

Matter of City of New York
2016 NY Slip Op 30990(U)
May 26, 2016
Supreme Court, New York County
Docket Number: 450208/16
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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In the Matter of the Application of the CITY OF NEW
YORK and the NEW YORK CITY DEPARTMENT
OF CONSUMER AFFAIRS,

Petitioners,

DECISION AND JUDGMENT

Index No.: 450208/16

Mot. Seq. No. 001

For an order to compel compliance with a
Subpoena Duces Tecum duly served on

HOMEFRONT DELI, INC.,

Respondent.

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

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

PAPERS

NUMBERED

NOTICE OF PETITION, VERIFIED PETITION AND EXHIBIT ANNEXED.....	1-2 (Ex. A)
AFF. IN SUPP.	3
MEMORANDUM OF LAW IN SUPP.	4

This special proceeding was commenced by petitioners to compel compliance with a subpoena duces tecum arising from the alleged failure by the respondent to pay sick leave benefits to its employees. The petition is unopposed. For the reasons set forth below, **the petition is denied.**

FACTUAL AND PROCEDURAL BACKGROUND

Petitioners seek enforcement of a subpoena served on respondent. The subpoena seeks information relating to respondent New York City Department of Consumer Affairs' (hereinafter DCA) investigation into whether the respondent violated New York City's Earned Sick Time Act

(Administrative Code of City of NY tit. 20, ch. 8) and its implementing rules (6 RCNY ch. 7).

The DCA'S Subpoena

The subpoena, served by the DCA on respondent on October 28, 2015, sought the following:

1. Documents and correspondence sufficient to identify:
 - a. [respondent's] Federal Employer Identification Number;
 - b. the identity of all Persons and/or Entities who have an ownership or equity interest in [respondent];
 - c. the identity of all Persons and/or Entities in which [respondent] has an ownership or equity interest;
 - d. the business structure and lines of authority within [respondent];
 - e. the locations where [respondent] conducts business operations in New York City;
 - f. the locations where employers perform work for, on behalf of, and/or assigned by employer in New York City; and
 - g. all employees of [respondent] responsible for setting, administering, implementing, and overseeing human resources policies, procedures, and practices of employer.

2. Documents sufficient to identify each employee, including separated or terminated employees, and:
 - a. the number of hours each employee worked each pay period;
 - b. the number of sick leave hour[s] each employee accrued per pay period;
 - c. the employee's rate of pay for the hours worked;
 - d. the start date for each employee;
 - e. the date(s) each employee separated and/or was terminated from employment, if any; and
 - f. the date(s) each employee resumed employment, if any.

3. A copy of form NYS-45 filed for [respondent] in the second, third, and fourth quarters of 2014, and first and second quarters of 2015.

4. A copy of form BLS 3020 (Multiple Worksite Report) filed for employer in the second, third, and fourth quarters of 2014 and the first and second quarters of 2015.

5. All of [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.

6. All documents and/or correspondence concerning:

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

7. Documents sufficient to show the dates of [respondent's] calendar year as defined by . . . [Administrative] Code § 20-912 (a).

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

9. Documents sufficient to show that the Notice of Employee Rights, as required by Admi[nistrative] Code § 20-919, was:

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

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

- a. had available for use on April 1, 2014 pursuant to [respondent's] sick leave policies;

- b. accrued each week pursuant to [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.

11. All documents and/or correspondence concerning any disciplinary action taken by [respondent] against an employee including, without limitation, those who had taken sick time, requested sick time, or requested to be paid for sick time taken and/or sick leave used from April 1, 2014, including:

- a. documents sufficient to identify the employees against whom the employer took disciplinary action;
- b. documents sufficient to show the dates, nature of and reasons for the disciplinary actions taken by the employer; and
- c. all documents concerning discipline for use of leave and/or sick time.

12. All documents and/or correspondence concerning all complaints made to [respondent] regarding [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.

