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November 30, 2010

The Honorable Joseph F. Bianco
United States District Judge
100 Federal Plaza
Central Islip, NY 11722

Re: Zarda v. Altitude Express, Inc., et ano., CV-10-4334 (JFB)(ARL)

Dear Judge Bianco:

I represent plaintiff in this action and respond to the defendant's pre-motion letter. The motion cannot be successful at this juncture, and it would serve no purpose other than to waste attorney and judicial time. Concomitantly, it offers no corresponding benefit in limiting discovery since this is a diversity case: a dispute will remain even if there are no federal claims. The claim should proceed; if necessary, plaintiff can replead.

1. The Second Circuit Recognizes a Sex Stereotyping Claim for a Gay Plaintiff Where the Discrimination is Based on Appearance and Behavior as a Male, as Opposed to his Status as a Homosexual.

The recent jurisprudence governing pre-answer motions requires that a Court must "[a]ccept[] the factual allegations of the complaint as true... [and d]raw[] all reasonable inferences from these facts in favor of the plaintiff." Roberts v. Babkiewicz, 582 F.3d 418, 422 (2d Cir.2009). Defendants don't suggest the statements in the complaint are insufficiently pled; rather they complain that plaintiff is "manipulating" the pleadings so as simultaneously maintain a sexual orientation discrimination claim alongside a sex-stereotyping Title VII claim. However, since the facts that plaintiff has alleged state a claim for both sexual orientation discrimination and sex stereotyping, dismissal will not lie.

Defendants impliedly concede that the complaint states a cause of action for sexual orientation discrimination, and, as the complaint alleges diversity of citizenship, the Court will retain jurisdiction even if the Title VII claim is dismissed. Lyons v. Legal Aid Soc'y, 68 F.3d 1512, 1517 (2d Cir. 1995). As such, there should be no rush to burden the court with motion practice on the Title VII claim when allowing it to proceed to will not involve much additional discovery, if any at all. The pleadings, accepted as true, state a claim for relief, and attacking them as "manipulative" do not give the defendants a right to dismissal. While it is true that Title VII cannot be used to bootstrap a sexual orientation discrimination claim, it does not mean than anytime a sexual orientation discrimination claim is pled that, *ipso facto,* there is no Title VII claim. In the case cited by the defendant, Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005) the Court dismissed the claim because the plaintiff

had not pled the sex-stereotype discrimination theory; more importantly, there was insufficient evidence in the record to support such a theory. Id. at 221. The Court noted however, that such a theory would be viable where one alleges discrimination based on a "fail[ure] to conform to gender stereotypes in two ways: (1) through behavior or (2) through appearance." Id. In Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000), similarly, the Court found that plaintiff failed to plead facts that pertained to sex stereotyping, but "express[ed] no opinion as to how this issue would be decided in a future case in which it is squarely presented and sufficiently pled." Id. at 37. Since then, the Second Circuit has allowed sex stereotype claims to proceed to the jury. In one, a sexual orientation claim was also present. See Miller v. City of New York, 177 Fed. Appx. 195, 2006 U.S. App. LEXIS 10730 (reversing grant of summary judgment under Title VII) (unpublished). In another, the complaint allowed a male to proceed to the jury where, as in this case, the employer reflexively terminated the accused male harasser because the employer contended, stereotypically, that a male is less worthy of belief where there is an allegation of sexual harassment. Sassaman v. Gamache, 566 F.3d 307, 311 (2d Cir. 2009).

