

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

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EMPIRE WINE & SPIRITS LLC,  
Petitioner,

**DECISION AND ORDER**  
Index No. 555-15

NOEL COLON, as Director of Enforcement for the New York State Liquor Authority, WILLIAM CROWLEY, as Director of Public Affairs for the New York State Liquor Authority, KERRI O'BRIEN, as Deputy Commissioner of Licensing for the New York State Liquor Authority, JACQUELINE P. FLUG, as General Counsel of the New York State Liquor Authority, MARK D. FRERING, as Senior Attorney for the New York State Liquor Authority, and MARGARITA MARSICO, as Associate Counsel to the New York State Liquor Authority,  
Respondents.

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Supreme Court, Albany County,  
Justice Gerald W. Connolly, Presiding

APPEARANCES:     WHITEMAN OSTERMAN & HANNA LLP  
Attorneys for the Petitioner  
William S. Nolan, Esq.  
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Albany, NY 12260

HON. ERIC T. SCHNEIDERMAN  
Attorney General of the State of New York  
Attorney for Respondent  
James B. McGowan, Esq. (Assistant Attorney General)  
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Connolly, J.:

Petitioner Empire Wine & Spirits LLC seeks an order pursuant to CPLR §2308 and §401 *et seq.*: (1) compelling respondents to comply with subpoenas; (2) awarding petitioner damages sustained by reason of the subpoenaed respondents' failure to comply with the subpoenas; (3)

imposing costs in the amount of fifty dollars; and (4) awarding a penalty against each subpoenaed respondent in the amount of fifty dollars. Respondents oppose the application and have cross-moved for an order quashing petitioner's subpoenas on the grounds of their "impropriety" and defective service.

Petitioner brings this special proceeding to compel respondents Colon, Crowley, O'Brien and Flug to comply with subpoenas *ad testificandum* commanding their testimony at an administrative hearing held before the New York State Liquor Authority ("SLA"). Petitioner argues that the instant proceeding is necessary because two SLA prosecutors, respondents Frering and Marsico, refused to permit two of the subpoenaed respondents, Colon and O'Brien, to testify during an administrative proceeding held at SLA's Albany office on January 23, 2015. Petitioner contends that instead of moving to quash the subpoenas in advance of the hearing, the prosecution waited until the moment the witnesses were called to state they would not comply and did not provide any substantive or procedural basis for such refusal. Per petitioner, the prosecutors also made clear they would prevent the other subpoenaed respondents from testifying. Due to such actions, the Administrative Law Judge adjourned the hearing indefinitely so that petitioner could bring this proceeding.

Petitioner asserts that in or around August 2014, SLA charged petitioner with sixteen counts of "improper conduct" under 9 NYCRR §53.1(n) based on SLA's unilateral determination that sixteen of the states to which petitioner allegedly ships wine prohibit their residents from receiving wine shipments from retailers in New York and other states. Petitioner asserts that, in support of its defense against such charges, it has the right, under 9 NYCRR §54.3(h), to subpoena witnesses to testify at the disciplinary hearing. Such regulation provides that "[a]ny

licensee desiring to subpoena a witness may do so in the name of the Chairman of the State Liquor Authority and in the manner provided for subpoenas in the New York Civil Practice Law and Rules. If evidence other than oral testimony is required, such as documents or written data, the subpoena shall set forth the specific matter to be produced.” Petitioner also cites to CPLR §2302(a) which provides, in pertinent part, that “[s]ubpoenas may be issued without a court order by ... an attorney of record for a party to an action, an administrative proceeding or an arbitration, ...”. Petitioner asserts that it issued subpoenas *ad testificandum* to the subpoenaed respondents and none of the respondents moved to quash such subpoenas. Petitioner asserts that respondents have no basis to refuse to comply with the subpoenas and that petitioner is entitled, pursuant to CPLR §2308(b), to an order compelling respondents compliance. They also argue that any relevance objection must await the time and place of the subpoenaed party’s testimony (*see e.g., In re Edge Ho Holding Corp.*, 256 NY 374, 381-82 [1931]). Further, pursuant to CPLR §2308(b)(1), petitioner seeks costs and damages sustained by reason of respondents’ failure to comply with the subpoenas.

