

<b>State of New York v ERW Enter., Inc.</b>
2015 NY Slip Op 30592(U)
April 14, 2015
Sup Ct, New York County
Docket Number: 451462/13
Judge: Debra A. James
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## SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES

PART 59

Justice

STATE OF NEW YORK,

Petitioner,

Index No.: 451462/13

Motion Date: \_\_\_\_\_

- v -

Motion Seq. No.: 01

ERW ENTERPRISES, INC.,

Defendant.

The following papers, numbered 1 to 9 were read on this petition to compel.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_

Answering Affidavits - Exhibits \_\_\_\_\_

Replying Affidavits - Exhibits \_\_\_\_\_

## PAPERS NUMBERED

1 - 45 - 78 - 9Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers,

The issue presented on this motion is the scope of the petitioner Attorney General's authority to issue subpoenas pursuant to Executive Law 63 (12) and CPLR 2302 (a) to the respondent ERW Enterprises, Inc., (ERW) a corporation licensed to conduct business in New York State. Non-party ERW Enterprises a/k/a ERW Wholesale (Wholesale), is a companion company, licensed by the Seneca Nation of Indians, a Native American tribe in western New York. The Attorney General moves to compel compliance with its subpoena while the respondent ERW cross-moves

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FOR THE FOLLOWING

to quash same. For the reasons that follow, the court shall grant the motion of the Attorney General and deny the cross-motion.

The subpoena issued by the petitioner requests certain records from respondent related to respondent's transactions with King Mountain Tobacco Company, a tobacco company that manufactures cigarettes on the Yakima Indian Reservation in Washington state. The Attorney General asserts that cigarettes from King Mountain have been illegally transported and transferred to entities in New York for sale within this State without complying with tax and safety laws and regulations, and that the information sought in the subpoena is in furtherance of its investigation of these activities.

Respondent argues that (1) the subpoena was served upon the wrong party and that respondent does not possess the information sought; and (2) the subpoena requests information that is beyond the power of the petitioner to request because the purported respondent is a tribal business and thus has sovereign immunity from inquiries by state authorities. Respondent places reliance on the fact that the transactions that are allegedly the subject of the subpoena only involve tribal entities and not entities or persons on non-tribal land.

Petitioner counters that the respondent should be deemed to be the entity named in the subpoena based upon the relationship

between ERW and Wholesale. Petitioner further argues that the information sought in the subpoena is within the scope of the petitioner's powers under Executive Law 63 (12).

Respondent argues that the subpoena seeks information about transactions which do not involve ERW and that instead the only entity that has engaged in cigarette transactions is Wholesale. Thus ERW argues that the subpoena should be quashed because ERW has no responsive records and the subpoena is thereby defective. The court disagrees.

To the extent that respondent ERW argues that the subpoena names the incorrect party, its position on its cross-motion is unsupportable. ERW is a New York corporation clearly subject to the jurisdiction of and process by the petitioner. If in fact ERW has no responsive documents or information about the subject matter of the subpoena that does not nullify the subpoena or grant ERW the right not to respond. It is clear that the Attorney General has the power to issue subpoenas to New York corporations in pursuit of its investigative function. See La Belle Creole Intern., S. A. v Attorney-General of the State of New York, 10 NY2d 192, 198 (1961) (as long as the Attorney General has reasonable basis for believing that a corporation violated a New York statute the power to issue subpoenas and initiate investigations is authorized).

Therefore, even were the court to accept respondent's contention that it was not the entity involved in the alleged activity that was the subject of the subpoena, its cross-motion to quash is subject to denial as the petitioner is acting within its powers to investigate whether that in fact is the case.

However, petitioner in its opposition to the cross-motion makes clear that despite the fact that it issued the subpoena against ERW, it expects to receive responses based upon information in the possession of Wholesale. Similarly, respondent in making the cross-motion makes arguments on behalf of and seeks relief on behalf of Wholesale even though Wholesale is not explicitly named in the subpoena.

As both petitioner and respondent have chosen to treat the subpoena as seeking records and information from Wholesale, the court shall determine the propriety of the subpoena with respect to Wholesale by essentially deeming the subpoena to ERW to be applicable to Wholesale based upon the fact that ERW and Wholesale share offices and have the same principal.

The subpoena in question seeks records concerning cigarette shipments Wholesale received from King Mountain Tobacco Company. The petitioner alleges that King Mountain has transported tobacco products within this State in a manner that violates state and federal law.

