



STATE OF NEW YORK
SUPREME COURT CHAMBERS
112 STATE STREET, ROOM 1350
ALBANY, NEW YORK 12207
(518) 285-8592
FAX (518) 487-5378

GERALD W. CONNOLLY
Judge

TARA A. KERSEY, ESQ.
Law Clerk

CATHERINE NELLS GUNN
Secretary

September 12, 2008

VIA MAIL & FACSIMILE

DeGraff, Foy & Kunz, LLP
George Szary, Esq.
David F. Kunz, Esq.
R. Martin Witt, Esq.
90 State Street
Albany, NY 12207
Fax: (518) 436-0210

Roemer Wallens & Mineaux LLP
James T. Roemer, Jr., Esq.
Earl T. Redding, Esq.
13 Columbia Circle
Albany, NY 12203
Fax: (518) 464-1010

Hon. Andrew Cuomo
Attorney General of the State of New York
Darcy M. Goddard, Esq. - Asst. Attorney General
Douglas J. Goglia, Esq. - Asst. Attorney General
The Capitol
Albany, New York 12224-0341
Fax: (518) 473-1572

Re: Albany County Supreme Court
In the Matter of...Joseph D. Hill, Index No. 5780-08

Dear Counselors:

Enclosed is a Decision and Order with regard to the above referenced matter. The original together with all papers submitted is being forwarded to Attorneys Szary, Kunz and Witt for filing. Copies of the decision are enclosed for Attorneys Roemer, Redding, Goddard and Goglia.

Very truly yours,

Catherine Nells Gunn
Secretary to Judge

enc.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK, BY
ANDREW M. CUOMO, ATTORNEY GENERAL OF
THE STATE OF NEW YORK,

Petitioners,

DECISION and ORDER
Index No. 5780-08

-against-

JOSEPH D. HILL,

Respondent.

(Supreme Court, Albany County, RJI 01-08-093637)

(JUSTICE GERALD W. CONNOLLY PRESIDING)

APPEARANCES: DeGraff, Foy & Kunz, LLP
George Szary, Esq.
David F. Kunz, Esq.
R. Martin Witt, Esq.
90 State Street
Albany, NY 12207

Roemer Wallens & Mineaux LLP
James T. Roemer, Jr., Esq.
Earl T. Redding, Esq.
13 Columbia Circle
Albany, NY 12203

Hon. Andrew Cuomo
Attorney General of the State of New York
Attorney for Respondent
Darcy M. Goddard, Esq. - Asst. Attorney General
Douglas J. Goglia, Esq. - Asst. Attorney General
The Capitol
Albany, New York 12224-0341

CONNOLLY, J.

Petitioners have moved by Order to Show Cause for an order and judgment pursuant to
CPLR 602(b) removing to this Court the motion to quash a subpoena duces tecum filed by

Respondent in Ulster County on June 27, 2008. Respondent opposes such motion.

CPLR § 602(a) provides, in pertinent part, that “[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay”. CPLR § 602(b) provides, in pertinent part, that “[w]here an action is pending in the supreme court it may, upon motion, remove to itself an action pending in another court and consolidate it or have it tried together with that in the supreme court.” Motions to consolidate are addressed to the sound discretion of the trial court (*see* Government Employees Ins. Co. v. Uniroyal Goodrich Tire Co., 242 AD2d 765 [3rd Dept., 1997]).

Respondent was personally served with a subpoena duces tecum on May 28, 2008 in connection with an on-going investigation of the New York State Office of Attorney General, pursuant to New York Executive Law §63 (12) and New York State Finance Law §190, into allegations of pension fraud and potentially fraudulent employment arrangements relating to public school systems and lawyers throughout the State. The return date of the subpoena had been previously adjourned through agreement of the parties and since such adjournments, respondent has filed a motion to quash the instant subpoena.

Petitioners argue that respondent’s motion to quash raises similar legal issues to those being litigated in this Court in three separate proceedings¹, though petitioners acknowledge that motions to quash are “necessarily predicated on factual circumstances unique to the subpoenaed

¹Matter of Quashing the Subpoena Duces Tecum Served upon John B. Hogan, Index No. 3626-08, Matter of Quashing the Subpoena Duces Tecum Served upon James W. Roemer, Jr., Index No. 3766-08 and Swergold, et al v. Cuomo, et al.

moving party.” Petitioners also argue that no prejudice will result from such requested removal.

The law requires that some factual basis be demonstrated to support a subpoena. In Myerson v. Lentini Bros Moving and Storage Co., 33 NY2d 250, 256 [1973], the Court of Appeals stated, in pertinent part, that the agency asserting its subpoena power must show “...some basis for inquisitorial action”, (citing to A’Hearn v. Committee on Unlawful Practice of Law of N.Y. County Lawyers’ Assn., 23 NY2d 916 [1968]), though this showing does not need to reach a level of probable cause.

Based upon a review of the record and in the Court’s discretion, the Court denies petitioners’ instant motion. As noted by petitioners, each determination by the Court with respect to the motions to quash require an individual analysis of the admittedly separate factual bases of and separate circumstances surrounding the individual subpoenas and, while recognizing that common questions of law may exist among the motions, as each motion to quash will necessarily involve different questions of fact, the Court will not exercise its discretion to remove the instant motion to this Court.

Accordingly, based upon a review of the record, it is hereby

ORDERED, that petitioners’ motion for an order and judgment pursuant to CPLR 602(b) removing to the Court the motion to quash a subpoena duces tecum filed by respondent in Ulster County on June 27, 2008 is hereby denied.

This shall constitute the decision and order of this Court.

All papers, including this Decision and Order, are being returned to counsel for respondent. The signing of this Decision and Order shall not constitute entry or filing under

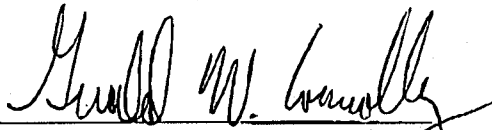
CPLR 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED.

ENTER.

Dated at Albany, New York

September 12, 2008



Gerald W. Connolly
Acting Justice of the Supreme Court

Papers Considered:

1. Order to Show Cause of July 9, 2008; Affirmation of Darcy M. Goddard dated July 9, 2008 with accompanying exhibits;
2. Affidavit of George J. Szary in Opposition to Petitioner's Motion dated July 15, 2008; Memorandum of Law;
3. Reply Memorandum of Law in support of Order to Show Cause dated July 16, 2008.