Matter of Monster Beverage Corp. v Schneiderman
2017 NY Slip Op 30089(U)
January 13, 2017
Supreme Court, New York County
Docket Number: 158728/14
Judge: Debra A. James
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: **DEBRA A. JAMES** **PART 59**
Justice

In the Matter of the Application of
MONSTER BEVERAGE CORPORATION
Petitioner,

-v-

ERIC T. SCHNEIDERMAN, Attorney General of the State of New York
Respondent.

Index No.: 158728/14
Motion Date: _____
Motion Seq. No.: 01
Motion Cal. No.: _____

The following papers, numbered 1 to 88 were read on this petition to quash.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____	1 - 28
Answering Affidavits - Exhibits _____	31 - 86
Replying Affidavits - Exhibits _____	87 - 88

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers,

The petitioner seeks to quash an investigatory subpoena issued by Attorney General pursuant to Executive Law 63 (12). The Attorney General cross-moves to compel petitioner's compliance with the subpoena.

The subpoena dated August 6, 2014 states that it is "in connection with an investigation concerning Monster Energy Drinks and the Collegiate Ambassador Program." The Monster Energy Drinks are a brand of beverage marketed by the petitioner since

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

Check One: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SETTLE/SUBMIT ORDER/JUDG.

approximately 2002. According to the petitioner the drinks contain ingredients including sugar, caffeine and vitamins. The petitioner further states that the Collegiate Ambassador Program incorporates the activities of the Monster Energy Collegiate Ambassador Team ("CAT"). The CAT consists of college students sho promote and market Monster drinks on their campuses and provide periodic reports to the assigned supervisor who is a Monster employee.

The subpoena at issue here dated September 8, 2014 was issued to Monster employee Harmony Booker "in connection with an investigation concerning Monster Energy Drinks and the Collegiate Ambassador Program." The subpoena sought documents (a) for a period of seven years "reflecting policies, practices, and procedures related to the Collegiate Ambassador Program including, but not limited to, the establishment of the program and the recruitment of members of the Collegiate Ambassador Team ("CAT")" and (b) for a period of two years "all e-mails and Documents directed to and sent by Harmony Booker related to the Collegiate Ambassador Program and the mixing of Monster Energy Drinks with alcohol." According to petitioner, Harmony Booker resides in Florida and at the time of the subpoenas was employed by the petitioner overseeing the activities of the Monster Energy Collegiate Ambassador Team.

By electronic mail message dated August 8, 2014, petitioner's counsel requested the Attorney General set forth the statutory and factual basis for the subpoena. In an August 11, 2014 electronic mail message, the Attorney General replied that the basis for the subpoena was that Attorney General "had reason to believe that Monster is engaged in deceptive and illegal marketing of Monster, including, but not limited to i) marketing Monster as safe when the product is associated with serious health risks particularly to children and young adults; ii) aggressively marketing Monster to children and young adults, iii) promoting the consumption of Monster with alcohol, iv) misbranding Monster as a dietary supplement in violation of [federal law] and v) selling an adulterated food not generally recognized as safe in violation of [federal law]."

Monster now moves to quash the subpoena arguing that none of the grounds cited by the Attorney General concern any actual or suspected violation of New York law by the petitioner. In cross-moving to compel compliance the Attorney General's office argues that it possesses broad investigative authority under New York law to investigate potential fraud and illegality in business practices within the state.

The Attorney General under Executive Law 63(12) "is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil

practice law and rules" in connection with any investigation where it is alleged that "any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business." See also GBL 349(b).

The Court of Appeals has set forth the standard to be applied where a party challenges a subpoena issued by the Attorney General pursuant to Executive law 63 (12) as follows

> [U]pon a preliminary motion, such as the present, to contest the obligation of the writ, he need only show that the records and books which he seeks bear a reasonable relation to the subject-matter under investigation and to the public purpose to be achieved. He does not, it is true, have arbitrary and unbridled discretion as to the scope of his investigation, but, unless the subpoena calls for documents which are utterly irrelevant to any proper inquiry or its futility to uncover anything legitimate is inevitable or obvious, the courts will be slow to strike it down. As this court stated in the Edge Ho Holding Corp. case, [i]nvestigation will be paralyzed if arguments as to materiality or relevance, however appropriate at the hearing, are to be transferred upon a doubtful showing to the stage of a preliminary contest as to the obligation of the writ.

La Belle Creole Intern., S. A. v Attorney-General of State of N.Y., 10 NY2d 192, 196-197 (1961) (citations and internal quotations omitted). The Court has further stated that

> However broad the statutory language may be, the discretion [of the Attorney General] must be exercised within bounds circumscribed by a reasonable relation to the subject-matter under investigation and to the public purpose to be achieved. So we have said that the statute does not commission the Attorney-General to embark upon any roving course for the purpose of generally prying into the affairs of any person. The power to require a witness to produce books and papers is necessarily

> limited to a proper case, even though those words are not expressly used in the statute here as they were in the statute considered in Matter of Hirschfield v. Craig. A proper case is ordinarily one where the books and papers called for have some relevancy and materiality to the matter under investigation.

Carlisle v Bennett, 268 NY 212, 217-218 (1935) (citations omitted). The Court reiterated this standard in an action involving the marketing of alcoholic beverages stating

> An application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry. In defending his inquiry, the Attorney-General enjoys a presumption that he is acting in good faith and must show only that the materials sought bear reasonable relation to the subject matter under investigation and to the public purpose to be achieved.

