

**Matter of Menin v Webster Hand Car Wash Corp.**

2015 NY Slip Op 32012(U)

October 27, 2015

Supreme Court, New York County

Docket Number: 452853/15

Judge: Kathryn E. Freed

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

-----X  
 In the Matter of the Application of Julie Menin,  
 the Commissioner of New York City DCA,

Petitioner,

-against-

Webster Hand Car Wash Corp.,

Respondent.

-----X  
 KATHRYN E. FREED, J.

DECISION AND ORDER

Index No.: 452853/15

Mot. Seq. No. 001

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF  
 THIS MOTION:

PAPERS

NUMBERED

NOTICE OF MOTION AND AFFIDAVIT ANNEXED

1-2 (Exs. A)

This special proceeding was commenced by the petitioner New York City Department of Consumer Affairs (“DCA”) to compel compliance with a subpoena duces tecum arising from the alleged failure by the respondent Webster Hand Car Wash Corp. to pay sick leave benefits to its employees. DCA moves, pursuant to CPLR 2308(b), for an order compelling respondent to comply with the subpoena. DCA also seeks \$50 in costs. The motion is unopposed. For the reasons set forth below, the motion is denied with leave to renew upon proper papers.

**FACTUAL AND PROCEDURAL BACKGROUND**

Petitioner Julie Menin, as Commissioner of the DCA, seeks enforcement of a subpoena served on respondent Webster Hand Car Wash Corp. The subpoena seeks information relating to

the DCA's investigation into whether the respondent violated New York City's Earned Sick Time Act, Title 20 of Administrative Code section 20-911 et seq. and its implementing rules, Title 6 of the Rules of the City of New York, and section 7-01 et seq.

### **The DCA'S Subpoena**

The subpoena, served by the DCA on respondent on August 6, 2015, sought the following:

1. Documents and correspondence sufficient to identify:
  - a. [the respondent's] Federal Employer Identification Number;
  - b. the identity of all persons who have an ownership or equity interest in [the respondent];and
  - c. the business structure and lines of authority within [the respondent].
  
2. Documents sufficient to identify each employee who worked for [the respondent] since April 1, 2014, including separated or terminated employees, and;
  - a. the number of hours each employee worked each pay period;
  - b. the employee's rate of pay for the hours worked;
  - c. the start date for each employee;
  - [d]. all employees responsible for setting, administering, implementing, and overseeing human resources policies, procedures, and practices of [the respondent].
  
3. A copy of form NYS-45 filed for [the respondent] in the second, third, and fourth quarters of 2014, and first quarter of 2015.
  
4. All of [the respondent's] policies, practices, procedures, instructions, handbook(s), manual(s) and related documents in effect at any time from April 1, 2014 to the date of the response, including their effective dates, concerning:

- a. sick and other medical leave;
- b. employee discipline; and
- c. employee work performance.

5. All documents and/or correspondence between [the respondent] and employees concerning:

- a. [the respondent's] sick leave policies, practices, and procedures in effect;
- b. trainings administered by [the respondent] concerning leave policies, including sick leave policies and leave of absences for medical reasons; and
- c. the Paid Sick Leave Law.

6. Documents sufficient to show the dates of [the respondent's] calendar year as defined by New York City's Earned Sick Time Act, Admin. Code § 20-912(a).

7. Documents sufficient to show that [the respondent] posted or distributed written sick leave policies, including the dates and the method of such distribution and posting.

8. Documents sufficient to show that the Notice of Employee Rights, as required by Admin. Code § 20-919, was:

- a. distributed to each employee of [the respondent] and the date it was distributed;
- b. received by each employee of [the respondent] and the date it was received.

9. Documents sufficient to show the number of sick leave hours each employee who worked for [the respondent]:

- a. had available for use on April 1, 2014 pursuant to [the respondent's] sick leave policies;
- b. accrued each week pursuant to [the respondent's] sick leave policies;
- c. requested to use, the date of the request, the date the request was approved or denied and, if denied, the reason for the denial; and
- d. used each week and the rate at which the employee was compensated for the sick leave hours used, if any.

10. All documents and/or correspondence concerning all complaints made to [the respondent] regarding [the respondent's] sick leave policies and/or practices, and/or alleging noncompliance with laws relating to leave and/or disabilities, such as the Paid Sick Leave Law, including documents:

- a. sufficient to identify the individuals who initiated the complaints;
- b. sufficient to show the dates and nature of the complaints; and
- c. concerning the resolutions of such complaints.

11. Documents sufficient to show [the respondent's] compliance with the law and the rules.

Steven T. Kelly, Esq., Legal Director of the Paid Sick Leave Division of the DCA, submitted an affidavit in support of the motion dated September 29, 2015. Kelly stated in the affidavit that the DCA had the authority to issue subpoenas pursuant to section 2203(f) of the New York City Charter. He further stated that, on April 9, 2015, the DCA received a complaint from an individual (“the complainant”), who began working for the respondent in January, 2010 and still worked for the respondent. According to Kelly, the complainant reportedly stated that the respondent failed to compensate him after he used properly accrued sick time on February 24-28, 2015 and March 1 and 2, 2015 and failed to compensate any of its employees for properly accrued sick time on unspecified dates.

Kelly added that the DCA “believe[d] that the documents demanded by the subpoena [were] essential to its investigation into whether the respondent violated the Paid Sick Leave Law and Rules.” Thus, asserted Kelly, this Court must grant the DCA’s motion to compel compliance with its subpoena.

