

**New York State Div. of Human Rights v H&R Block
Tax Servs., Inc.**

2008 NY Slip Op 33662(U)

March 6, 2008

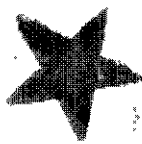
Supreme Court, Bronx County

Docket Number: 1726/2007

Judge: Betty Owen Stinson

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NEW YORK SUPREME COURT - COUNTY OF BRONX
IAS PART 08

-----X
THE NEW YORK STATE DIVISION OF HUMAN
RIGHTS,

Petitioner,

INDEX No. 1726/2007

-against-

H&R BLOCK TAX SERVICES, INC.; H&R BLOCK
BUSINESS AND TAX SERVICE, INC., and H&R
BLOCK MORTGAGE CORPORATION,

Respondents.

Present:
HON. BETTY OWEN STINSON
J.S.C.

-----X

The following papers numbered 1 to 11 read on this petition for order to compel and cross-motion to quash subpoena, Noticed on 02-20-08 and submitted as No. 3 on the Calendar of 02-20-08

PAPERS NUMBERED

Notice of Motion -Exhibits and Affidavits Annexed.....	1-2, 3-8
Order to Show Cause - Exhibits and Affidavits Annexed.....	
Answering Affidavits and Exhibits.....	12
Replying Affidavits and Exhibits.....	
Sur-reply Affidavits and Exhibits.....	
Stipulations - Referee's Report - Minutes.....	
Memorandum of Law.....	9, 10, 11

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Upon the foregoing papers this petition and cross-motion are decided per annexed memorandum decision.

Dated: March 6, 2008
Bronx, New York

Betty Owen Stinson
BETTY OWEN STINSON, J.S.C.

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

-----X
NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Petitioner,

INDEX № 1726/2007

-against-

DECISION/CRDER

H&R BLOCK TAX SERVICES, INC.; H&R BLOCK
BUSINESS AND TAX SERVICE, INC., and H&R
BLOCK MORTGAGE CORPORATION,

Respondents.

-----X

HON. BETTY OWEN STINSON:

This petition by the New York State Division of Human Rights (“Division”) for an order compelling respondents H&R Block Tax Services, Inc.; H&R Block Business and Tax Service, Inc., and H&R Block Mortgage Corporation (collectively, “H&R Block”) to comply with a subpoena duces tecum, dated April 9, 2008 and issued by the Division, and to produce the documents specified therein, is granted to the extent that the respondents are directed to comply with said subpoena and produce said documents no later than fifteen (15) days after service of a copy of this order with notice of entry. Respondents’ cross-motion for an order quashing the subpoena duces tecum is denied.

The following facts are not in dispute. Individuals visiting H&R Block tax preparation offices often receive short-term “Pay Stub”, “Holiday” or “Refund Anticipation Loans” (collectively, “RAL’s”) collateralized by an imminent pay check or an anticipated tax refund. The costs and fees associated with these loans can reach annualized rates of up to 400% or more. The loans are processed through HSBC Bank USA, National Association (“HSBC” or “Bank”),

pursuant to an agreement between H&R Block and the Bank, referring to H&R Block as an “agent” of the Bank for purposes of making these loans. It is H&R Block, however, that advertises and promotes the loans, offers them to its clients, provides clients with the loan applications, completes the loan applications and obtains signatures, delivers the applications to the bank and delivers the loan proceeds to the client, usually in the form of a check printed by H&R Block with costs and fees deducted. Independent entities conducting recent studies have released findings indicating that the vast majority of RALs were issued in communities of color between 2002 and 2005 (see *Predatory Tax-Time Loans Strip \$324 Million from New York City's Poorest Communities*, Neighborhood Economic Development Advocacy Project, January 2007). In 2004, one study concluded that almost twice as many African-American taxpayers were sold RALs as were White taxpayers (*All Drain No Gain: Refund Anticipation Loans Continue to Sap the Hard-Earned Tax Dollars of Low-Income Americans*, National Consumer Law Center, January 2004). An August 2006 report by the U.S. Department of Defense found that these high cost loans were marketed to and targeted at military families (*Payday Lenders Target the Military*, Center for Responsible Lending [September 2005]; *Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents*, Department of Defense [August 9, 2006]; see also *Down But Not Gone: Quick Tax Refund Loans Continue to Gouge Taxpayers and Military*, Consumer Federation of America [February 5, 2007]).

