

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

PRESENT: HERMAN CAHN
Justice

PART 49

Parkhouse

- v -

STRINGER

INDEX NO.

109510/07

MOTION DATE

8/14/07

MOTION SEQ. NO.

001

MOTION CAL. NO.

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE.....**

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

Dated: 10/17/07

Herman Cahn

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

-----X
In the Matter of a Motion
to Quash a Non-Judicial Subpoena

VIRGINIA PARKHOUSE,

Petitioner,

-against-

Index No. 109510/07

SCOTT M. STRINGER, Borough President of
Manhattan, ROBERT TIERNEY, Chairman of The
New York City Landmarks Preservation Commission,
ROSE GILL HEARN, Commissioner of Investigation,
KIM A. BERGER, Deputy Commissioner of Investigation,
and DEPARTMENT OF INVESTIGATION OF THE
CITY OF NEW YORK,

Respondents.

-----X
Herman Cahn, J.:

Petitioner moves by order to show cause to quash a non-judicial subpoena issued by Respondent Department of Investigation of the City of New York (DOI) in connection with her testimony at a public hearing on October 17, 2006 before the New York City Landmarks Preservation Commission (CPLR 2304). Respondents cross move to compel compliance with the subpoena (CPLR 2308 [b]). Petitioner further cross moves to strike scandalous and prejudicial matter (CPLR 3024 [b]), and to declare City Charter § 803 [b] unconstitutional as applied to statements made by citizens at a public hearing (CPLR 3001).

This dispute arises out of testimony given by petitioner at a Landmarks Preservation Commission (LPC) public hearing held on October 17, 2006. The hearing concerned two historic stables in Manhattan, the Mission/Dakota Stables (Dakota Stables) at 348-354 Amsterdam Avenue, and the New York Cab Company Stables at 201 West 75th Street. At that

meeting, Parkhouse, an employee of a group called “Landmark West!,” purportedly read into the record an August 14, 2006 letter from respondent Scott M. Stringer, the Manhattan Borough President. According to respondents, petitioner misrepresented the contents of the letter, changing its contents and thereby changing the position set forth in the letter. Respondents filed a complaint with the DOI, whereupon the DOI served a non-judicial subpoena on petitioner on May 24, 2007. Petitioner now brings this proceeding seeking to quash the subpoena.

BACKGROUND

Manhattan’s Upper West Side contains many buildings with historic backgrounds, architecture and structure. One of the LPC’s function, there and around the City, is to preserve historic buildings which qualify as landmarks, from demolition and destruction.

On August 14, 2006, Borough President Stringer wrote to the chairman of the LPC, respondent Robert B. Tierney, regarding the Dakota Stables and the New York Cab Company Stables. In the letter, Stringer set forth the historic nature of both buildings, and stated that “[p]reserving these stables will ensure that no demolition or development interferes with the vibrant history alive in them” (Order to Show Cause, Exh E). He stated, at the beginning of his letter, that “I strongly urge you to calendar these two important buildings for public hearing by the Landmarks Preservation Commission,” and reiterated that “I ask that you move to calendar these two buildings and protect an important part of the history of the development of the Upper West Side” (*id.*). A copy of the letter was sent to Landmarks West!, a not-for-profit group interested in the architectural heritage of the Upper West Side and petitioner’s employer (Arsenault Aff, ¶ 4).

On October 17, 2006, the LPC held a public hearing on the issue of whether the stables

should be designated as landmarks. At the hearing, Parkhouse signed in as a representative of Landmark West! (Arsenault Aff, ¶ 5; Arsenault Aff, Exh B). She asked to speak, stating that she was “volunteering today to read the statement of Borough President Scott Stringer” (Order to Show Cause, Exh D; see also, Arsenault Aff, Exh D). She then read what was claimed to be the August 14, 2006 letter. However, what she read, was the letter with changes. First, she left out the sentence in the initial paragraph, in which Stringer stated that “I strongly urge you to calendar these two important buildings for public hearing by the [LPC]” (See Order to Show Cause, Exh E [original letter]). Second, she left out the similar sentence in the letter’s final paragraph, in which Stringer stated again that “I ask that you move to calendar these two buildings” (Order to Show Cause, Exh E). Instead, she changed the wording to “I ask that you immediately protect the important part of history of the Upper West Side and landmark these buildings” (Order to Show Cause, Exh D). This clearly changed the meaning of the letter.

Respondents claim that between August 14, 2006 and October 17, 2006, Stringer’s view of this matter had changed, and that he would no longer support landmarking one of the buildings because its facade had previously been demolished (Arsenault Aff, ¶ 12). They claim that Stringer sent an aide to the October 17 hearing to monitor the proceedings, and that the aide was informed that someone was speaking on Stringer’s behalf (id.).