In this case, plaintiff has alleged facts -- which the Court must accept as true -- that plaintiff was treated differently because of (1) his manifestation of a non-stereotypical appearance (¶¶ 22-25 mentioning his choice of colors and accessories); and (2) his behavior in discussing his sexual orientation at work (¶¶ 26-32). He has thus alleged the two bases upon which Dawson suggests a sex stereotype claim would lie. Plaintiff makes the claim that his gayness was tolerated barely and only begrudgingly to the point that he expressed it in his behavior and appearance. He alleges that male instructors were allowed to make jokes of a sexual nature with clients and at the workplace as long as they conformed to the fraternity stereotype that (a) objectifies women; or (b) makes light of homosexuality. As soon as plaintiff, on the other hand, mentioned his sexual orientation to a client in a serious manner, on the contrary, he was terminated for his behavior. In the words of defendant Maynard he was fired for discussing "his personal escapades outside of the workplace."[1] Additionally, plaintiff is prepared to plead – and broadly construing the complaint, the complaint make this claim – that defendant reflexively fired plaintiff based on an allegation of inappropriate touching by a female, notwithstanding plaintiff's homosexuality, and notwithstanding the highly intimate nature of a freefall skydive.

Plaintiff also has stated a claim that defendant Maynard harbored animus toward plaintiff on the grounds of his sexual orientation and terminated him on the pretextual grounds that plaintiff, a gay man, inappropriately touched a female passenger. Nevertheless, notwithstanding this claim, he is allowed to plead simultaneously that the stated reason that defendant gave for his termination - his "behavior" at the workplace – as a stereotype claim that is grounded in an inequitable enforcement of how a man is allowed or expected to act: Men are permitted to make fun of women and gays, but a gay man

[1] Maynard is on tape making this precise incantation. Further, on October 4, the defendant's attorney told the *New York Post* that Mr. Zarda "was terminated for inappropriate behavior in the workplace." While these points are not to be considered on a motion to dismiss, they provide an indication that there is more information that will be forthcoming and that plaintiff should have the opportunity to develop the record to prove that he not only for being gay, but also for saying that he was gay. We can include them in a repleaded complaint, if necessary.

cannot speak about being gay or otherwise behave in a way that is "gay." This will be an interesting and unusual case; the Court should let the evidence come forth and be heard.

2. A "Recreational Establishment" Is Not Exempt to State Minimum Wage Laws.

Plaintiff alleges that he was required to remain on the job for long unpaid hours, during which he was paid nothing, not even minimum wage. Complaint ¶¶ 13, 43, 48. Let us assume that the defendant company would be exempt under the Fair Labor Standards Act as a "recreational establishment." While this exemption applies to state overtime laws, it does *not* apply to state minimum wage laws. State overtime laws are governed by 12 NYCRR § 142-2.2, which incorporates the exemptions under FLSA. State minimum wage laws, however, are governed by 12 NYCRR § 142-2.1, which does not incorporate FLSA. One recent case, Matter of Cuomo v. Dreamland Amusements, Inc., 880 N.Y.S.2d 223 (Sup.Ct, NY County 2009) made exactly this point. The highlighted opinion is attached.

3. The FLSA Overtime Exemptions Cannot Be Resolved on the Pleadings.

Defendants are correct that a "recreational establishment" is exempt from FLSA, but the test is one that is subject to proof and cannot be ascertained on the pleadings. It may be that the defendant's six slowest months generate revenue less than 33% of the annual revenue. However, dismissal under is still not appropriate unless "a defendant raises . . . [a statutory bar] as an affirmative defense and it is clear from the face of the complaint, and matters of which the court may take judicial notice." Staehr v. Hartford Fin. Servs. Group, 547 F.3d 406, 426 (2d Cir. 2008). FLSA "exemptions are narrowly construed," Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392, (1960), and are "affirmative defense[s] for which the employer has the burden of proof." Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974).

The exemption upon which defendant relies is not made out in the pleadings. While the complaint does mention the seasonal nature of freefall diving, whether the defendant is entitled to a FLSA exemption will depend not on plaintiff's characterization of the business, but on an examination of defendant's receivables. True, the defendant has attached documents that seem to suggest that they may be entitled to this exemption; however, plaintiff is entitled to put the defendants to the test of this defense. Not every case involving an employer that may seem to be "recreational" is entitled to this exemption. In Bridewell v. Cincinnati Reds, 155 F.3d 828 (6th Cir. 1998), the Sixth Circuit denied the exemption on the grounds that the defendant manipulated its accounting methods in order to fall into the exemption. Plaintiff is entitled to examine the accounting methods and verify the receipts before accepting this defense, including the receipts for 2010, which are not yet available.

