Matter of Brasky v City of New York
2006 NY Slip Op 30744(U)
March 15, 2006
Supreme Court, New York County
Docket Number: 11453
Judge: Lottie E. Wilkins

[* 1]

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

PRESENT: LOTTIE E. WILKINS PART 18

Lottie E. Wilkins Justice

In the Matter of the Application of BRUCE BRASKY,

Petitioner,

- v -

CITY OF NEW YORK, DEPARTMENT OF INVESTIGATION,

Respondent.

INDEX NO. 114539/05

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for quash subpoena

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

ENTERED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Petition and cross-motion are denied and the proceeding dismissed in accordance with the attached decision.

Dated: March 15, 2006

MAR 15 2006

Lottie E. Wilkins J.S.C.

Check one: [X] FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST

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

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

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BRUCE BRASKY,

Plaintiff,

-against-

NEW YORK DEPARTMENT OF INVESTIGATION,

Defendant.

----------X

PART 18

Index No. 114539/05

Hon. Lottie E. Wilkins
J.S.C.

DECISION

Lottie E. Wilkins, J..:

Petitioner, Bruce Brasky, seeks an order pursuant to CPLR §2304 quashing a subpoena duces tecum issued by respondent, New York City Department of Investigation ("DOI"). Petitioner further asks for an order directing DOI to turn over the tapes and/or transcripts relating to the investigation of petitioner's alleged private legal practice while employed by the City. DOI cross-moves pursuant to CPLR §2308(b) to compel compliance with the subpoena.

In deciding this matter, the Court considered petitioner's order to show cause and affirmation dated October 17, 2005; respondent's notice of cross-motion and affirmation in opposition to the application and in support of the cross motion dated November 18, 2005; the affirmation in opposition to respondent's cross-motion and in further support of the application dated January 4, 2006; and the reply affirmation in further support of the cross-motion dated January 9, 2006. When the Court first signed the order to show cause on October 20, 2005, it

issued an order temporarily restraining respondent form enforcing its subpoena pending hearing, which injunction was further extended pending determination of this matter.

FACTS

On October 5, 1981, Mr. Brasky commenced his employment with the New York City Department of Finance, serving as an attorney. In March 2005, DOI, the investigatory agency overseeing all city activities, received a third party complaint concerning Mr. Brasky. The complainant alleged that Mr. Brasky was violating the City's ethics rules and regulations, by maintaining a private legal practice during his tenure as a city employee. As a result, DOI commenced an investigation into this allegation, and on June 29, 2005, a Deputy Inspector General interviewed Mr. Brasky. Subsequently on July 20, 2005, DOI requested that Mr. Brasky produce all documents related to his alleged private legal practice. Instead of complying with DOI's request, Mr. Brasky terminated his employment on August 16, 2005, without giving prior notice. On September 29, 2005, DOI resorted to the issuance of a non-judicial investigatory subpoena, which requested the production of "[all] documents including, but not limited to, lists, invoices, billing records, cash receipt journals, bank deposit records and time records reflecting, identifying or referencing, by name, all persons on whose behalf you provided legal services for the period of January 1, 2003 through July 20, 2005." In turn, Mr. Brasky commenced this proceeding to quash the subpoena.

MOTION TO QUASH

Through City Charter section 803, DOI maintains the power to investigate the activities of any city agency. This broad power explicitly extends to employees and non-

employees who conduct business with the city. In order for DOI to effectively perform its investigatory duties, DOI may issue non-judicial investigatory subpoenas.

Petitioner contends that the subpoena must be quashed on various grounds. First, Petitioner submits that DOI lacks the authority to issue a subpoena against a non-City employee. Further, petitioner argues that the scope of the subpoena evidences DOI's intent to harass and intimidate him. Finally, petitioner argues that the subpoena would violate attorney client privilege, as well as various constitutional rights. All of these arguments lack merit.