Wholesale argues that the information sought by the subpoena is beyond the jurisdiction of the petitioner because Wholesale's headquarters and business are situated in the Cattaraugus Reservation of the Seneca Nation of Indians, a federally recognized Native American tribe, and that the information sought is geographically located within that jurisdiction. Wholesale's argument is that whatever the merits of the petitioner's investigation, the Attorney General's authority stops at the reservation boundary. Thus Wholesale advocates the position that

The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the pre-emption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits. The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

White Mtn. Apache Tribe v Bracker, 448 US 136, 151 (1980)

(internal quotations and citations omitted).

Thus the issue as framed by Wholesale is whether the information sought by the Attorney General implicates tribal sovereignty and to what extent that acts as a shield to the production of the responses sought. Recent authority sets forth that in fact Wholesale cannot claim sovereign immunity as a shield from the petitioner's investigation based upon the fact that the business is allegedly conducted solely on the reservation. Sue/Perior Concrete & Paving, Inc. v Lewiston Golf

Course Corp., 24 NY3d 538, 552 (2014) rearg denied \_\_ NY3d \_\_

(Mar. 31, 2015). As the Court has previously held

A foreign corporation's immunity from civil suit in New York, on the ground that it is not doing business there, does not mean that it is immune from investigation by the Attorney-General in an inquiry to determine whether it is violating the laws of this State. As long as that official has reasonable basis for believing that the corporation violated a New York statute, he is not prevented by the due process clause of the Federal Constitution from exercising his power of subpoena and initiating an investigation designed to ascertain the facts.

La Belle Creole Intern., S. A. v Attorney-Gen., 10 NY2d 192, 198

(1961). Thus, (1) Wholesale is not immune from the service of the subpoena on it merely because it is a Seneca company, and (2) Wholesale is subject to the service of the subpoena upon it.

Therefore the issue presented is to what extent must Wholesale comply with the subpoena. As stated by the Appellate Division

While it is true that respondent [Attorney General] does not possess arbitrary and unbridled discretion in inquiring into the prospect of possible violations of law, especially with respect to subpoena duces tecum, there is a presumption that respondent is acting in good faith. To support the issuance of the subpoena, respondent is not required to show probable cause or to disclose the scope of the investigation. His obligation is to show his authority, the relevancy of the items sought and some factual basis for the inquisitorial action. Furthermore, even if the subpoena is not sufficient on its face, reference may be had to an affidavit in opposition to the motion to quash.

Pharm. Socy. of State of N.Y. v Abrams, 132 AD2d 129, 133 (3d

Dept 1987). In this case, the petitioner has demonstrated that

it is investigating possible violations of state laws regarding the regulated distribution and sale of tobacco products within and through the state. The affidavits in support of the motion demonstrate a good faith basis for the records sought and therefore the subpoena is a valid exercise of respondent's authority and the court shall compel a response.

With respect to respondent's apparent jurisdictional argument, the fact that this court compels respondent's compliance with the subpoena issued by the petitioner under the laws of this State does not implicate any issues regarding the jurisdictional reach of this court. That is, while the petitioner has obtained relief in this court for the failure of the respondent to reply to the subpoena and this court now compels such reply, the enforcement of this court's order is subject to the reach of the remedies provided in this State's statutes. Enforcement of this court's order falls to respondent availing itself of any such remedies. The court notes that it has been held that under Executive Law 63 (12) "in the absence of specific Federal enabling legislation, the State has no authority to enforce its civil regulatory laws on Indian reservations". People v Anderson, 137 AD2d 259, 268 (4<sup>th</sup> Dept 1988); cf. Alexander v Hart, 64 AD3d 940, 942 (3d Dept 2009) ("State courts do not violate an Indian nation's sovereign right to self-government by exercising jurisdiction over disputes between



private civil litigants on matters that have no bearing on the tribal nation's government").

To the extent that ERW also cross-moves for a discretionary change of venue pursuant to CPLR 510 (3) that cross-motion shall be denied as the court has no need to take testimony from witnesses in this special proceeding and therefore there is no support for such an application. See Chimarios v Duhl, 152 AD2d 508, 509 (1<sup>st</sup> Dept 1989) (convenience of party's employees is not to be considered in deciding a motion to change venue).

Accordingly, it is

ORDERED that the petitioner's motion for the relief sought in the petition is GRANTED and the respondent's cross-motion is DENIED; and it is further

ORDERED and ADJUDGED that the respondent is directed to respond to the subpoena that is the subject of this petition by producing the items sought within thirty (30) days from service of a copy of this order with notice of entry upon it.

This is the decision and order of the court.

Dated: April 14, 2015

ENTER:

Debra A. James  
**DEBRA A. JAMES** J.S.C.