In February 2007, DOI received a complaint from LPC that at the October 17, 2006 public hearing, petitioner misrepresented the contents of the letter written by Stringer (Arsenault Aff, ¶ 2). LPC’s complaint was based in part on a letter, dated November 27, 2006, it had received from Jimmy Yan, counsel to Stringer, in which Yan stated that Stringer was concerned that a person and/or organization “may have falsely induced reliance from a public agency based

on representations appearing to derive from the authority of an elected official or public servant” (Arsenault Aff, ¶ 8, citing Yan Nov 27, 2006 letter). Yang’s letter further stated that the conduct was highly inappropriate and, if made with intent to mislead, could potentially be a violation of Penal Law Section 190.25, proscribing criminal impersonation (id.).

After it received the complaint, DOI commenced an investigation in which it attempted to interview key players to the incident (id., ¶ 13). Petitioner refused to be interviewed and, as a result, on May 24, 2007, she was served with the subpoena at issue. On consent, the parties agreed to an appearance date, but petitioner failed to appear on the agreed upon date and instead brought this Order to Show Cause (Arsenault Aff, ¶14).

Petitioner contends that the subpoena interferes with her First Amendment right to free speech. She argues that the subpoena is unlawful and unauthorized because she is not an employee of the City of New York, and that she testified before the LPC as a private citizen. She also argues that the subpoena violates public policy because it has a chilling effect on her First Amendment rights to petition and free speech. She urges that the DOI subpoena is an abuse of power and harasses her and other citizens who come before the LPC. She claims it was intended to frighten and harm her as a preservation volunteer.

In their cross motion, respondents contend that DOI needs to be able to conduct a full investigation so that it can determine what policy and procedure recommendations it might make to the LPC in order to ensure that persons who appear before the LPC are in fact representing the persons and groups they claim to represent. They maintain that a full consideration of the circumstances will help DOI better understand whether or not Parkhouse engaged in a deliberate effort to improperly influence official government proceedings.

Respondents argue that DOI has the authority to investigate petitioner under section 803 (b) of the New York City Charter; that it has jurisdiction over petitioner even though she is not a City employee; and that her testimony is relevant to its investigation of whether she and/or Landmarks West! engaged in a deliberate effort to improperly influence official government proceedings. They argue that the testimony sought has a reasonable relation to the subject matter under investigation and to the public purpose it is seeking to achieve. They contend that there is no interference with First Amendment rights because the investigation strictly concerns the issue of on whose behalf petitioner was purporting to speak, and whether she was authorized to speak on any one's behalf, not the content of her speech.

In response, petitioner cross-moves to strike allegedly scandalous and prejudicial matters unnecessarily inserted in the respondents' pleadings. Specifically, she wants the Arsenault Affidavit stricken in its entirety, as well as certain paragraphs of the respondents' Memorandum of Law which refer to the actions of another Landmark West! employee, Lindsay Miller, who attended the same LPC hearing, and to the November 27, 2006 letter from Stringer's counsel, to the LPC. Parkhouse argues that this material was unnecessarily inserted in the respondents' pleading; that the Arsenault affidavit contains a grossly misleading implication that Ms. Miller refused to testify before the DOI on Fifth Amendment grounds; that the DOI has no authority to investigate alleged criminal conduct; and that the respondents' offer to this Court of an in camera review is a bald attempt to prejudice the Court into believing that petitioner was engaged in criminal, dark or improper behavior that cannot be discussed in public (Pet Cross Mot Memo at 3).

Petitioner further cross-moves to declare City Charter § 803 (b) unconstitutional as

applied to a citizen's testimony at a public hearing, and to enjoin respondents Tierney and Stringer from attempting to prevent or penalize the exercise of free speech. She claims that the discretionary power granted to the DOI to compel citizens to explain their testimony in public hearings before public agencies plainly violates the First Amendment. She asserts that "[n]either is it 'consistent with the values and interests protected by the First Amendment' that 'the public, along with those public servants who are acting in the public interest, such as members of the LPC, has a right to know the accurate views of its elected officials with respect to matters of public concern and no individual or private organization has the right to attempt to add credence to their own particular viewpoint by falsely representing that their view is in fact the view of an elected official'" (*Id.* at 8, citing Resp Memo at 13). She argues that the First Amendment does not provide such a guarantee to public servants.

DISCUSSION

Petitioner's motion to quash is denied. Respondents' cross motion to compel is granted. Petitioner's further cross motion to strike allegedly scandalous and prejudicial matter is denied.

The Court will first address the motion to quash and the cross motion to compel.

