

**The Inspector Gen. of the State of N.Y. v Indian
Cultural & Community Ctr., Inc.**

2011 NY Slip Op 33967(U)

December 12, 2011

Supreme Court, New York County

Docket Number: 402885/11

Judge: Manuel J. Mendez

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

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

THE INSPECTOR GENERAL OF THE STATE OF
NEW YORK, ELLEN N. BIBEN,
Petitioner,
For an Order under CPLR §2308[b] to enforce compliance
with a Subpoena
-against-
INDIAN CULTURAL AND COMMUNITY CENTER, INC.,
Defendant(s) .

INDEX NO. 402885/11
MOTION DATE 12-07-2011
MOTION SEQ. NO. 001

The following papers, numbered 1 to 4 were read on this motion to pursuant to CPLR §2308 (b) to compel respondents to comply with subpoena and the cross-motion to quash and/or limit the subpoena:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____ cross motion _____
Replying Affidavits _____

PAPERS NUMBERED
1 - 2, 3-4
FILED

DEC 14 2011

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is ordered that the petitioner's motion by Order to Show Cause pursuant to CPLR §2308, seeking to compel the respondent to comply with an administrative subpoena, and for costs in the amount of fifty dollars and damages, is granted to the extent of ordering respondent to produce the remainder of the items sought in the subpoena within thirty (30) days from the date of service of a copy of this Order with Notice of Entry. Respondent's cross-motion pursuant to CPLR §2304, to quash the subpoena is denied.

Petitioner has been conducting an investigation into the sale by the Dormitory Authority of the State of New York (hereinafter referred to as "DASNY") of parcels of land that were part of the Creedmoor Psychiatric Campus in Queens to the respondent. The land had initially been used by the Office of Mental Health (hereinafter referred to as "OMH") and was also utilized by the Office of People With Developmental Disabilities (hereinafter referred to as "OPWDD"). Respondent is a single member corporation, incorporated for the purpose of purchasing land from New York State. The sole member of the respondent is the St. Gregorios Malankara Orthodox Church. The terms of sale for the property initially restricted the land use to solely as a Community Center, but this term was modified to permit a removal of the use limitation upon certain conditions ten years after the deed was recorded, with an additional payment of \$1,795,000.00 consideration to DASNY.

The property was deeded to the respondent on July 1, 2008 for \$1.8 million and subsequently assessed by the New York Department of Finance as having a value of \$7.3 million for the tax year of 2010-2011. Respondent attempted to purchase additional property on the Creedmoor Psychiatric Campus in 2011, and a bill for that purpose was

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

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introduced in the State Senate In June of 2011, but withdrawn as a result of controversy concerning the purchase price and intended use for the property.

In July of 2011, the petitioner commenced its investigation into the sale and development of the Creedmoor Psychiatric Campus and the involvement of DASNY, OMH, OPWDD and the respondent.

Petitioner served an administrative subpoena on the respondent on July 11, 2011 seeking documents, records, and materials in any format, related to the sale of the property by New York State by and through the DASNY to the Indian Cultural and Community Center, Inc.. A response to the subpoena was due by August 15, 2011. Respondent initially agreed to provide responses on a rolling basis and advised petitioner that it was also responding to an investigation by the Office of the New York State Attorney General. On July 18, 2011 via e-mail, the petitioner sought documents which have not been provided, specifically:

**“Names and/or addresses of investors, donors, holders of subvention certificates, or people who otherwise provided funds that were used to purchase the Property by deed dated July 1, 2008; and
The prospectus or other information provided to the people listed above and/or any agreements with the people listed above.”**
(Mot. Exh. 7)

Respondent sent responses to petitioner's subpoena in the form of document production on July 15, 2011, July 22, 2011 and by e-mail production on September 12, 2011. At no time during the July 2011, production of documents did the respondent object to the terms of the subpoena. Petitioner claims that as of September 8, 2011, respondent did not seek an extension of time to answer or object to the terms of the subpoena and has therefore waived any basis for objection.

The courts will be slow to strike down a subpoena unless it calls for documents that are utterly irrelevant to the inquiry or where the “futility to uncover anything legitimate is inevitable or obvious” (La Bell Creole Intl., S.A. v. Attorney General of the State of N.Y., 10 N.Y. 2d 192, 176 N.E. 2d 705, 219 N.Y.S. 2d 1 [1961] citing to Matter of Edge Ho Holding Corp., 256 N.Y. 374, 176 N.E. 537[1931]). A subpoena issued by an administrative entity enjoys a presumption that it has been made in good faith. The party that issued the subpoena only needs to show that the materials sought bear “a reasonable relation to the subject matter investigation and to the public purpose to be achieved”(Anheuser-Busch, Inc. v. Abrams, 71 N.Y. 2d 327, 520 N.E. 2d 535, 525 N.Y.S. 2d 816 [1988]) A subpoena issued by an agency that has jurisdiction over other governmental entities also applies to those doing business with the governmental entities (Carl Andrews & Assoc., Inc. v. Office of the Inspector General of the State of N.Y., 85 A.D. 3d 633, 925 N.Y.S. 2d 504 [N.Y.A.D. 1st Dept. 2011]).