Petitioner's argument that he is not subject to DOI's subpoena powers because he no longer works for the city goes against both the plain meaning interpretation of the city charter and well developed case law. The authority granted under the City Charter has been interpreted to apply not only to city employees but any individual who possess information related to the subject of an investigation (see. Matter of New York City Department of Investigation v. Caesar Passannante et al., 148 AD2d 191, 104 [1st Dept. 1989]. Therefore, even if petitioner had not been employed by the city for over twenty years, petitioner would still be subject to DOI's subpoena and investigation, as a person who possess information related to this investigation. Furthermore, the subpoena and investigation relate wholly to petitioner's activities during his employment with the city. Notwithstanding this clear applicability to petitioner, petitioner continuously fails to give much due credence to the investigation being solely based on his city employment. Petitioner, in essence, attempts to create a loophole for all city employees to avoid investigatory subpoenas by simply resigning, as he has demonstrated. Such a proposition does not even merit a comment.

Petitioner further posits that the subpoena's breadth is indicative of an intent to harass and intimidate. The Court of Appeals has set forth a three prong test to ensure that

government agencies, such as DOI, do not issue subpoenas to authorize an "unlimited and general inquisition" (Matter of Charles A. A'Hearn v. Committee on Unlawful Practice of the Law of the New York County Lawyers' Assoc., 23 NY2d 916, 918 [1969]). To satisfy this test, there must be a showing of 1) authority, 2) relevance, and 3) some basis for the inquisitorial action (Id.).

As discussed earlier, DOI maintains broad authority to issue subpoenas against both city employees and non-city employees who possess information related to the investigation (see. Matter of New York City Dept. of Investigation v. Passannante, supra). Petitioner unquestionably falls within this range of authority. Turning to relevance, petitioner offers no legitimate argument against the relevance of the documents sought. To the extent that DOI is investigating petitioner's alleged private legal practice, the documents sought are completely geared towards that investigation. Finally, with regards to the justification of the subpoena, the Court of Appeals has held that there is no litmus test to determine a subpoena's justification, but instead, puts forth a broad analysis approach (Matter of Levin v. Murawski, 59 NY2d 35, 42 [1983]). In this case, the reliability of the complaint, coupled with the good faith basis of DOI and the pre-subpoena investigation creates more than adequate grounds to justify the subpoena. Therefore, the subpoena has met the test set forth by the Court of Appeals.

Petitioner further argues that the subpoena violates his attorney client privilege and constitutional rights. However, these arguments also do not have merit. The documents sought are "...lists, invoices, billing records, cash receipt journals, bank deposit records and time records...," which do not divulge the nature or substance of petitioner's legal services. Therefore, while the requested documents may generally relate to petitioner's legal practice, the documents are of a collateral nature. It is well established that such collateral documents are not

protected by the attorney client privilege (see, Matter of Richard D. Priest v. Richard A. Hennessy, Jr., 51 NY2d 62, 69 [1980]). Turning to petitioner's constitutional claims, a violation of a Fifth Amendment right does not occur until the commencement of a criminal trial, and therefore, this is not the proper juncture to discuss any such violation. While petitioner also claims a Fourth and Sixth amendment violation, these claims were not substantiated by petitioner, and therefore, no discussion is warranted.

Motion to Compel Disclosure

Petitioner contends that the City Charter requires DOI to turn over tapes and/or documents related to the investigation. However, the language of the City Charter does not warrant such disclosure to petitioner. The plain language meaning of City Charter section 803(c) requires disclosure to only the mayor or council who requested the investigation, not the person subject to the investigation, in this case petitioner. Notwithstanding this plain language meaning, disclosure to petitioner would go directly against the public policy of preserving these investigations (Robert Blaikie v. Borden Co., et al., 47 Misc. 2d 180 [1965]). Therefore, disclosure should not be granted.

Cross Motion to Compel Compliance

Respondent's cross motion to compel petitioner's compliance with the subpoena in issue is denied without prejudice. Subpoenas maintain an inherent power to compel compliance, and until petitioner avoids the subpoena, intervention is not necessary. Thus far, petitioner has not avoided the subpoena per se but invoked his rights to challenge the subpoena. Therefore, until petitioner truly avoids the subpoena, which is no longer in dispute, the subpoena stands alone to compel compliance. Accordingly it is,

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Ordered and adjudged that petitioner's motion to quash the subpoena issued by respondent is denied; it is further

Ordered that petitioner's motion to compel production of tapes and/or documents related to the investigation is denied; it is further

Ordered that respondent's cross motion to compel compliance with the subpoena is denied without prejudice.

This constitutes the decision and judgment of the court.

Dated: March 15, 2006

MAR 15 2006

Lottie E. Wilkins, J.S.C.

Lottie E. Wilkins

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).