An office subpoena, like the one at issue here, may be challenged by a motion to quash on the ground that the materials sought are irrelevant (*Virag v Hynes*, 54 NY2d 437, 441-42 [1981]). Upon the motion to quash, the issuer of the subpoena must come forward with a "factual basis" establishing the relevancy of the materials sought before the witness will be compelled to comply with the subpoena (*id.* at 442). This is not a heavy burden. The issuer must simply show that the materials sought "have a reasonable relation to the subject matter under investigation and to the public purpose to be achieved" (*id.*; see also *A'Hearn v Committee on the Unlawful Practice of*

Law of the New York County Lawyer's Assn., 30 AD2d 47, 54 [3d Dept 1968], affd 23 NY2d 916, cert denied 395 US 959 [1969])).

At the outset, the Court must determine whether respondent DOI has the jurisdiction to conduct an investigation, seeking testimony from non-party witnesses such as Parkhouse (see Levin v Murawski, 59 NY2d 35, 41 [1983]; A'Hearn, 23 NY2d at 916). Pursuant to Chapter 34 of the New York City Charter, section § 803 (b), the commissioner of DOI is “authorized and empowered to make any study or investigation which in his opinion may be in the best interests of the city, including but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency” (City Charter § 803 [b]; New York City of Dept. of Investigation v Passannante, 148 AD2d 101, 103 [1st Dept 1989]). DOI’s power to investigate extends to anyone, even though the person is not a city employee, when the commissioner has grounds to believe that the person has information relevant to the subject matter under investigation (New York City Charter § 803; Weintraub v Fraiman, 30 AD2d 784, 785 [1st Dept 1968], affd 24 NY2d 918 [1969]). The DOI Commissioner has the power to compel witnesses to testify “[f]or the purpose of ascertaining facts in connection with any study or investigation authorized by this chapter” (City Charter § 805 [a]; see also New York City Dept. of Investigation v Passannante, 148 AD2d at 103; New York Shredding Corp. v New York City Dept. of Investigation, 184 Misc 2d 174, 178-79 [Sup Ct, NY County 2000] [Madden, J.]).

DOI’s power has limitations – it may not conduct an unlimited and general inquisition into the affairs of a person under its jurisdiction “solely on the prospect of possible violations of law being discovered” (A'Hearn, 23 NY2d at 918). Instead, the investigations it is authorized to make are limited to ones which have a legitimate and reasonable relation to the operation of the

executive branch of the City's government (see New York Shredding Corp., 184 Misc 2d at 179-80). Its power reaches any person, even if the person is not employed by the city, "where there are grounds present to sustain a belief such person has information relative to the subject matter of the investigation" (Weintraub, 30 AD2d at 784-85).

Here, petitioner voluntarily testified at a public hearing before the LPC. DOI's investigation involves the conduct of LPC's October 17, 2006 hearing. Specifically, it is investigating the manner in which witnesses at that hearing identified themselves, and purportedly presented the position of particular governmental officials on the issue under consideration. While petitioner is apparently not an employee of the City and not in contractual privity with it, that does not shield her from DOI's investigative power as set forth in City Charter § 803, and its power to compel witnesses to testify contained in City Charter § 805 (a) (see C.S.A. Contracting Corp. v Stancik, 259 AD2d 318 [1st Dept 1999] [private company not in privity with Board of Education, but worked on Board of Ed project as subcontractor, subject to investigative subpoena of School District]; New York City Dept. of Investigation v Passannante, 148 AD2d at 103 [DOI had power to investigate vendors, consultants which performed consulting to college to which City had paid \$20 million]; Weintraub, 30 AD2d at 784-85 [DOI's investigatory power extended to Office of City Marshall and to any person, even if not connected with city employment, where grounds to believe person had relevant information]).

DOI's investigation was an investigation into the affairs and functions of a City agency, the LPC (New York City Charter § 803 [b]), and the conduct of its hearing. It is investigating the manner in which petitioner identified herself, and the viewpoint she was purporting to represent at the hearing. This investigation has a legitimate and reasonable relation to the LPC's function

of determining whether the stables should be landmarked and what the view of the public officials, as well as others, are with regard to such landmarking.

Respondents have also demonstrated that the investigation bears a reasonable relation to the public purpose of assuring that parties appearing before the LPC do not misrepresent the views of public officials. It is vital in a free society that persons testifying at a public hearing, testify truthfully. Where such persons purport to read a letter or statement of a public official, it is important that no unauthorized alterations, especially these which change the import of the letter or statement, be made.

On the issue of the basis for the DOI's inquisitorial action in this case, respondents have sufficiently shown based on petitioner's testimony at the hearing (Not of Cross Mot, Exh D), the actual August 14, 2006 letter by respondent Stringer (Order to Show Cause, Exh E), the marked up (by petitioner) copy of that letter as read by petitioner (Not of Cross Mot, Exh E), and the November 26, 2006 letter from Stringer's counsel to the LPC (Not of Cross Mot, Exh F), that there is a factual basis for DOI's investigation. These documents provide sufficient identifying or authenticating detail (see Levin, 59 NY2d at 42). Therefore, respondents have demonstrated DOI's authority to issue the subpoena, the relevancy of the testimony sought and a basis for the DOI's investigation.