Given this and other information, the Division decided, pursuant to its statutory authority, to investigate whether these products were being disproportionately targeted toward people of color and military families in New York and whether they disproportionately impact these protected classes in an unlawful manner. On March 15, 2007, the Division initiated an

investigation into the marketing practices of the three largest tax preparation companies offering these products: H&R Block, Jackson Hewitt and Liberty Tax. The companies were asked to provide (1) a list of the branches and franchises in New York issuing or promoting RALs for the last three years, (2) the number issued from each location, (3) a list of the outlets for advertisements (such as newspapers and billboards) and (4) the marketing plans for these loans. After subpoenas were issued, Jackson Hewitt and Liberty Tax provided the requested material to the Division. H&R Block did not. In response to the instant petition for an order compelling H&R Block to comply with the subpoena, H&R Block cross-moved for an order quashing the subpoena.

In support of its cross-motion, H&R Block made the following arguments: the subpoena does not assert facts showing a jurisdictional basis to issue the subpoena; the Division has no authority to investigate without having filed a formal complaint; and the subject loan products are offered by a federally-chartered bank, meaning that the Division, as a state agency, is barred by federal preemption from regulating these loans in any way or even investigating them.

The New York State Legislature has given the Division the power to “inquire into incidents of and conditions which may lead to tension and conflict among racial, religious and nationality groups and to take such action within the authority granted by law to the division, as may be designed to alleviate such conditions, tension and conflict” (Law Against Discrimination, Executive Law § 295.11). The commissioner may investigate unlawful discriminatory practices in relation to credit, among other things, such as, but not limited to, the extending of credit, or the fixing of rates, terms or conditions of any form of credit on the basis of race, color, national origin or military status (Executive Law § 296-a[1][b]). The statute is to be “construed liberally for the

accomplishment of the purposes thereof" (Executive Law § 300). Wide powers have been vested in the commissioner to allow him to effectively eliminate specified unlawful discriminatory practices because "discrimination is rarely so obvious or its practices so overt that recognition of it is instant and conclusive, it being accomplished usually by devious and subtle means" (*New York State Division of Human Rights v. Nationwide Mutual Insurance Company*, 74 AD2d 16 [1st Dept 1980]).

In addition to investigating complaints filed by private citizens with the Division, the Division has the statutory power, "[u]pon its own motion, to test and investigate and to make, sign and file complaints alleging violations of this article and to initiate investigations and studies to carry out the purposes of this article" (Executive Law § 295[6][b]). The Division "may make rules as to the issuance of subpoenas which may be issued by the division at any stage of any investigation or proceeding before it" (Executive Law § 295.7). The State Commissioner for Human Rights has subpoena power for use in a general informal investigation and its subpoena powers are not limited to the particular procedures outlined for use in proceedings instituted in the case of complaints filed by private citizens, such as those outlined in Executive Law § 297 (*Broido v State Commissioner of Human Rights*, 40 Misc2d 419 [Sup Ct, NY Cty 1963]).

H&R Block claims there is no minimum factual basis for the issuance of a subpoena because it is not a "creditor" within the meaning of Executive Law § 296-a, applicable to creditors who discriminate in the granting, withholding, extending or renewing of credit. That statute, however, is not limited only to creditors, but includes any "officer, agent or employee" of a creditor as well. H&R Block has specifically identified itself as an "agent" of HSBC for the purpose of offering RALs and is therefore covered by § 296-a. Furthermore, the Division is not

merely on a fishing expedition. The reports noted above provide extensive and detailed information about the demographics involved in the sale of RALs. H&R Block does not deny that at least one of its corporate partners derives substantial revenue from RALs, that its customers are offered those loan products in H&R Block tax preparation offices, that H&R Block advertises and markets the products and that the associated costs and fees make the products extremely high cost loans by any measure. Given statistics tending to show that the New York customers most likely to make use of these loans are in the military or located in minority neighborhoods and less likely to have a bank account, it is clearly within the purview of the Division to ascertain whether that customer base is due to marketing practices by H&R Block that specifically target these protected groups with loan products which would be rejected out of hand by experienced borrowers.

