

People v Smith & Degroat, Inc.

2010 NY Slip Op 32736(U)

September 23, 2010

Supreme Court, Nassau County

Docket Number: 5568/10

Judge: Anthony L. Parga

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SHORT FORM ORDER

SUPREME COURT – STATE OF NEW YORK – NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

-----X
PEOPLE OF THE STATE OF NEW YORK, by
ANDREW M. CUOMO, Attorney General of the
State of New York,

Petitioner,

- against -

SMITH & DEGROAT, INC., MATTHEW L.
SMITH, and EDWARD DRAKE,

Respondents,
-----X

PART 9

Index No. 5568/10

MOTION DATE: 9/10/10
SEQUENCE NO. 001, 002

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Upon the foregoing papers, it is ordered that the motion by petitioner to compel respondents to comply with the three subpoenas ad testificandum and duces tecum served upon them on or about June 2, 2008, pursuant to CPLR §2308(b), and for an award of costs in the amount of \$50.00, and the respondent's cross-motion to quash or modify the subpoenas pursuant to CPLR §2304 are decided as follows: Respondents are ordered to comply with the subpoenas ad testificandum and duces tecum served on or about June 2, 2008, as modified herein, within 90 days of this order. Petitioner's application for costs is denied.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

The within petition arises from an investigation which was begun by the Attorney General's office into allegations regarding improper activities on the respondents' part, while

acting as “buyer-broker” for a not-for-profit corporation, Greater Hempstead Housing Development Fund Corporation (“GHHDFC”). In furtherance of its investigation, the Attorney General’s office served upon respondents three subpoenas ad testificandum and duces tecum, dated June 16, 2008. Petitioners claim that the respondents have allegedly engaged in multiple acts of untrustworthy behavior and have breached their fiduciary duties to GHHDFC while acting as GHHDFC’s buyer-broker. In support of their position, Petitioner has submitted affidavits of Scott Kershaw, Chairman and Executive Director of GHHDFC, James Herkenham, a licensed investigator employed by the New York State Department, and Austin Graff, an associate attorney of The Scher Law Firm, LLP, who served as one of the attorneys of record for GHHDFC. Each of the affiants attest to facts which demonstrate the Petitioner’s good faith basis for pursuing the investigation and issuing the subpoenas.

Respondents cross-move to quash the subpoenas arguing, *inter alia*, that the documents and testimony sought by the Attorney General are wholly immaterial and irrelevant to the purported scope of Petitioner’s investigation. Respondents claim that they have complied with a State Department investigation, to which the Attorney General’s office was privy, and have set forth facts contesting the allegations made by the Petitioner through the production of voluminous documents and through several interviews of Smith & DeGroat’s agents. Respondents claim to have responded to items 10 through 14 of the subpoenas, but assert that the remaining items sought by petitioner “are onerous and overbroad, and more particularly, do not relate to [its] investigation of the services rendered by [respondents] to [GHHDFC].”

Petitioner served the subpoenas pursuant to Executive Law §63(12) which states that the Attorney General is empowered to seek injunctive relief, restitution, damages, penalties, and costs against any person or business that engages in persistent fraud or illegality in the conduct of business. Deceptive acts in the conduct of any business are unlawful, and the Attorney General is authorized to seek injunctive relief, restitution, penalties, and costs against any person or business that engages in such practice. (General Business Law §349). The Attorney General is specifically authorized pursuant to Exec. Law §63(12) and General Business Law Article 22-A “to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules” whenever he believes a business is engaged in fraudulent and illegal business practices. (*See, La Belle Creole International, S.A. v. Attorney-*

General, 10 N.Y.2d 192 (1961)). In his petition, the Attorney General sets forth many of the allegations and preliminary findings relating to several business transactions involving GHHDFC and the Respondents. Based upon same, and upon the affidavits submitted at the request of the Petitioner, the petitioner has demonstrated a factual basis for the investigation.

The requirements for an investigatory subpoena duces tecum such as that at bar, are (1) that the issuing agency has authority to engage in the investigation and issue the subpoena, (2) that there is an authentic factual basis to warrant the investigation, and (3) that the evidence sought is reasonably related to the subject of the inquiry.” (*Abrams v. Thruway Food Market and Shopping Cntr. Inc.*, 147 A.D.2d 143 (2d Dept. 1989); *Matter of Levin v. Murawski*, 59 N.Y.2d 35 (Ct. of App. 1983)). The Attorney General “enjoys a presumption that he or she is acting in good faith.” (*Abrams*, 147 A.D.2d at 147 (2d Dept. 1989)). That noted, the documents sought by the subpoena must be relevant to the investigation, and relevancy must be determined when deciding whether to quash a subpoena duces tecum. (*N. (Anonymous) v. Novello*, 13 A.D.3d 631 (2d Dept 2004)).

