

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA.

SHAPIRO & FISHMAN, LLP,

CIVIL DIVISION "AN"
CASE NO. 502010CA021246

v.

THE STATE OF FLORIDA,
ATTORNEY GENERAL,
DEPARTMENT OF LEGAL
AFFAIRS.

COPY

**ORDER GRANTING PETITION TO QUASH ATTORNEY
GENERAL'S INVESTIGATIVE SUBPOENA DUCES TECUM**

THIS CAUSE comes before the Court on the Petition to Quash Attorney General's Investigative Subpoena Duces Tecum directed to the Petitioner Shapiro & Fishman, LLP (the "Shapiro Firm") on August 20, 2010. After reviewing the Petition and the attached exhibits, and having heard the argument of the parties, it hereby:

ORDERED AND ADJUDGED as follows:

I. BACKGROUND

The Shapiro Firm is a law firm that represents mortgage servicing companies, lenders and provides legal services in foreclosure matters throughout the State of Florida. On August 6, 2010, the Attorney General issued an Investigative Subpoena Duces Tecum (the "Subpoena") upon the Shapiro Firm. The Subpoena on its face states that the Attorney General relied exclusively upon its investigative powers pursuant to Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"). It stated:

"The general purpose and scope of this investigation extends to possible unfair and deceptive trade practices which involve the advertising and marketing practices of [the Shapiro Firm]."

Despite the designated scope of the investigation, the Subpoena commands the production of documents related to thirteen subjects that center around the Shapiro Firm's legal representation of lending institutions in foreclosure matters and the internal operation of the law firm. It does not request evidence related to the Shapiro Firm's advertising and marketing practices. Remarkably, the Subpoena requests information on any corporations, companies, partnerships, or associations in which the Shapiro Firm and its individual partners, Mr. Shapiro and Mr. Fishman, have any interest.

On August 20, 2010, the Shapiro Firm filed the instant Petition to quash the Subpoena, arguing in part that the Attorney General does not have jurisdiction to pursue a FDUTPA claim against a law firm, that the Subpoena seeks to investigate conduct that is protected and that the Subpoena is overbroad and requests documents beyond the scope of the Attorney General's stated investigation.

II. ANALYSIS AND RULING

A. Applicability of the Florida Deceptive and Unfair Trade Practices Act

Florida Statute § 501.212 (2009) details the activities that are exempt from FDUTPA, including entities regulated by the Office of Financial Regulation of the Financial Services Commission, such as banks. Though this exemption was not raised (and may not be applicable) clearly what the AG is after is information about servicing companies' and lenders' foreclosure practices and the legal representation of these entities by their attorneys in foreclosure proceedings in court.

The enumerated list of exempted activities does *not* specifically include attorneys, law firms, or any person or entity that is regulated by the Florida Bar. However, the legislature knew that the authority to regulate and discipline the conduct of attorneys has been exclusively

reserved to the Florida Supreme Court. See Art. V, § 15, Fla. Const. (“The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted”). Such a constitutional provision is a bright line articulation of the separation of powers doctrine, which operatively prohibits the legislative and executive from encroachment into matters that fall within the purview of the judiciary.

This court is confident that the legislature did not intend any encroachment when it drafted FDUTPA because it clearly allowed the Department to adopt rules and conduct administrative actions pursuant to Fla. Chapter 120 knowing that Florida Statute 120.51 specifically states that it does not apply to the Legislature or to the Courts. See Florida Statute § 501.205 (2009).

The legislature recognized that there are other supervising authorities within the state when it included Florida Statute 501.209.

The idea that the Attorney General has authority to regulate, discipline or otherwise control Attorneys under consumer protection legislation and that its power co-exists with the Supreme Court’s constitutionally mandated responsibility to govern the conduct of attorneys is a constitutional absurdity.

This court believes that Kelly v. Palmer, Reifler & Assocs., P.A., 681 F. Supp. 2d 1356 (S.D. Fla. 2009) is instructive but not controlling. In Kelly, the Southern District of Florida analyzed the scope of FDUTPA and its regulation of “trade or commerce” in the context of a law firm preparing pre-lawsuit demand letters. Id. Ultimately, the court determined that, even applying a liberal interpretation of FDUTPA, a law firm’s preparation of pre-lawsuit demand letters has no connection or nexus to trade or commerce:

[A]bsent that important nexus, the entire FDUTPA statutory scheme simply does not apply to these particular circumstances,

even if a reasonable juror could find that the firm's conduct amounted to deceptive conduct. A contrary result would, indeed, expose a great deal of pre-litigation tactics by attorneys to potential exposure under the statute, which is a result not contemplated by the statute. Thus, even though a lawyer's status *per se* is not a bar to relief (because certainly some lawyers may engage in trade or commercial transactions while acting as lawyers), the particular conduct at issue here does not fall within the statute's umbrella.