In support of its argument that the Division has no authority to issue a subpoena duces tecum without first having filed a complaint, respondents offered *Matter of Parnassa Realities v. NYSDHR*, 65 Misc2d 136 (Sup Ct, NY Cty 1970) *aff'd without op* 35 AD2d 1085 (1st Dept 1970). In *Parnassa*, a complaint against a realty company was dismissed by the Commissioner who found no substantial evidence on the record to support it. Nevertheless, one month later, the Division served a subpoena on the realty company for the production of voluminous records. The Court considered this conduct by the Division to amount to harassment, since it could have compelled the material earlier, quashed the subpoena and held there should be a finality in the decisions of an administrative agency. The Court also observed, in dicta, that it could not find an indication in the statute that an individual may be investigated in the absence of a complaint. The First Department affirmed the Court's result without issuing an opinion.

Viewing the Human Rights statutes as a whole, it is clear the Division's powers to

investigate do indeed include the authority to issue a subpoena without first filing a formal complaint, the Court's failure in *Parnassa* to find that authority notwithstanding (*see also* *NYSDHR v. Liberty Mutual Ins. Co.*, 74 AD2d 16 [1st Dept 1980])[assuming, without deciding, division's power to issue subpoena without complaint, but finding no factual basis to support the issuance of subpoena in that case]). As noted above, the Division may *both* sign and file a complaint *and* initiate investigations and studies in the pursuance of its duties under the statute (Executive Law § 295[6][b]). This court, in agreement with *Broido* (40 Misc2d 419), finds no procedural limitation in the statute on the Division's ability to investigate and study potentially discriminatory practices using its subpoena powers.

The Division is not preempted by federal law from investigating marketing of the above referenced loan products. HSBC is a national Bank chartered by the U.S. Office of the Comptroller of the Currency ("OCC"). The National Bank Act provides that chartered banks have the power to exercise, by their board of directors or duly authorized officers or agents, all such incidental powers as necessary to carry on the business of banking (12 USC § 24). With regard to the business of banking, the Bank is subject to exclusive regulation and examination by the OCC. The Supreme Court of the United States has held that federal oversight of banking operations by the OCC extends even to state-chartered, wholly owned, mortgage lending subsidiaries of federal banks (*Watters v. Wachovia Bank N.A.*, ___ US ___, 127 S Ct 1559 [2007]). To decide whether a state may regulate any third-party entity selling federal bank products, the relevant inquiry is not *whom* the state may regulate, but rather *what activity* is being regulated (*SPGGC v. Ayotte*, 488 F2d 525 [1st Cir 2007])[federal law did not allow State of New Hampshire to prohibit mall owner from selling gift cards as bank's agent, because mall owner played no role in defining relationship

between gift-card purchaser and bank, and had no role in managing it]; see also *SPGGC v. Blumenthal*, 505 F3d 183 [2d Cir 2007][Connecticut gift-card law not preempted by federal law by its prohibition of seller's in-state sales of gift cards since enforcement did not interfere with bank's ability to develop and market gift cards, but interfered only with conduct of seller who bore costs of administering program, collected fees and established terms and conditions of gift-cards]; *Carson v. H&R Block*, 250 F. Supp.2d 669 [SD Miss 2003][court rejected non-bank defendant's preemption argument because statute at issue did not prohibit banking activity, but rather prohibited third-party agent from misrepresenting bank products it was selling]). A close agency or business relationship with a federal bank is not sufficient by itself under the National Bank Act to entitle the agent to protection from investigation or regulation by a state authority (*Blumenthal*, 505 F3d 183).

H&R Block is admittedly an agent of HSBC and not a wholly-owned subsidiary of a federal bank, as was the mortgage lender in *Watters*. Furthermore, the Division is not investigating the Bank's ability to extend loans of the type relevant here, rather it is investigating H&R Block's marketing practices with respect to those loans, an activity properly within the State's and particularly the Division's purview and not preempted by federal banking law (see *Carson*, 250 F.Supp.2d 669; *Blumenthal*, 505 F3d 183). Other cases cited by H&R Block in support of its argument to the contrary are either inapplicable or actually support the Division's position.

This constitutes the decision and order of the court.
 Dated: March 6, 2008
 Bronx, New York


 BETTY OWEN STINSON, J.S.C.