An examination of the subpoenas served by the Petitioners upon the Respondents herein reveals that Petitioner requests all documents and records for every real estate deal or transaction in which Respondents have been involved and all financial documents relating to Respondents and their associates and employees, including financial statements, tax returns, bond and securities accounts, and valuations of personal and business assets. Petitioner is seeking all documents generated in connection with the business operations of the Respondents for the past seven years and in connection with its principals, associates, and employees. The subpoenas request documentation beyond Respondents dealings with GHHDFC, which is the purported subject of Petitioner’s investigation. The scope of the subpoenas is broader than the scope of the investigation with respect several of the items sought, and there is no factual basis which establishes the relevance of the documents which do not pertain to the investigation directly.

As such, the subpoenas are modified to quash the following items:

Item 5: List containing identifying information (institution name and address, account number) for all personal and/or business bank accounts and/or securities accounts in which S&D and/or Matthew L. Smith and/or Edward T. Drake Jr. and/or Thomas Pavone and/or Martin Schackner

and/or William Kadish have any interest, either individually, jointly, in trust for another and/or in the name of any business or corporation in which one or more of them have any financial or controlling interest.

Item 6: Copies of all statements and records generated in connection with such personal and/or business bank accounts and/or securities accounts in which S&D and/or Matthew L. Smith and/or Edward T. Drake Jr. and/or Thomas Pavone and/or Martin Schackner and/or William Kadish have any interest, either individually, jointly, in trust for another and/or in the name of any business or corporation in which one or more of them have any financial or controlling interest, covering the time period of January 1, 2003 through the present.

Item 7: List and approximate valuation of all personal and/or business assets of S&D, Matthew L. Smith, Edward T. Drake Jr., Thomas Pavone, Martin Schackner, and William Kadish, whether held in their names individually, jointly, in trust for another and/or in the name of any business or corporation in which one or more of them have any financial or controlling interest, covering the time period of January 1, 2003 through the present.

Item 9: Copies of all documentation for all open listing agreements with S&D.

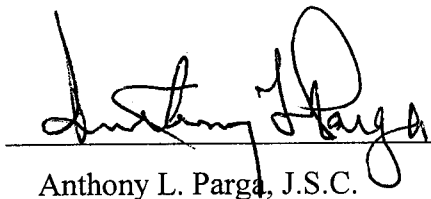
Item 16: List of all employees and independent contractors who have worked for any and all companies, corporations and/or business entities in which S&D has, or had, any financial or controlling interest.

Additionally, the subpoenas are further modified with respect to the item numbered 8 to limit the scope of the demand to the real properties which were presented or introduced to GHDFC (or Park Lake Housing Development Fund Corporation), including those properties listed in Question #12 A-G, for the time period of January 1, 2003 to the present. (See, *N. (Anonymous) v. Novello*, 13 A.D.3d 631 (2d Dept 2004); *Crowley Foods, Inc. v. Lefkowitz*, 75 A.D.2d 940 (3d Dept. 1980)). The following modification applies to the item which presently reads as follows:

Item 8: Copies of all commission agreements, proof of commission payments, listing agreements, agency disclosure forms, contracts of sale, closing statements, (leases, if applicable); and contact information for all involved parties (including but not limited to buyers, sellers, landlords, tenants, attorneys, mortgage broker, mortgage bank, private lenders, title companies and appraisers), for all real estate transactions in which S&D and/or its officers and/or directors and/or principals and/or agents and/or employees and/or independent contractors and/or representatives of S&D participated, including but not limited to Matthew L. Smith, Edward T. Drake, Jr., Thomas Pavone, Martin Schackner and William Kadish.

The subpoenas are hereby modified as directed *supra*, and Respondents are ordered to comply with the subpoenas ad testificandum and duces tecum served on or about June 2, 2008, as modified herein, within 90 days of this order. Accordingly, Respondents are ordered to appear for depositions within 90 days, notwithstanding their right to assert a Fifth Amendment privilege at said time.

Dated: September 23, 2010



Anthony L. Parga, J.S.C.

ENTERED

SEP 29 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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