Petitioner asserts that respondents must comply with the subpoenas as they are “non-judicial” and as such is governed by CPLR §2308(b), which provides that

[I]f a person fails to comply with a subpoena which is not returnable in a court, the issuer or the person on whose behalf the subpoena was issued may move in the supreme court to compel compliance. If the court finds that the subpoena was authorized, it shall order compliance and may impose costs not exceeding fifty dollars. A subpoenaed person shall also be liable to the person on whose behalf the subpoena was issued for a penalty not exceeding fifty dollars and damages sustained by reason of the failure to comply.

Accordingly, petitioner argues that the Court should, in this case, order compliance as a subpoena is authorized when the issuer has legal authority to issue such subpoena (*see New York Temporary State Com’n on Lobbying v Crane*, 49 AD3d 1066, 1067-68 [3d Dept 2008]).

Petitioner argues that subpoenas are authorized by SLA regulation (*see* 9 NYCRR §54.12) and

CPLR §2302(a) which provides that an attorney of record for a party to an administrative proceeding may issue a subpoena without a court order. Accordingly, petitioner argues that the subpoenas are authorized. Petitioner further asserts that it is seeking to elicit testimony directly related to its defenses including SLA's present and prior out-of-state shipping policies, industry standards and practices, and penalty mitigation.

Respondents contend that the subpoenas must be quashed because petitioner failed to pay the proposed witnesses the statutorily required fees, a jurisdictional defect prohibiting enforcement of the subpoenas. Further, respondents contend that the petitioner's subpoenas were not issued for proper purposes and seek irrelevant information. Respondents assert that the petitioner has identified no lawful purpose to compel respondents to testify, and they argue the subpoenas are improperly served. Respondent asserts that petitioner's claims that it wants to use the subpoenas to introduce evidence as to the Authority's policies and alleged changes in policy is without merit as the Authority's position that a New York State licensee's violation of other State's laws is a basis for an improper conduct charge.

Petitioner in reply asserts that respondents have received their witness fees and that respondents waived any objections to the subpoenas on such grounds where SLA counsel agreed to accept service of the subpoenas and indicated she would not raise any technical objections to the subpoenas, failed to raise this issue in a demand pursuant to CPLR 2308 that the subpoenas be withdrawn and failed to raise the issue at the administrative hearing as a basis for blocking the subpoenaed witnesses' testimony.

Initially, petitioner asserts that respondents' "cross-motion" is untimely served a day late. Based upon the record, as petitioner has demonstrated no prejudice to consideration of respondents' "cross-motion", and pursuant to CPLR §2004, the Court will consider such "cross-motion".

As to the witness fees, petitioner asserts that petitioner was prepared to tender the appropriate witness fees on the day of the subpoenaed respondents' testimony based upon an informal arrangement between petitioner's counsel and SLA's counsel whereby SLA agreed to waive the formal service requirements. Petitioner notes that associate counsel Marsico affirmed that she accepted service of six subpoenas from petitioner's attorney and that such fees were not included. Further, petitioner notes that respondents did not raise the issue of witness fees as a basis of their non-compliance with the subpoenas on the date of the hearing. Petitioner argues that, accordingly, such issue has been waived. Based upon the record, such issue is moot. While petitioner bears the burden of offering payment, petitioner has demonstrated that respondents have been paid, subsequent to initiation of the instant application at issue. While a witness need not comply with a subpoena where the fees are not tendered and may not be punished for disobedience, respondents have failed to demonstrate that the failure to pay such fees was the basis for respondents refusal to allow certain individuals to testify. As such fees have now been paid, the Court may consider petitioner's application to compel compliance with such subpoenas (*c.f. Bobrowsky v. Bozzuti*, 98 AD2d 700 [2<sup>nd</sup> Dept 1983]; *State Com. for Human Rights v. Marrano*, 45 Misc. 2d 1092 [Sup. Ct., Erie Cty., April 27, 1965]).

