliance with the subpoena would be necessary to authenticate the sought-after documents, and therefore, would be "a necessary link to incriminating evidence contained in them." Fox, 721 F2d at 38 (quoting In re Grand Jury Proceedings United States (Martinez), 626 F2d 1051 (1st Cir 1980)). Accordingly, because Reverend Walker's compliance with the subpoena would require testimony which may be incriminatory, Reverend Walker has properly asserted an act of production privilege.

Although Reverend Walker has an act of production privilege, IFCO must nonetheless comply with the relevant subpoena. This compliance can be achieved by IFCO's appointment of another individual to produce the documents, who may be either some other IFCO employee or an entirely new agent with no previous connection to IFCO' such alternately designated custodian would not similarly be incriminated by the act of production. U.S. S.E.C. v. First Jersey Securities, Inc., 843 F2d 74 (2d Cir. 1988); In re Two Grand Jury Subpoenae Duces Tecum, 769 F2d 52 (2d Cir 1985). At oral arguments, respondents attorney, Linda A. Backiel, Esq, represented to the court that it would not be burdensome for IFCO to appoint another person to conduct a search for

records responsive to the subject subpoena (3/12/09 Transcript, pg. 17, lines 24-26, pg 18, lines 2-3). The court notes that based upon respondents' claim that Reverend Walker turned over the two documents identified in the privilege log to respondents' attorneys, a search for IFCO's documents responsive to the relevant subpoena would then likely include a request for these document from respondents' attorneys. If these documents belong to IFCO, then the attorneys must turn them over to the newly designated custodian.

The court finds the drastic relief of contempt is not warranted against either respondent. Reverend Walker has validly asserted a Fifth Amendment privilege, insofar as the privilege is based upon the act of production. Therefore, Reverend Walker has not violated the court's prior order which preserve his 5th Amendment privilege.

While IFCO has not fully complied with the order, the court at this point will not characterize IFCO's actions as having been calculated to, or actually defeated, impaired, impeded or prejudiced petitioner's rights or remedies. Farkas v. Farkas, *supra*. IFCO is given a further opportunity to comply with the court's order, as particularized herein. Respondent IFCO is ordered to appoint another individual, either some other IFCO employee or an entirely new agent with no previous connection to IFCO, who would not similarly be incriminated by the act of production; such person is to search for and produce any and all documents responsive to the subject subpoena served on IFCO.

In order to clarify the problems posed by the combined privilege log previously served, the court directs Reverend Walker to produce a privilege log identifying any and

all responsive documents with respect to the subject subpoena which are his personal property, within twenty days from the date of this decision. If no such documents exist, a statement in lieu of the privilege log should be provided. In this regard, since the only privileges asserted on the original log are constitutional in nature, and IFCO has no constitutional privileges to assert, there is no basis for IFCO to present a separate privilege log. IFCO is directed to produce the documents and give testimony on at SCI's offices on June 11, 2009, unless the parties mutually agree in writing to another date. Petitioner reserves the right to make an application before this court for an *in camera* review of the *bona fides* of Reverend Walker's personal claim of privilege, if the nature of such privilege cannot be gleaned from the privilege log.

Conclusion

In accordance herewith it is hereby:

ORDERED that the motions are denied insofar as they seek contempt, and otherwise are granted to the following extent:

[1] Respondent IFCO is ordered to appoint another individual, either some other IFCO employee or an entirely new agent with no previous connection to IFCO, who would not similarly be incriminated by the act of production; such person is to search for and produce any and all documents responsive to the subject subpoena served on IFCO;

[2] IFCO is directed to produce the documents and give testimony on at SCI's offices on June 11, 2009, unless the parties mutually agree in writing to another date; and

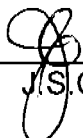
[3] within ten days from the date of this decision, Reverend Walker is produce a privilege log identifying any and all responsive documents with respect to the subject subpoena which are his personal property, within twenty days from the date of this decision. If no such documents exist, a statement in lieu of the privilege log should be provided to petitioners within twenty days hereof; and it is further

ORDERED that any requested relief not otherwise expressly granted herein is denied, and it is further

ORDERED that this shall constitute the decision and order of the court.

Dated: New York, NY
May 7, 2009

SO ORDERED:



J.G. J.S.C.

FILED
MAY 11 2009
NEW YORK
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