Sincerely,

Gregory Antollino

Cc: Saul Zabel (via ecf)

2009 NY Slip Op 50062U, *; 22 Misc. 3d 1107A, **;
880 N.Y.S.2d 223, ***; 2009 N.Y. Misc. LEXIS 85

[*1] **In the Matter of the Application of Andrew M. Cuomo Attorney General of the State of New York, Petitioner, for an Order under C.P.L.R. ß 2308(b) to enforce compliance with subpoenas Judgment against Dreamland Amusements Inc.; TOY CIRCUS, INC.; CROSSROADS TRUCKING CORP.; ROBERT F. DESTEFANO, JR., KATHRYN L. DESTEFANO; and any other owners and corporate officers of Dreamland Amusements Inc., Toy Circus, Inc., and/or Crossroads Trucking Corp., Respondents.**

401816/08

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2009 NY Slip Op 50062U*; *22 Misc. 3d 1107A*; *880 N.Y.S.2d 223*; *2009 N.Y. Misc. LEXIS 85

January 6, 2009, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

PRIOR HISTORY: *Cuomo v. Dreamland Amusements, Inc., 2008 U.S. Dist. LEXIS 71432 (S.D.N.Y., Sept. 22, 2008)*

HEADNOTES

[**1107A] [***223] Witnesses--Subpoena--Motion to Compel Compliance. Civil Practice Law and Rules--ß 2308 (b) (Disobedience of subpoena).

COUNSEL: For Petitioner: State of New York, Office of the Attorney General, New York, NY, Andrew J. Elmore, Esq., of counsel, Julian Birnbaum, Esq., of counsel.

For Respondents: Tarter, Krinsk & Drogin LLP, New York, New York, Edward Finkelstein, Esq., of counsel, Spector Gadon & Rosen, P.C., Philadelphia, PA, Bruce Thall, Esq., of counsel, admitted pro hac vice, Heather M. Eichenbaum, Esq, of counsel, admitted pro hac vice.

JUDGES: JOAN B. LOBIS, J.S.C.

OPINION BY: JOAN B. LOBIS

OPINION

Joan B. Lobis, J.

Petitioner Andrew M. Cuomo, the Attorney General of the State of New York, brings this proceeding, by order to show cause, for an order, pursuant to *C.P.L.R. ß 2308(b)*, to compel respondents to comply with the subpoenas *ad testificandum* and *duces tecum* to appear, testify, and produce documents in connection with an investigation that was commenced by the Attorney General. The Attorney General seeks information to assist in its investigation under *Executive Law ß 63(12)*, regarding respondents' alleged illegal and fraudulent business practices. Respondents have failed to comply fully with the subpoenas. Petitioner also seeks costs in the amount of $ 50; a penalty in the amount of $ 50; and, damages, pursuant to *C.P.L.R. ß 2308(b)*.

Dreamland Amusements, Inc. ("Dreamland") operates a traveling carnival company. Dreamland is owned and operated by respondents Kathryn DeStefano and Robert DeStefano. The DeStefanos are also owners, officers, and operators of Toy Circus, Inc., and Crossroads Trucking Corp. Collectively, the entities and the DeStefanos will be referred to as "Respondents." According to the Attorney General, all of the entities appear to operate as a single enterprise in jointly operating the traveling carnival business

known as Dreamland. Dreamland and the other entities are alleged to be New York corporations, [1] which have their principal place of business in Stony Brook, New York. Dreamland has operated fairs on and around the East Coast, and has operated fairs in New York; in 2008, Dreamland had fairs in six counties in New York.

1 After this proceeding was brought, Dreamland apparently filed a certificate of dissolution in New York. At oral argument during the federal court proceedings, on September 2, 2008, Dreamland's counsel stated on the record that Dreamland has always operated as a New Hampshire corporation, and that the New York corporation had been formed erroneously. The New York corporation was apparently dissolved as of August 22, 2008. The relevant page from the Department of State website, which the Attorney General includes as an exhibit, lists Dreamland as "inactive." There is no information in this record as to the status of the other two corporate entities.

