

<b>Matter of Schneiderman v Tierney</b>
2015 NY Slip Op 30851(U)
May 18, 2015
Supreme Court, New York County
Docket Number: 451489/14
Judge: Joan M. Kenney
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 8

-----x

In the Matter of  
ERIC T. SCHNEIDERMAN, ATTORNEY  
GENERAL OF THE STATE OF NEW YORK,

Petitioner,

Index No.: 451489/14

For an Order pursuant to CPLR § 2308  
(b) to compel compliance with a  
subpoena issued by the Attorney  
General,

-against-

DECISION

TERRENCE M. TIERNEY,

Respondent.

-----x

JOAN M. KENNEY, J.:

**For Petitioner**

Michael Torrisi  
Assistant Attorney General  
120 Broadway, 3d Floor  
New York, New York 10271  
(212) 416-6241

**For Respondent**

Margot Ludlam  
Baxter Smith & Shapiro P.C.  
Hicksville, New York 11801  
(516) 997-7330

Papers considered in review of these motions

**Papers**

Notice of Petition & Aff  
Exhibits  
Notice of Cross Motion & Aff  
Exhibits  
Memo in Opp  
Aff in Opp & Exhibits  
Replv

**Numbered**

1-2  
3-8  
9-10  
11-15  
16  
17-20  
21

Petitioner moves, by order to show cause, for an order: (1) compelling Respondent to comply with the subpoena served on him on May 14, 2014 that directed him to appear and give testimony on June 9, 2014, which date was adjourned by the Attorney General to July 10, 2014; (2) assessing against Respondent, pursuant to CPLR § 2308 (b), costs of \$50, penalties of \$50, and damages to the Attorney General in the amount of the court reporting fees for the July 10, 2014 for which Respondent did not appear; and (3) such other and further relief as the Court may seem just and proper.

Respondent cross-moves, pursuant to CPLR 2304, to quash the subpoena on the grounds that the subpoena is improper and directed to an individual not within the authority and control of the Attorney General, and for such other and further relief as the Court may seem just and proper.

#### **BACKGROUND**

Petitioner bases his petition on his authority, pursuant to the New York Estates, Powers and Trusts Law (EPTL), the New York Not-For-Profit Law (N-PCL) and Article 7-A of the New York Executive Law.

The Charities Bureau of the Office of the Attorney General is investigating Friends of the Fighting 69<sup>th</sup>, Inc. (Friends), a New York Not-For-Profit corporation that purports to support the Manhattan-based New York Army National Guard 69<sup>th</sup> Infantry

Regiment, its soldiers and their families. Friends was originally incorporated in 2004 under a different name, but changed its name to its present nomenclature in 2008. Respondent served as Friends' principal director from its inception until, according to Respondent, 2011.

According to the affidavit filed in support of the petition, Friends, which was granted tax exempt status in 2004 by the Internal Revenue Service (IRS), failed to file IRS Form 990 in 2007, 2009, 2010 and 2011, causing IRS to revoke Friend's tax exempt status. Petition, Ex. D. In addition, Friends has never registered with the Charities Bureau, in violation of Executive Law 172 and EPTL § 8-1.4.

Petitioner states that, prior to starting his investigation, his office received several public complaints alleging that Respondent had misapplied and mishandled charitable contributions made to Friends. Petitioner seeks to determine whether Friends and/or Respondent violated New York law governing the conduct of charitable trustees, not-for-profit organizations, and the solicitations of charitable donations.

On May 14, 2014, petitioner issued a subpoena ad testificandum to Respondent, requiring his appearance at an investigative examination on June 9, 2014. Petition, Ex. A. Respondent accepted service and replied that he would attend. Petition, Ex. E. At the request of Respondent's attorneys, the

hearing was adjourned. Petition, Ex. F.

No specific date was set for the adjournment, and Petitioner emailed Respondent's counsel suggesting several alternate dates. *Id.* On June 18, 2014, counsel responded that Respondent needed time to review Friends' bank records and would contact Petitioner. *Id.* Eventually, when Respondent failed to indicate a date, Petitioner set the hearing for July 10, 2014. *Id.* Counsel responded by saying that his client would not appear until he received the bank records and had an opportunity to review them. *Id.* Petitioner informed counsel that the hearing would not be postponed indefinitely and, on July 7, 2014, emailed counsel that the hearing would take place as scheduled. *Id.* Respondent failed to appear, resulting in the instant petition.