Anheuser-Busch, Inc. v Abrams, 71 NY2d 327, 331-332 (1988) (citations and internal quotations omitted). The Court in Anheuser-Busch held that unless the legality of the practice being investigated by the Attorney General is well-established, the Attorney General has broad powers to investigate the conduct. Id. at 332.

Therefore, petitioner's burden on this application is to establish that the conduct which is the subject of the subpoena is of such legality that the information sought would serve no purpose in identifying conduct which would actionable by the Attorney General Attorney General under the state's anti-fraud statutes. On the present application, the petitioner comes

close, but ultimately fails to clear the high burden necessary to sustain the relief it seeks.

As the subpoena must necessarily further the Attorney General's investigation of activity that is deceptive and illegal, the court shall analyze the subpoena's relevance to the conduct Attorney General states may be violative of the anti-fraud statutes.

The Attorney General alleges that the petitioner's beverage is deceptively marketed and that the subpoena attempts to discover evidence in support of this allegation. The Attorney General argues that the marketing by the petitioner is aimed at children and "young adults" and therefore impermissibly implies that its product is generally recognized as safe (GRAS) for these allegedly targeted groups. The petitioner argues that its marketing cannot be the basis of a consumer fraud claim because there is no statutory prohibition against marketing its beverage with the exception of a local statute in Suffolk County.

The court agrees with petitioner that the allegation that petitioner is marketing its beverages to young adults and children, without more, is insufficient to sustain the exercise of the Attorney General's subpoena power. The Attorney General fails to allege any fraudulent statement or omission in the petitioner's marketing or that such marketing violates any statutory or regulatory prohibition upon which the Attorney

General could maintain an action against petitioner. The Attorney General states in its brief that it does not seek to bar the sale of energy drinks but confines its investigation solely to petitioner's marketing and promotional activities.

However, in the absence of any allegation that the sale or consumption of petitioner's beverages are subject to any statutory or regulatory bar, the Attorney General fails to set forth any basis that by merely marketing to young adults and children petitioner's alleged actions could be actionable as fraudulent or deceptive in a manner that justifies the upholding of its subpoena. The authorities cited by the Attorney General in support of its position reinforce the principle that its powers must be exercised in support of investigating some underlying statutory or regulatory violation. See People v Concert Connection, Ltd., 211 AD2d 310, 320 (2d Dept 1995) (Executive Law §63(12) aimed at protecting consumers from deceptive and misleading practices may be maintained for alleged violation of Arts and Cultural Affairs Law); People ex rel. Spitzer v Gen. Electric Co., Inc., 302 AD2d 314, 315 (1st Dept 2003) (Attorney General authorized to prosecute deceptive practice where statements made differed from those approved by the Consumer Product Safety Commission).

Similar reasoning applies to the Attorney General's argument that the subpoena at issue is supported by its investigation into

the allegation that petitioner's marketing of its product implies that its beverages are GRAS. The Attorney General's argument in this regard is circular in that it is not the content of the marketing which is being challenged as misleading but the mere fact of such marketing. That is, the mere fact that something is being marketed always implies that the item being marketed is safe as it would be a violation of the anti-fraud statutes to market any product that was not safe. As the Attorney General is not claiming that the sale of petitioner's beverages are illegal, the mere marketing of those beverages in a manner not prohibited by statute or regulation does not in and of itself constitute a deceptive or illegal practice.

Therefore in the absence of any allegation that the sale of petitioner's beverage is by itself violative of any statute or regulation, the subpoena under consideration would be subject to the relief sought by the petitioner.

However, the Attorney General asserts that part of its investigation is based upon the petitioner's alleged marketing of its beverages in conjunction with alcohol. The Attorney General notes that at this time the Food and Drug Administration has found that alcoholic beverages containing added caffeine are not generally recognized as safe (GRAS) and constitute an adulterated product. Thus, as the Attorney General argues, it is empowered to investigate whether petitioner's marketing under the CAT

program encourages consumers to ingest its beverages containing caffeine along with alcoholic beverages as such marketing could constitute a deceptive practice. Such marketing would suggest to a consumer that it was safe to combine and consume petitioner's beverage in a manner that the FDA has found is not GRAS and therefore would be deceptive.

Thus the subpoena is reasonably related to activities which may a deceptive practice and therefore constitutes a proper exercise of the Attorney General's authority. See La Belle Creole Intern., S. A., supra, 10 NY2d at 196-197. The Court of Appeals has also held that the Attorney General is empowered to issue subpoenas concerning the marketing of alcoholic beverages. Anheuser-Busch, Inc. v Abrams, supra, 71 NY2d 327, 330 (1988); See also Integrated Beverage Group Ltd. v New York State Liq. Auth., 6 NY3d 883, 884 (2006). Although the petitioner may not be marketing alcoholic beverages per se, any marketing of its beverages that would include as a component the promotion of alcoholic consumption would be a proper subject for the Attorney General to investigate.

Therefore, petitioner fails to show that the Attorney General's subpoena seeks information "utterly irrelevant" to a proper inquiry and its motion to quash must be denied on that basis.

Accordingly, it is

ORDERED and ADJUDGED that the petition is DENIED; and it is further

ORDERED and ADJUDGED that the cross-motion to compel compliance with the subject subpoena is GRANTED and the items sought shall be produced within (30) days from service of a copy of this order with notice of entry.

This is the decision and order of the court.

Dated: January 13, 2017 ENTER:

J.S.C.

DEBRA A. JAMES
J.S.C.