According to the petition, in or about 2007, the Attorney General's office began receiving complaints that Respondents were engaged in unlawful employment practices. A substantial portion of Dreamland's employees is comprised of aliens who are authorized to work on a seasonal basis, pursuant to temporary H-2B work visas. To be eligible to seek temporary labor certification for H-2B workers, Dreamland had to file Applications for Alien Employment Certifications (Form ETA 750) with the New York State Department of Labor (the "Department"), as required by federal law. The forms require the employer to pay its seasonal H-2B employees a specified rate of pay listed in the forms, which is at or above the prevailing wage, as determined by the Department. The form further requires the employer to pledge not to discriminate against the H-2B employees, and to pledge that the terms, conditions, and occupational environment of the job are not contrary to federal, state, or local law.

Through employee complaints and other information received by the Attorney General, [*2] the Attorney General was led to believe that Respondents were not abiding by New York State's minimum wage law, overtime law, or record-keeping requirements. Further, the Attorney General learned that Respondents might not be paying the H-2B employees the prevailing wage, under Articles 6 and 19 of the New York Labor Law. Complaints were also received alleging that the alien employees were subjected to inferior work and housing conditions, including living in severely unhygienic and overcrowded housing. These allegations, if true, also violate New York State Law.

In May 2008, after asserting that it had corroborated some of the allegations through surveillance of the Dreamland worksite, the Attorney General served subpoenas *ad testificandum* and subpoenas *duces tecum* on the DeStefanos, and served subpoenas *duces tecum* on the corporate entities. A supplemental subpoena *duces tecum* was served on Respondents on July 8, 2008. The subpoenas required testimony and production of documents with respect to payroll records; time records; documents identifying employee names and dates of employment; employment policies, procedures and practices; articles of incorporation and other corporate documents; tax returns; and, documents filed with state and federal governmental entities regarding wages and other terms and conditions of employment.

Initially, Respondents produced some documents and the DeStefanos assured the Attorney General that they would appear for hearings, to give testimony regarding the ongoing investigation. Then, Respondents sought adjournments of the hearings; the Attorney General agreed to three adjournments. The Attorney General issued a final return date for the subpoena hearings, which was July 15, 2008. Respondents requested a fourth adjournment. The Attorney General advised Respondents that non-compliance with the subpoenas would result in a motion to compel compliance.

On or about July 14, 2008, Respondents commenced an action in the United States District Court for the Southern District of New York for declaratory and injunctive relief, seeking to enjoin certain parts of the investigation on the ground that the investigation is preempted under federal law. *Dreamland Amusements, Inc., et al., v. Andrew M. Cuomo*, 08 Civ. 6321 (JGK). Then, after the Attorney General brought the instant proceeding on July 29, 2008, by notice dated August 8, 2008, Respondents filed a petition for removal of this proceeding to federal court, claiming that this proceeding was preempted by federal law. *Andrew M. Cuomo v. Dreamland Amusements, Inc., et al*., 08 Civ. 7100 (JGK). After the matter was before the federal court, the Attorney General moved to remand the instant proceeding to this court and to dismiss Dreamland's action for declaratory and injunctive relief. In response, Dreamland moved for a preliminary and permanent injunction concerning the investigation.

In a opinion and order dated September 22, 2008, the Hon. John G. Koeltl, United States District