As to the subpoenas themselves, respondents assert that the subpoenas should be quashed as they are seeking irrelevant information concerning alleged bias and selective enforcement regarding a hearing concerning disciplinary charges against petitioner. Petitioner seeks to compel compliance with the subpoenas. As argued by petitioner, the subpoenas command the subpoenaed respondents to appear and give testimony at the hearing and petitioner's right to issue such subpoenas. An attorney has a presumptive right to issue a subpoena which applies to attendance in an administrative as well as a judicial proceeding (*see Del Vecchio v. White Plains*

*Unit, Westchester County Chapter*, 64 A.D.2d 975 [2d Dept 1978]). “Oral testimony can only be in response to inquiry and, in most cases, the wrongfulness of testimony sought to be elicited can only be judicially tested when the witness claims a constitutional right or refuses to answer. To attempt to anticipate the line of inquiry is hazardous and flies in the face of the warning against prophecy contained in *Matter of Edge Ho Holding Corp* (256 N.Y. 374, 381, 382)” (*City of Albany v Albany Professional Permanent Firefighters Assoc.*, 66 Misc.2d 822, 824-25 [Sup. Ct., Alb. Cty., 1971]). As noted in *Matter of Edge Ho Holding Corp.*, herein respondents are seeking to have the Court quash the subpoenas based upon “forecasts of the testimony and nicely balanced arguments as to its probable importance”, however, “[v]ery often the bearing of information is not susceptible of intelligent estimate until it is placed in its setting, a tile in the mosaic. Investigation 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. Prophecy in such circumstances will step into the place that description and analysis may occupy more safely. Only where the futility of the process to uncover anything legitimate is inevitable or obvious must there be a halt upon the threshold (*Id.* at 381-82 [1931]). Petitioner has demonstrated that the subpoenas are authorized and respondents have failed to demonstrate that issuance of the subpoena was beyond the power of the petitioner’s counsel. Further, respondents have failed to demonstrate a clear legal right to have the subpoenas at issue quashed at this juncture. The Court is unwilling at this time, prior to any subpoenaed party taking the stand in the administrative hearing, and any specific objection being made in the context of such hearing by respondents’ counsel to which the administrative law judge has rendered an initial determination upon, to quash the subpoenas at issue herein.

Based upon the record, the Court will grant petitioner’s application, in part, and deny

respondents application to quash. As to petitioner's request for costs and attorney's fees, based upon the record, the Court, in its discretion pursuant to CPLR §2308(b)(1), denies such request.

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

Accordingly, it is hereby

**ORDERED**, that petitioner's motion to compel respondents Noel Colon, William Crowley, Kerri O'Brien and Jacqueline P. Flug to comply with subpoenas ad testificandum commanding their testimony at an administrative hearing is granted; and it is further

**ORDERED** that respondents' application for a motion to quash the subpoenas *ad testificandum* are denied.

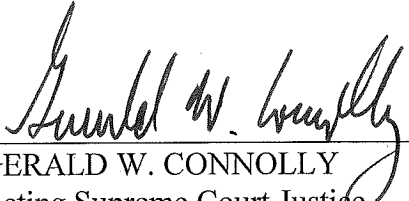
This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being returned to the petitioner's counsel. A copy of this Decision and Order together with all other papers are being forwarded to the County Clerk for filing. The signing of this Decision and Order and delivery of the copy of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule with respect to filing, entry, and notice of entry of the original Decision and Order.

SO ORDERED.

ENTER.

Dated at Albany, New York

May 19, 2015

  
GERALD W. CONNOLLY  
Acting Supreme Court Justice

Papers considered:

1. Notice of Verified Petition dated February 4, 2015; Verified Petition dated February 4, 2015 with accompanying exhibit A; Affidavit of William S. Nolan, Esq. dated February 4, 2015 with accompanying exhibits A-G; Memorandum of Law in Support of the Verified Petition dated February 4, 2015;
2. Notice of Cross-Motion dated February 20, 2015; Answer dated February 20, 2015; Affirmation of M. Marsico, Esq. dated February 15, 2015; Affidavit of K. O'Brien dated February 18, 2015; Affidavit of Noel Colon dated February 15, 2015; Affidavit of W. Crowley dated February 20, 2015; Affirmation of J. Flug, Esq. dated February 17, 2015; Memorandum of Law in Opposition to the Petition and in Support of the Cross Motion to Quash dated February 20, 2015; Affirmation of M. Frering, Esq. dated February 20, 2015 with accompanying exhibits A-B with Exhibits 1-7 and 9-14 introduced at the administrative hearing;
3. Reply Affidavit of William S. Nolan, Esq. dated February 26, 2015 with accompanying exhibit A-C; Reply Memorandum of Law in Further Support of the Verified Petition.