

MAR 13 2007

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PHILIP G. URRY, CLERK
By MEZ

STATE OF ARIZONA,) 1 CA-SA 07-0014
)
Petitioner,) DEPARTMENT A
)
v.) Maricopa County
) Superior Court
) No. CV2006-018804
THE HONORABLE KENNETH L. FIELDS,)
Judge of the SUPERIOR COURT OF)
THE STATE OF ARIZONA, in and for) DECISION ORDER
the County of MARICOPA,)
)
Respondent Judge,)
)
WESTERN UNION FINANCIAL SERVICES,)
INC., VIGO REMITTANCE CORP., and)
ORLANDI VALUTA,)
)
Real Parties in Interest.)
_____)

This special action came on regularly for conference on February 20, 2007, before Presiding Judge Patricia A. Orozco, and Judges Diane M. Johnsen and G. Murray Snow. The matter was taken under advisement. For the following reasons, we accept jurisdiction and grant relief.

The Arizona Attorney General's Office petitioned this court for special action relief, challenging the trial court's order denying its request for a protective order from discovery requests served on the Attorney General by Western Union

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FINANCIAL REMEDIES SECTION

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Financial Services, Inc. (WUFS), Vigo Remittance Corp. (Vigo) and Orlandi Valuta (OV), (collectively, the Respondents).¹

This special action arises from an investigation by a financial task force made up of a variety of agencies, including the Attorney General's Office. The Attorney General's Office serves as the task force's financial analysis component. Thus, it utilizes its statutory authorizations pursuant to A.R.S. § 13-2315 (2001) to obtain information on financial transactions and provides information to the task force's officers. The task force's investigation has found "Western Union transaction data involving Arizona [demonstrates] . . . Arizona's premier ranking as the state selected by most alien and drug smugglers to smuggle their merchandise into the country." It has also found "[t]he two most frequent criminal users of money transmitters are coyotes² and drug dealers." Since 2000, the Attorney General's Office has been serving WUFS with information requests

¹ The Respondents provide consumer to consumer money transfer services both in the United States and internationally. All three provide such services in Arizona through authorized delegates and each is licensed as a money transmitter under Arizona's Transmitters of Money Act (Arizona Revised Statutes sections 6-1201 et seq. (1999 & Supp. 2006)).

² Smugglers of undocumented aliens (UDA).

and collecting records regarding money transmissions into and out of Arizona.

Recently, according to the task force, people transmitting money connected to smuggling UDA began engaging in the process of triangulating their transactions to avoid detection resulting from the direct transfers of funds into Arizona.³ In April 2006, the Attorney General served civil subpoenas and several requests for information on WUFS as part of his investigation of triangulated transactions. After WUFS refused to obey the subpoenas, the Attorney General brought an enforcement proceeding in front of Judge Keppel to enforce the subpoenas.⁴ The Attorney General's Office obtained a judgment in that proceeding and WUFS appealed that decision to this court.

While the appeal was pending, the Attorney General's Office expanded the scope and nature of its requests by serving

³ Using "triangulation," a coyote in Arizona communicates with the person who is sponsoring the illegal transportation of a UDA in another state. In order to avoid detection by the Arizona authorities, the coyote directs the sponsor to send the funds via money transmitter to an associate of the coyote in Northern Mexico, instead of sending the funds directly to the coyote in Arizona. When the associate has received the funds, he calls the coyote and tells him that the money has been received and the coyote releases the UDA.

⁴ The parties disagree as to whether WUFS refused to obey the subpoenas.

Respondents with new record requests, pursuant to A.R.S. § 13-2315, seeking data regarding "all money transfers over \$300 sent from anyone in Nevada to anyone anywhere in the world or received by anyone in Nevada from anyone anywhere in the world." Additionally, the Attorney General's Office "served OV and Vigo with requests for information about all money transfers over \$300 sent from anyone in Sonora, Mexico to anyone anywhere in the world or received by anyone in Sonora, Mexico from anyone anywhere in the world." Also on July 31, 2006, the Attorney General served Geographic Targeting Order 2006-02 (GTO) on Respondents.

On December 7, 2006, Respondents filed a declaratory judgment complaint "challenging the Nevada records requests, the OV and Vigo Sonora record requests, and the GTO on both statutory and constitutional grounds." On December 19, 2006, the Respondents filed an Application for Temporary Restraining Order and Motion for Preliminary Injunction. In the Motion for Preliminary Injunction, Respondents alleged that the Attorney General exceeded his authority under A.R.S. § 13-2315 and the Attorney General could not justify his records requests as being part of an investigation under A.R.S. § 6-1242. Respondents

also alleged that the records requests and GTO violated the United States Constitution's due process and commerce clauses.