Judge, granted the Attorney General's motions to dismiss Dreamland's action for declaratory and injunctive relief, and also granted the motion to remand the action to this court. Judge Koeltl observed that only three federal statutes have been found by the Supreme Court to preempt completely any state law claims: section 301 of the Labor-Management Relations Act [*3] (LMRA); section 502(a) of the Employee Retirement Income Security Act (ERISA); and, sections 85 and 86 of the National Bank Act. *Cuomo v. Dreamland, 08 Civ. 7100, slip op. at 9, 2008 U.S. Dist. LEXIS 71432(S.D.NY Sept. 22, 2008)* (JGK), *citing, Sullivan v. American Airlines, Inc., 424 F.3d 267, 272 (2d Cir. 2005)*. Additionally, the Second Circuit has found that the Copyright Act also preempts state law. Neither federal immigration laws nor the Fair Labor Standards Act (FLSA) have been recognized as completely preemptive. Judge Koeltl rejected Dreamland's claim that federal immigration law provides a basis to assert subject matter jurisdiction in federal court over the Attorney General's efforts to compel compliance with the subpoenas. The action by Dreamland to enjoin the investigation was also dismissed, both on the ground that it was not ripe for judicial review and based on the *Younger* abstention doctrine (*Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 [1971]*). Judge Koeltl found that the issuance of subpoenas seeking information that may lead to the commencement of future civil or criminal proceedings qualifies as an ongoing state proceeding; he also found that the instant proceeding to compel compliance with the subpoenas constitutes an ongoing state proceeding, notwithstanding the fact that this proceeding was commenced in state court only after Dreamland commenced the federal action. He noted that the Attorney General satisfied the "important interest" prong of *Younger*, since the state has an interest in enforcing its own laws and investigating alleged violations of state laws. In addition, Judge Koeltl found that Dreamland could have raised its preemption arguments in this court by bringing a motion to quash the subpoenas or raising the issue as a defense to the motion to compel.

Following the remand to this court, the parties agreed to a briefing schedule for the submission of additional papers on the motion to compel. The motion was restored to the motion calendar. Oral argument was held on November 25, 2008.

Dreamland opposes the order to show cause to compel compliance with the subpoenas, but did not cross-move to quash the subpoenas. Dreamland argues that the Attorney General's non-judicial office subpoenas are void and voidable unless the Attorney General makes a preliminary showing to a court that the matter under investigation is within the jurisdiction of his office and the scope of the subpoena is reasonably related to the exercise of that jurisdiction. Dreamland relies on two cases, *Sussman v. New York State Organized Crime Task Force, 39 NY2d 227, 347 N.E.2d 638, 383 N.Y.S.2d 276 (1976)* and *Gardner v. Lefkowitz, 97 Misc 2d 806, 412 N.Y.S.2d 740 (Sup. Ct. NY Co. 1978)*. The Appellate Division decision in *Sussman* reflects that in 1974, the New York State Organized Crime Task Force ("OCTF") began an investigation into the alleged "fixing" of horse races at Monticello Raceway. The OCTF issued a non-judicial office subpoena to the Sullivan County Harness Racing Association (the "Association"), directing it to produce certain corporate records. The Association brought a proceeding to quash the subpoenas. *Sussman, supra, 39 NY2d 227*, *aff'g 48 AD2d 154, 368 N.Y.S.2d 588 (3d Dep't 1975)*. Similarly, in *Gardner*, the entity that was the subject of the subpoena--a corporate diamond seller--brought a proceeding in state supreme court to quash the Attorney General's subpoena *duces tecum* that was served upon it, and which required the corporation and its president to appear in the Office of the Attorney General to testify with regard to a matter under investigation.

In neither case on which Respondents rely did the Attorney General have an affirmative [*4] obligation to go to court to make a preliminary showing that the purpose of the investigation is within his statutory authority. It is only if the subpoenaed party brings a proceeding to quash the subpoena that the Attorney General must make the preliminary showing to the court in order for the court to uphold the subpoena. Here, however, since Respondents did not move to quash in the first instance, there is no requirement that there be a showing that the matter under investigation is within the jurisdiction of the Attorney General. The "validity of the subpoena need not be demonstrated in court before the subpoena issues." *Hynes v. Moskowitz, 44 NY2d 383, 393, 377 N.E.2d 446, 406 N.Y.S.2d 1 (1978)*. Respondents' argument that the Attorney General is required to prove it has jurisdiction is without merit.