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

The petition is verified by Steven T. Kelly, Esq., Legal Director of the Paid Sick Leave Division of DCA. In the petition, Kelly asserts that DCA has the authority to issue the subpoenas pursuant to New York City Charter § 2203 (e) and (f), Administrative Code § 20-924 (a) and (c), and

6 RCNY 7-13 (a) and 7-14 (d). The petition alleges that, in September 2015, the DCA “began receiving information from an employee who wishes to remain anonymous [(hereinafter “the complainant”)], alleging that [respondent] does not provide its employees with the required Notice of Employee Rights, does not allow its employees to accrue any sick time, does not pay its employees if they take sick leave, and does not maintain a written sick time policy that complies with the Paid Sick Leave Law and Rules.” The petition does not allege that the violations pertain to a specific time frame. Kelly asserts in the petition that the documents and information sought are “directly relevant to [the DCA’s] investigation into [respondent’s] potential violations of the Paid Sick Leave Law and Rules.”

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 Matter of Temporary Comm. of Investigation of State of N.Y. v French*, 68 AD2d 681 [1st Dept 1979]), that the documents subpoenaed are material and relevant to the matter being investigated (*see Carlisle v Bennett*, 268 NY 212 [1935]), and that there is a sufficient factual basis for the investigatory action to support enforcement. *See Myerson v Lentini Bros. Moving & Stor. 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.” *Matter of 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 (1st Dept 1989).

There is no question that the DCA has the authority to issue subpoenas in accordance with an investigation of Paid Sick Leave Law violations. See New York City Charter section 2203(f). However, the verified petition fails to provide a basis upon which this Court should compel respondent to respond to the subpoena. The petition provides a bare-bones representation that a complaint was made that the complainant was not paid benefits and that all employees of respondent were not paid benefits. There is nothing alleged other than the receipt of a complaint from a single employee, "the nature and reliability of which [this Court is unable] to judge" (*Myerson v Lentini Bros. Moving & Stor. Co.*, 33 NY2d at 259-260), as there is no indication as to whether the complaint was verified or corroborated in any way.

Further, the subpoena itself is onerous, overbroad and calls for items of questionable relevance. With respect to Item 1, a sweeping inquiry into the precise nature of respondent's business structure does not appear to be warranted based upon the allegation of a single employee at a single location. Petitioners explain that the demand would "clarify[] respondent's business operations," but it is not at all apparent why such a detailed examination of respondent's corporate

structure has any bearing on an investigation into whether its employees are being paid sick leave.

Item 2 of the subpoena requires respondent to provide information relating to each and every employee respondent has ever had, "including separated or terminated employees," with no time limitation whatsoever, and is thus extremely overbroad.

Item 5 of the subpoena seeks all materials regarding respondent's policies, practices, procedures, instructions, handbooks, and manuals regarding employee discipline and work performance. This demand is onerous, and petitioners fail to explain how such materials would be relevant to the respondent's alleged failure to pay sick leave time.

In Item 6 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. The request also appears to require respondent to make a legal determination as to what is and is not relevant to the Sick Leave Law.

In Item 10 of the subpoena, the DCA seeks information regarding the number of sick leave hours available to each employee as of April 1, 2014. However, even accepting the allegation that a complaint was received by petitioners in September 2015, there is no basis on which to conclude that petitioners have a reasonable suspicion that any violations of the Sick Leave Law occurred before that time.

Item 11 of the subpoena seeks all documents and/or correspondence regarding any disciplinary action taken by the employer against an employee. This sweeping demand is overbroad, and petitioners' explanation that it will help it determine whether respondent "through policy or practice," violated the Sick Leave Law does not suffice to sustain it.

Item 12 seeks documents sufficient to show respondent's compliance with the law and rules.

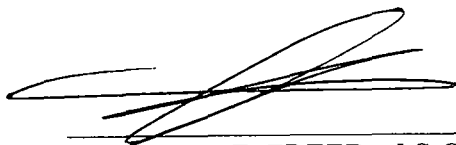
This request is vague and overbroad since it does not specify which documents the DCA seeks, the time period for which the DCA seeks them, or the individuals to whom the documents are relevant. “In short, [this Court finds that] the scope of relevancy and materiality [of the items petitioners seek in the subpoena] overlaps with the risks and possible fact of unjustified harassment” of respondent. *Myerson v Lentini Bros. Moving & Storage Co., Inc.*, 33 NY2d at 260.

In light of the foregoing, it is hereby:

ADJUDGED that the petition is denied and the proceeding dismissed without prejudice to renew; and it is further,

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

Dated: May 26, 2016



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

MAY 27 2016