In opposition, and in support of his cross motion, respondent argues that, pursuant to section 8-1.4 of the EPTL, he does not fall within any of the categories of persons or entities who are subject to the control of the Attorney General. However, Respondent stated that he had notified the Attorney General that he was willing to appear for a deposition, but only after he had the opportunity to obtain and review all of the appropriate bank records. In support of his contention regarding his willingness to cooperate, Respondent has attached copies of the subpoenas that he sent to the financial institutions possessing the relevant records. Cross Motion, Ex. D. Respondent requests that

the subpoena be quashed until he has looked over the Friends' bank statements. Moreover, Respondent averred that Friends never established trusts for individuals, but used its funds for general charitable purposes.

In opposition to Respondent's cross motion, and in further support of the petition, Petitioner reasserts his initial position.

In reply, Respondent again states that he is willing to appear for a deposition, but only once he has reviewed all of the necessary financial records. In addition, Respondent contends that the petition is premature, since none of the children of the families referred to by Petitioner (those who complained to the Attorney General about Respondent's alleged misappropriation of Friends' funds) have yet to attain the age of eighteen and there is no indication that Friends will not turn over funds to those persons when they reach their majorities.

#### **DISCUSSION**

The petition is granted in part, denied in part, and the cross motion is denied.

"There is no doubt that the Attorney-General has a right to conduct investigations to determine if charitable solicitations are free from fraud and whether charitable assets are being used properly for the benefit of intended beneficiaries. This authority is granted to the Attorney-General pursuant to the various articles of the Not-for-Profit Corporation Law and the Estates, Powers and Trusts Law identified in the challenged subpoena here."

*Abrams v Temple of the Lost Sheep, Inc.*, 148 Misc 2d 825, 828-829  
(Sup Ct, NY County 1990).

Section 8-1.4 (I) of the EPTL states:

"The attorney general may investigate transactions and relationships of trustees for the purpose of determining whether or not property held for charitable purposes has been and is being properly administered. The attorney general, his or her assistants, deputies or other such officers as may be designated by him or her, are empowered to subpoena any trustee, agent, fiduciary, beneficiary, institution, association or corporation or **other witness**, examine any such witness under oath and, for this purpose, administer the necessary oaths, and require the production of any books or papers which they deem relevant to the inquiry [emphasis added]."

Pursuant to the provisions of the N-PCL, the Attorney General has the power to seek redress for injuries resulting from, *inter alia*, unlawful distributions of corporate cash, property or assets, improper loans, waste of corporate assets, and breach of fiduciary duties. N-PCL §§ 719 (a) (1) (4); (a) (5); 720 (a) (1) (B) and (b). See generally *People v Grasso*, 11 NY3d 64 (2008). Under the N-PCL, the Attorney General is responsible for the supervision of not-for-profit corporations, which is in addition to his common law *parens patrias* authority to protect the public interest in charitable property. *Spitzer v Lev*, 2003 NY Misc Lexis 830 (Sup Ct, NY County 2003).

In addition, the Attorney General has broad investigatory powers under the Executive Law and is authorized to take proof and make a determination in any investigation of allegations of persistent fraud or illegality. *Matter of Cuomo v Dreamland*

*Amusements .Inc.*, 22 Misc 3d 1107 (A) (Sup Ct, NY County 2009).

As a consequence of the foregoing, Respondent's sole statutory argument, that he does not fall within the scope of persons over whom the Attorney General has supervisory authority, pursuant to the EPTL, must fail.

"It is well settled that one who challenges a subpoena issued by the Attorney-General, which is presumptively valid, has the burden of proof to establish the invalidity of the subpoena."

See *Matter of Edge Ho Holding Corp. v Higgins*, 256 NY 374 (1931); also *Matter of Kapon v Koch*, 23 NY3d 32 (2014).

Moreover, even if the court were to consider Respondent's secondary argument valid, that he needs time to review the Friends' financial records, more than ten months have elapsed since that argument was proffered rendering any such contention moot.

Lastly, Petitioner is not entitled to \$50.00 in costs, 50.00 in penalties, pursuant to CPLR 2308, or the amount of court reporting fees for July 10, 2014 because no evidence of those costs was provided.

#### **CONCLUSION**

Accordingly, it is hereby

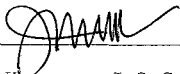
ORDERED that the petition is granted to the extent of compelling Respondent to appear and give testimony, pursuant to the subpoena issued by Petitioner, at a date and time to be established by Petitioner; and it is further

ORDERED that the remainder of the petition is denied; and it is further

ORDERED that Respondent's cross motion is denied.

Dated: May 18, 2015

ENTER:

  
\_\_\_\_\_

Joan M. Kenney, J.S.C.