Respondents' excuse for not having come into court in the first instance is their claim of ignorance of any procedure that would have allowed them to move to quash a non-judicial office subpoena in the first instance. In its memorandum of law, Dreamland argues that the courts must enforce the requirement that the matter under investigation is within the Attorney General's jurisdiction, and that the court can do so only if "the subpoenaed party knows that it can,

and does, challenge the subpoenas." Dreamland asserts that the Attorney General should be required to tell subpoenaed parties that they have the right to contest the subpoenas before a court. Dreamland's argument that the Attorney General has some affirmative obligation to inform the subpoenaed party that it has a right to challenge a non-judicial office subpoena is specious. *Section 2304 of the C.P.L.R.* provides that

> [a] motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable. *If the subpoena is not returnable in a court, a request to withdraw or modify the subpoena shall first be made to the person who issued it and a motion to quash, fix conditions or modify may thereafter be made in the supreme court* . . . .

(Emphasis added.) The Attorney General cannot be deemed accountable for Respondents' ignorance of the C.P.L.R. and their failure to bring a proceeding to quash the subpoenas in the first instance. *See, Cherfas v. Wolf, 20 Misc 3d 1118[A], 867 N.Y.S.2d 15, 2008 NY Slip Op 51397[U], 240 N.Y.L.J. 15 (Table), 2008 WL 2746740 at 3 (Sup. Ct. Kings Co. 2008)* (noting that a party's failure to seek appropriate advice after being served with a subpoena, even if it results in waiver of a right to challenge the subpoena, is "immaterial").

In any event, once the Attorney General brought this motion to compel compliance, it was incumbent upon Respondents to seek affirmative relief, by way of a cross motion to quash the subpoenas. The Attorney General argues initially that Respondents waived any challenge to the validity of the subpoenas because they failed to file a motion to quash. "A motion to quash or vacate, . . . , is the proper and exclusive vehicle to challenge the validity of a subpoena or the jurisdiction of the issuing authority." *Brunswick Hosp. Cen., Inc. v. Hynes, 52 NY2d 333, 339, 420 N.E.2d 51, 438 N.Y.S.2d 253 (1981)*; *People v. Doe, 170 Misc 2d 454, 456, 649 N.Y.S.2d 326 (Sup. Ct. Monroe Co. 1996)*. Respondents failed to make a motion to quash which, to be timely, is generally required to be made before the initial return date of the subpoena and before any compliance with it. *C.P.L.R. ß 2304*; *Brunswick Hosp. Cen., Inc., supra, at 339*; *Cherfas v. Wolf, 20 Misc 3d 1118[A], 867 N.Y.S.2d 15, 2008 NY Slip Op 51397[U], 240 N.Y.L.J. 15 (Table), 2008 WL 2746740, at 2 (Sup. Ct. Kings Co. 2008)* ("To be effective, a motion to quash or vacate must be made [*5] promptly, usually prior to the return date of the subpoena, so as not to delay the proceedings."). Once there has been compliance with the subpoena, a motion to quash is unavailable. *Gammarano v. Gold, 51 AD2d 1012, 381 N.Y.S.2d 298 (1976)* (denying motion to quash that was made after applicant began testifying before the Grand Jury). "[H]aving complied with the process, the subpoenaed party no longer possesses the option of challenging its validity or the jurisdiction of its issuer." *Brunswick Hosp. Cen., Inc., supra, at 339*.

It is undisputed that Respondents complied in part with the subpoenas. [2] Neither party cites any authority as to whether partial compliance with a subpoena acts as a waiver of any right to object to the remainder of the subpoena. But, when considering as a whole the delay in challenging the subpoenas, the failure to affirmatively move to quash the subpoenas, and the partial compliance with the subpoenas, this court holds that Respondents' challenge to the subpoena has been waived.

> 2 According to Dreamland's counsel, as of June 20, 2008, Dreamland had so far forwarded seven (7) separate productions, comprising 10,095 documents, in response to the subpoenas.

Respondents' opposition to the subpoenas may be determined on this ground alone. But, because of the important interests raised here, this court will also address the application on the merits. For the reasons set forth below, this court holds that the subpoenas are valid and Respondents' challenge must fail, because the issues raised in the Attorney General's investigation are not preempted by federal law.