## LEGAL CONSIDERATIONS

Where a nonjudicial body seeks to compel compliance with a subpoena, it must demonstrate that it has the authority to issue the subpoena, that the subpoena is reasonably related to the matter under investigation (*see Temporary Comm'n of Investigation v French*, 68 AD2d 681 [1<sup>st</sup> Dept 1979]), that the documents subpoenaed are material and relevant to the matter being investigated (*see Carlisle v Bennett*, 268 N.Y. 212 [1935]), and that there is a sufficient factual basis for the investigatory action to support enforcement. *See Myerson v Lentini Bros. Moving & Storage Co.*, 33 NY2d 250 (1973). No “agency of government may conduct an unlimited and general inquisition into the affairs of persons within its jurisdiction solely on the prospect of possible violations of law being discovered.” *A'Hearn v Committee on Unlawful Practice of Law of N.Y County Lawyers' Assn.*, 23 NY2d 916, 918 (1969) *cert denied* 395 US 959 (1969).

It has been held that in order “[to] justify a nonjudicial investigatory subpoena duces tecum, there must be a threshold showing that the underlying complaint is authentic, that it is of sufficient substance to warrant investigation and that the documents sought are relevant to that investigation (*Matter of Levin v Murawski*, 59 NY2d 35). As for the complaint’s authenticity, that may be found in the substance of the complaint itself or it may be independently supplied (*Matter of Levin v Murawski*, supra, p 42)” (*Matter of D. V Guest*, 105 AD2d 915, 916 [1984], *lv denied* 64 NY2d 607 [1985]). Of course, the showing required by the courts “will depend on the breadth of the subpoena and the status of the investigation at the time the subpoena issues” (*Myerson v Lentini Bros. Moving & Stor. Co.*, supra, at 257).

*Matter of New York City Department of Investigation v Passannante*, 148 AD2d 101, 105 (1<sup>st</sup> Dept 1989).

Here, as Kelly represents, the DCA clearly has the authority to issue subpoenas in accordance with an investigation. *See New York City Charter section 2203(f)*. However, Kelly’s affidavit fails

to provide a basis upon which this Court should compel the respondent to respond to the subpoena.

In *Myerson, supra*, the DCA unsuccessfully moved to compel compliance with a subpoena where the court determined that it had insufficient information upon which to determine the nature and reliability of the complaints made to the DCA. Here, Kelly's affidavit provides a bare-boned representation that a complaint was made that the complainant was not paid benefits and that all employees of the respondent were not paid benefits. However, this, without more, does not establish that the complaint was authentic and of sufficient substance to warrant investigation, as required by *Matter of Levin v Murawski, supra*. Specifically, Kelly does not state whether the complaint was verified or corroborated in any way or provide any documents supporting the veracity of the complaint.

Kelly's affidavit is also devoid of any explanation as to why the records sought by the subpoena "bear a reasonable relation to the subject matter under investigation." See *Myerson, supra*, at 256. Rather, Kelly states, in conclusory fashion, that the DCA "believes that the documents demanded by the subpoena are essential to its investigation into whether the [r]espondent violated the Paid Sick Leave Law and Rules" (emphasis added). Kelly Aff., at par. 15. Kelly's lack of specificity is illustrated by the fact that, although the complainant referred to in his affidavit was allegedly not paid for sick time for certain days in February and March of 2015, the DCA claims that none of respondents' employees were paid for sick time but fails to state any time period when that occurred. For this reason, too, this Court will not compel compliance with the subpoena.

Further, the subpoena itself is overbroad and calls for items of questionable relevance. The DCA fails to explain the nature and relevance of the documents demanded in Items 1 and 2 of the subpoena and why they are all pertinent to its investigation.

In Item 3 of the subpoena, the DCA fails to explain what an NYS-45 form is and why it would be relevant to its investigation.

In Item 4 of the subpoena, the DCA fails to explain why all materials regarding its policies, practices, procedures, instructions, handbooks, and manuals regarding employee discipline and work performance would be relevant to the respondent's alleged failure to pay sick leave time.

In Item 5 of the subpoena, no time frame is given for the materials sought. Additionally, a request for all correspondence between the respondent and its employees regarding the Paid Sick Leave Law is overbroad.

In Item 6 of the subpoena, the DCA fails to explain the relevance of documents relating to respondent's calendar year as defined by the City's Earned Sick Time Act, Admin. Code § 20-912(a).

In Item 9 of the subpoena, the DCA seeks information regarding the number of sick leave hours available to each employee as of April 1, 2014. However, Kelly's affidavit does not state when respondent failed to compensate each of its employees for this sick time. Item 9 further seeks documents showing sick leave hours accrued each week by respondent's employees but sets forth no time frame for this request. Item 9 also asks for documents reflecting the hours used each week and the rate at which respondent's employees were compensated for sick leave hours used but sets forth no time frame for this request.

Item 10 of the subpoena seeks all documents and/or correspondence regarding all complaints made to the respondent regarding its sick leave policies and/or alleging noncompliance with laws relating to leave and/or disabilities, such as the Paid Sick Leave Law. This request is overbroad insofar as it contains no time limitation.

Item 11 seeks documents sufficient to show the respondent's compliance with the law and rules. This request is vague and overbroad since it does not specify which documents the DCA seeks, the time period for which the DCA seeks them, or the individuals to whom the documents are relevant.

In light of the foregoing, it is hereby:

ORDERED that the motion by petitioner Julie Menin, the Commissioner of the New York City DCA, is denied with leave to renew upon proper papers; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: October 27, 2015



KATHRYN E. FREED, J.S.C.  
**HON. KATHRYN FREED**  
**JUSTICE OF SUPREME COURT**