Kelly, 681 F. Supp. 2d at 1375.

In the instant case, the Attorney General has alluded to possible conduct by the Shapiro Firm-taken-on behalf of its clients in foreclosure actions. (Remember that the AG's subpoena is directed at "Advertising and Marketing" and the Supreme Court and the Bar regulate those activities.) The Court finds that the conduct alleged is already subject to regulation by the Florida Supreme Court acting through the Florida Bar and/or through the Circuit Court under Rule 3-3.5, Rules Regulating the Florida Bar. As such, the Attorney General does not have the constitutional authority to travel under FDUTPA in order to investigate and/or discipline the Shapiro Firm's alleged misfeasance in its practice of law.

Though it is not controlling, the Court finds the Delaware Superior Court's logic on the issue to be fitting in this instance:

[t]he very nature of the Act itself weighs heavily against any inference that the General Assembly intended it to apply to the conduct of attorneys in their practice... the disciplinary nature of this Act is specifically targeted toward the conduct of a business enterprise. The business of an attorney is his or her practice.

The grant of authority to the Supreme Court calls for attorneys to "behave themselves justly and faithfully in their *practice*, and if they misbehave themselves *therein*, they shall be *subject to such disciplinary measures as the Supreme Court, in its discretion, may determine...*" In light of this language, it is clear to this Court that lawyers, engaged in the practice of law, are subject to discipline only by the Supreme Court.

Jamgochian v. Prousalis, 2000 WL 1610750, *5 (Del. Super. 2000). Therefore the Court finds that any misconduct of the Shapiro Firm's practice of law is subject only to regulation by the Florida Bar and /or the Circuit Court and ultimately the Supreme Court.

Notwithstanding the forgoing, it should also be observed that the subpoena served by the Attorney General is not only overbroad, vague, inconsistent and unduly burdensome, but it is both invasive and highly unlikely to reveal actionable conduct on the part of the Shapiro Firm. The Court is not persuaded by the Assistant Attorney General's argument that the intended scope of the subpoena seeks to uncover specific information. The Court is confined to the four corners of the Subpoena itself, which does not include any sort of limiting language to that effect. As such, the Court finds that even if the conduct of the Shapiro Firm is subject to FDUTPA, the terms of the Subpoena are overbroad, vague, inconsistent and unduly burdensome in light of the investigation's suggested purpose.

Lastly, it is very troubling to this court that the AG is attempting by way of this subpoena to obtain personal, financial and business information about the individual partners, the individual employees and others, without giving those individuals notice and an opportunity to protect their Constitutional rights to privacy.

Accordingly, the Shapiro Firm's Petition to Quash Attorney General's Investigative Subpoena Duces Tecum is **GRANTED**, and the subpoena is hereby quashed.

DONE AND ORDERED, in Chambers at West Palm Beach, Palm Beach County, Florida this 4th day of October, 2010.

Copy provided to:
ATTACHED SERVICE LIST

CONFIRMED COPY
JACK COX, Circuit Judge

Fax Transmission

Date: October 4, 2010

To: Gerald F. Richman, Esq.
Fax: 820-1608

Theresa Edwards, Esq.
June Clarkson, Esq.
Fax: 954-712-4658

From: Carol Hall, Judicial Assistant
Palm Beach County Courthouse
Division "AN"

Phone: 561-355-3496

Subject: Shapiro & Fishman v. The State of Florida
2010CA021246

of Pages (including cover): 7

Message: Enclosed please find a conformed copy of the Order Granting Petition To Quash Attorney General's Investigative Subpoena Duces Tecum

Hard copies to follow via US Mail.

Thank you.

SERVICE LIST

RICHMAN GREER, P.A.
Gerald F. Richman, Esq.
One Clearlake Centre, Suite 1504
250 Australian Avenue South
West Palm Beach, FL 33401

OFFICE OF THE ATTORNEY GENERAL
June M. Clarkson, Esq.
110 S.E. 6th Street, 10th Floor
Fort Lauderdale, Fl 33301