No governmental agency or entity has unlimited ability to inquire into the affairs of individuals or entities for purposes of discovering possible violations of laws. (Matter of A'Hearn v. Committee on the Unlawful Practice of Law of the N.Y. County Lawyers Assn., 23 N.Y. 2d 916, 246 N.E. 2d 166, 298 N.Y.S. 2d 315 [1969] and Virag v. Hynes, 54 N.Y. 2d 437, 430 N.E. 1249, 466 N.Y.S. 2d 1249 [1981]). An investigative non-judicial or

office subpoena issued by an administrative agency may be challenged by a motion to quash. A witness subject to a non-judicial subpoena may always challenge it on the ground that it seeks irrelevant documents or results in harassment (*Myerson v. Lentini Brothers Moving & Storage, Co., Inc.*, 33 N.Y. 2d 250, 306 N.E. 2d 804, 351 N.Y.S. 2d 687 [1973]). The issuer of the subpoena is not required to come forward with a factual basis establishing the relevancy of the materials sought to compel compliance until after a motion to quash is made. A motion to quash requires the issuer of the subpoena to come forward with a factual basis that establishes the extent of the inquiry and, "... the extent of the investigation preceding the subpoena..." (*Matter of A'Hearn v. Committee on the Unlawful Practice of Law of the N.Y. County Lawyers Assn.*, *supra* and *Myerson v. Lentini Brothers Moving & Storage, Co., Inc.*, 33 N.Y. 2d 250, *supra*). In those circumstances where, "...the scope of relevancy and materiality overlaps with the risks of and possible fact of unjustified harassment," the showing required is less than when there is only a preliminary inquiry and greater for an inquiry that would be broadened into unlimited expansion into the affairs of a business or enterprise (*Myerson v. Lentini Brothers Moving & Storage, Co., Inc.*, *supra*).

Petitioner states it is authorized pursuant to Executive Law 4-A §51 and §53 to conduct its investigation of state agencies which includes those who do business with the agencies, and the documents sought are not for purposes of harassment. Petitioner also states that part of its investigation involves representations made to DASNY and others involved in the transaction by the respondent, prior to the sale of the initial parcel on July 1, 2008. Petitioner is interested in the representations that resulted in the removal of the limitation for use of the property solely as a Community Center. Petitioner claims that it has developed evidence that some of the funding for the purchase of the land was secured by the respondent in exchange for promises of senior housing units built on the land purchased from DASNY, and the small amount of documents sought are relevant to the inquiry into the sale and development of the land. Petitioner states that the remaining documentation would not cause any undue burden on the respondent. Petitioner claims the fact that another agency is conducting a separate investigation is not a basis to quash the subpoena or dismiss this proceeding and that the respondent's claims of efficiency are self-serving.

Respondent's cross-motion seeks to quash or modify the subpoena claiming that it is utterly irrelevant to a legitimate inquiry and is being sought to harass or to ascertain the existence of additional evidence. Respondent states that neither it or its investors are subject to direct investigation by the petitioner as they are not public corporations or agencies as defined by the Executive Law. Respondent claims that petitioner's subpoena and investigation duplicates or overlaps with one commenced four days prior by the New York State Attorney General, therefore this later subpoena and investigation should be consolidated or dismissed. Respondent also claims that the remaining items sought by the petitioner were not specifically identified in the original subpoena served on July 11, 2011, and there is no issue as to partial compliance or waiver of any challenges.

Upon review of all the papers submitted, this Court finds that petitioner has established a legitimate and reasonable basis for its inquiry based on obtained evidence. Respondent and its investors are subject to investigation by the petitioner. There has only been partial compliance with the terms of the subpoena. The July 18, 2011 e-mail sought to clarify the remainder of the documents due, not act as a separate supplemental

request. The subpoena issued by the Attorney General's office (Cross-Mot. Exh. 1) seeks similar documentation but its terms are more broadly written. The respondent has not sufficiently established that this investigation should be quashed because there is another similar investigation by a government agency. This Court notes that respondent did not provide a sufficient objection to production of the "prospectus or other information provided," to individuals that funded the purchase of the property or establish that the information was already provided to the petitioner or the attorney general. Respondent's objection to providing the information based on the potential of overlapping or risk of harassment, does not supersede the public interest in this case.

Accordingly, It is ORDERED that the motion pursuant to CPLR §2308, seeking to compel the respondent to comply with the remainder of the items sought in an administrative subpoena is granted, and it is further

ORDERED, that respondent shall produce the remainder of the items sought in the subpoena within thirty (30) days from the date of service of a copy of this Order with Notice of Entry, and it is further

ORDERED, that respondent's cross-motion pursuant to CPLR §2304, to quash the subpoena is denied

This constitutes the decision and judgment of this court.

Dated: December 12, 2011

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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