Respondents argue in their papers, and emphasized at oral argument, that there is a "contract" between Dreamland and the United States Department of Labor and United States Department of Homeland Security as to payment of a prevailing wage. Respondents contend that the State has no say in what the federal government determines to be the appropriate rate of pay. Additionally, Respondents contend that the State has no jurisdiction over an entity governed by the exception to wages and hours that is in ß 213 of the FLSA. The cases on which Respondents chiefly rely (*see* pp. 61-65 of Respondents Memorandum of Law) all concern those statutes which the Supreme Court has held to have "the requisite extraordinary preemptive force to support complete preemption." *Sullivan v. American Airlines, Inc., 424 F.3d 267, 272 (2d Cir. 2005)*. *See, e.g., San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959)* (the NLRA); *Wisconsin Dept. of Industry, Labor and Human Relations v. Gould Inc., 475 U.S. 282, 286, 106 S. Ct. 1057, 89 L. Ed. 2d 223 (1986)* (NLRA); *Livadas v. Bradshaw,*

512 U.S. 107, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994) (NLRA).

Nor are Respondents correct in attempting to rely on the federal immigration laws to argue that preemption applies here. Respondents argue that immigration and employment of aliens is solely within the purview of federal law. Respondents' reliance on *United States v. Richard Dattner Architects, 972 F. Supp. 738, 742-46 (S.D.N.Y.1997)*, is misplaced. This case concerned an action brought by a domestic worker for alleged violations of the Immigration and [*6] Nationality Act against a company that chose to hire a foreign worker in lieu of plaintiff. The court held in *Dattner* that there is no private right of action under the H-2B program. *972 F. Supp. at 742*. Contrary to Respondents' contention, the case does not stand for the proposition that a claim as to alleged inaccuracies in an employer's ETA-750 certification is preempted.

While the power to regulate immigration "rests exclusively with the federal government" (*Balbuena v. IDR Realty LLC, 6 NY3d 338, 351, 845 N.E.2d 1246, 812 N.Y.S.2d 416 [2006]*), that exclusive authority does not prevent the states from enacting labor laws with respect to the employment of aliens. *Id. at 352*, *citing De Canas v. Bica, 424 U.S. 351, 365, 96 S. Ct. 933, 47 L. Ed. 2d 43 (1976)*. The cases Respondents cite relate directly to the admission and registration of aliens; [3] here, in contrast, the Attorney General is interested in the working conditions of these employees once they are in New York.

> 3 *See*, *Hines v. Davidowitz, 312 U.S. 52, 68, 61 S. Ct. 399, 85 L. Ed. 581 (1941)* (striking down Pennsylvania law that required registration of aliens); *see also*, *Torao Takahashi v. Fish and Game Commission, 334 U.S. 410, 419, 68 S. Ct. 1138, 92 L. Ed. 1478 (1948)* (holding that states can neither "add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states.").

Respondents contend that the Attorney General is "affirmatively barred" from investigating and proceeding in the first instance, and contend that the Attorney General may not use state laws to "do an end-run around federal preemption." As Judge Koeltl noted, the FLSA does not preclude the application of state labor laws. *See*, *29 U.S.C. ß 218* ("No provision of this chapter or of any other thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter . . . .")

When issuing subpoenas for an investigation, "the Attorney-General enjoys a presumption that he is acting in good faith . . . and must show only that the materials sought bear a reasonable relation to the subject matter under investigation and to the public purpose to be achieved.'" *Anheuser-Busch, Inc. v. Abrams, 71 NY2d 327, 332, 520 N.E.2d 535, 525 N.Y.S.2d 816 (1988)* (internal citations omitted), *quoting, Carlisle v. Bennett, 268 NY 212, 217, 197 N.E. 220 (1935)*. Although Dreamland employs H-2B workers, it is not exempt from compliance with the laws of New York State. The Attorney General is entitled to investigate whether Respondents have violated New York's record-keeping, minimum wage, and overtime laws. *Labor Law ß 652* currently requires that employers pay their workers a minimum wage of $ 7.15 per hour, which is an increase from $ 6.75 per hour in 2006, and $ 6.00 per hour in 2005. According to the Attorney General, the documents that Dreamland has produced, which show only that its workers earn generally $ 200 or $ 300 per week, are insufficient to demonstrate that Dreamland is paying its employees the minimum wage. As petitioner points out, an employee working as few as 34 hours per week would be earning less than the minimum wage if he or she were receiving $ 200 per week ($ 200 / 34 = $ 5.88/hr.). [*7] **Notably, in contrast to the FLSA, *29 U.S.C. ß 213(a)(3)*, New York law does not provide an exemption for payment of the minimum wage to seasonal amusement or recreational establishments. Therefore, irrespective of whether the FLSA exemption applies to Dreamland, the state law requirements under New York Labor Law for payment of minimum wage, together with other requirements, [4] do apply, and are subject to investigation and enforcement by the Attorney General.**