To the extent that petitioner claims that she is being harassed, she fails to support that claim (see A'Hearn, 23 NY2d at 918). The simple fact that DOI is seeking her testimony does not constitute harassment. She is not a peripheral witness in this matter; she is a main witness to what occurred at the hearing. While respondents have a recorded version of the October 17, 2006 hearing, they seek to ask Parkhouse questions regarding the circumstances of her testimony.

This is appropriate.

Petitioner fails to present any evidence of “malice” or “rancor” by the public officials toward her, or any evidence of retaliation. If the DOI’s inquiry turns out to be unduly protracted or intrusive into petitioner’s affairs, without some further showing by DOI of usefulness in its investigation, petitioner is not without a remedy. She may then renew her motion to quash, or make another appropriate application (see A’Hearn, 23 NY2d at 918). However, this application, if made, should not be made before Parkhouse complies with the subpoena.

Parkhouse’s assertion that the subpoena violates her First Amendment rights is unpersuasive and meritless. She is not being prevented from speaking, and DOI is not punishing her or others because of the views they have expressed as private citizens, or attempting to chill her or other citizens’ right to free expression. It is investigating whether or not she intentionally misrepresented that she was expressing views on behalf of, and with the endorsement of, an elected official. DOI did not limit her right to attend the October 17, 2006 public hearing, and express her own views. Rather, it is investigating the issue on whose behalf she purported to speak, and whether she was authorized to speak on someone else’s behalf. The First Amendment does not protect citizens when they falsely purport to represent the views of public officials or others. Thus, there is no First Amendment right being abridged.

Petitioner’s argument that the subpoena is prohibited under the Fifth Amendment similarly lacks merit. The fact that the DOI investigation could possibly lead to a criminal referral regarding petitioner’s representations at the hearing (see New York City Charter § 803 [c]) does not warrant quashing the subpoena. The Fifth Amendment privilege against self-incrimination cannot be invoked prior to questions actually having been asked (see Application

of Waterfront Commn. of New York Harbor [Lamas], 245 AD2d 63, 64 [1st Dept 1997], ly dismissed 93 NY2d 921 [1999]). Petitioner may invoke the Fifth Amendment privilege with regard to a specific question put to her.

Petitioner's cross motion to strike is denied. She fails to demonstrate that the materials and statements constituted scandalous and prejudicial matter under CPLR3024 (b).

Respondents' allegation of potential criminal conduct is asserted to defend the propriety of the subpoena, and is supported by proof of the hearing testimony and the complaining letter from Yan. Respondents' allegations regarding another Landmark West! employee, Lindsay Miller, at that same hearing, also involving Ms. Miller's alleged misrepresenting the view of a public official, lends credence to their assertion that the investigation into the conduct of LPC hearings is necessary. The footnote in respondents' papers offering the court an in camera review does not connote that petitioner has engaged in any criminal, dark or improper behavior that cannot be discussed in public. An in camera review, while not necessary in this matter, is appropriate in some cases to prevent compromising an investigation. It does not, by itself, connote criminal or dark behavior.

Petitioner's cross motion to declare City Charter § 803 (b) unconstitutional as applied to a citizen's public hearing testimony also is denied. As discussed above, Parkhouse fails to demonstrate that there is any First Amendment violation in the DOI's investigation of the conduct of public hearings by a City agency. While she aptly reiterates the founding principles underlying the First Amendment, she fails to relate it to the subpoena at issue. Her contention that it is inconsistent with the First Amendment that the public has the right to know the accurate views of its public officials is nonsensical. Her request for an injunction enjoining Stringer and

Tierney from attempting to prevent or penalize the exercise of free speech is similarly conclusory and unsupported. No proof or serious allegations have been submitted that either of them acted or attempted to act in such a way.

Accordingly, it is

ORDERED that the petition to quash the May 24, 2007 subpoena served by respondent DOI on Parkhouse is denied; and it is further

ORDERED that the respondents' cross motion to compel compliance with the May 24, 2007 subpoena served by respondent DOI on petitioner is granted, and the petitioner is directed to make herself available within 30 days of service of this order with notice of entry on her attorney; and it is further

ORDERED that the petitioner's cross motion to strike scandalous and prejudicial matter, to have New York City Charter § 803 (b) declared unconstitutional as applied, and to enjoin respondents Stringer and Tierney, is denied.

Dated: October 17, 2007

ENTER:



J.S.C.