> 4 For example, the Labor Law requires specific record-keeping requirements (*NY Labor Law ß 661*) and requires posting of a notice, by the Commissioner of the Department of Labor, summarizing workers' rights. *12 N.Y.C.R.R. ß 142-2.8*.

Respondents do not argue that claims alleging discrimination in wages and working conditions against their workers are preempted by federal law, nor do Respondents argue that claims alleging sanitary code violations are preempted. Indeed, the Court of Appeals recognized in *Balbuena, supra*, that "[t]he presumption against preemption is especially strong

with regard to laws that affect the states' historic police powers over occupational health and safety issues . . . and is overcome only if it "was the clear and manifest purpose of Congress"' to supplant state law." *6 NY3d at 356* (internal citation omitted), *quoting, New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995)*. The Court of Appeals went on to hold that "[t]he Labor Law, therefore, applies to all workers in qualifying employment situations--regardless of immigration status--and nothing in the relevant statutes or our decisions negates the universal applicability of this principle." *Balbuena, supra, 6 NY3d at 358-59 and 360 at n.7*. Even assuming, *arguendo*, that preemption could apply to any causes of action based on Respondents' failure to comply with the express promises on its ETA 750 Forms, the Attorney General is investigating other areas that are exclusively within its power to investigate.

Respondents' argument that an administrative proceeding under *Executive Law ß 297* (the Human Rights Law) is a prerequisite to an investigation is also unavailing. The Attorney General is accorded broad investigatory powers under *Executive Law ß 63(12)*, which provides that in connection with any investigation of allegations of persistent fraud or illegality, "the attorney general 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." "[O]nce the Attorney General's Office suspects that [petitioner], or any other entities, might be engaged in some kind of discriminatory employment practice which would be prohibited under state and federal laws, the Attorney General is within its right to commence an investigation independent of the Division of Human Rights, and notwithstanding the procedures enumerated in *section 297*." *Pavillion Agency v. Spitzer, 9 Misc 3d 626, 630-31, 802 N.Y.S.2d 879 (Sup. Ct. NY Co. 2005)*.

Since Respondents did not affirmatively seek to quash the subpoenas, this court does not reach the issue as to whether any portion of the subpoenas is improper. This court does not reach the issue, as set forth in the Attorney General's papers, as to whether Respondents may still raise the issue of federal preemption if and when an enforcement action is ultimately brought by [*8] the Attorney General. For the reasons set forth above, the petition is granted to the extent that Respondents are directly to comply with the subpoenas issued by the Attorney General. Unless another adjourn date is agreed to by the Attorney General and Respondents, the subpoenas *duces tecum* shall be returnable at the office of the Attorney General on January 26, 2009, and the subpoena *ad testificandum* that was served on both Robert and Kathryn DeStefano is returnable on February 2, 2009. The request for damages is denied; there was no proof of actual costs submitted with these papers. *See Barkan v. Barkan, 271 AD2d 466, 706 N.Y.S.2d 902 (2d Dep't 2000)*. The request for a $ 50 penalty is granted. *C.P.L.R. ß 2308(b)*. This court will retain jurisdiction to insure that Respondents comply with the foregoing.

This constitutes the decision, order, and judgment of the court.

Dated: January, 2009

JOAN B. LOBIS, J.S.C.