In preparation for trial on the Motion for the Preliminary Injunction, Respondents served interrogatories, requests for documents, requests for admissions and deposition notices on the Attorney General. The Attorney General filed a Motion for Protective Order, Respondents filed a Response to Motion for Protective Order and the Attorney General filed a reply. The trial court denied the Attorney General's Motion for Protective Order. Thereafter, the Attorney General filed this special action requesting that this court exercise its jurisdiction to order the trial court to grant the Attorney General a protective order under the Arizona Supreme Court's decision in *People ex rel. Babbitt v. Herndon*, 119 Ariz. 454, 581 P.2d 688 (1978). We stayed the proceeding below pending this special action.

Jurisdiction

Special action relief is appropriate in cases in which "a trial court orders disclosures that a party or witness believes to be protected by a privilege," because an "appeal provides no remedy." *Emergency Care Dynamics, Ltd. v. Super. Ct. (Mohave Emergency Physicians, Inc.)*, 188 Ariz. 32, 33, 932 P.2d 297, 298 (App. 1997) (citation omitted); see also *Cervantes v. Cates*, 206

Ariz. 178, 181, ¶ 8, 76 P.3d 449, 452 (App. 2003) (noting that this court "generally do[es] not accept special action jurisdiction of a pretrial discovery dispute except where there is an order requiring disclosure of privileged or confidential material"). In this case, because the Attorney General's Office has no remedy by appeal, we accept jurisdiction.

Discussion

The Attorney General states that the issue is whether "the trial court abuse[d] its discretion in refusing to grant the [Attorney General] a protective order to preclude discovery of [its] investigators and its investigative files for a six-year period when the discovery was requested by a third party business trying to avoid compliance with [its] administrative subpoena." The Attorney General argues that the holding in *Herndon* governs this case because this is a subpoena enforcement proceeding and involves a request for discovery, as was requested in *Herndon*.

Respondents assert that *Herndon* is inapplicable because this case "is a full fledged civil suit" and not a mere subpoena enforcement action. The trial court held that *Herndon* was inapplicable because this proceeding "is a combined enforcement

action and a civil suit by the non-investigated party that has to comply with the administrative subpoena or administrative request."

We agree with the trial court that Respondents' lawsuit is a civil action involving elements of a subpoena enforcement action that presents the issues of whether the Attorney General has exceeded his statutory authority and is violating the United States Constitution's due process and commerce clauses. However, we disagree with the trial court that *Herndon* is inapplicable.

In *Herndon*, the Attorney General was investigating "Herndon, d.b.a. American Indian Jewelry, to determine whether his sales and advertising practices violated the Consumer Fraud Act." 119 Ariz. at 454, 581 P.2d at 688. Under the Consumer Fraud Act, if the Attorney General has reasonable cause to believe that the investigated party has violated the act, he may engage in extensive pre-complaint discovery. *Id.* "Pursuant to his authority under [the Consumer Fraud Act], the Attorney General. . . issued to Herndon a Demand for Production of Documents or Tangible Objects, a Demand to Answer Written Interrogatories and a Demand to Appear and be Examined Under Oath." *Id.* at 455, 581 P.2d at 689. After Herndon refused to

comply with the discovery demands, the Attorney General applied for an order to show cause why Herndon should not be found in contempt and "enjoined from advertising and selling merchandise." *Id.* In anticipation of the order to show cause hearing, Herndon served a deposition notice and Subpoena Duces Tecum on the Assistant Attorney General. *Id.* The subpoena requested that the Attorney General produce any evidence of probable cause that there had been a violation of the Consumer Fraud Act. *Id.* The Attorney General moved for a protective order, which was denied. *Id.* at 456, 581 P.2d at 690. When the Attorney General refused to attend the deposition, Herndon filed a motion to dismiss the order to show cause, which was granted. *Id.* The Attorney General appealed the dismissal to the Arizona Supreme Court. *Id.*

The Supreme Court vacated the superior court's order and held that discovery is not available to an investigated party to assist in the preparation of a defense to a subpoena when the Attorney General has reasonable cause to believe that there has been a violation of the Consumer Fraud Act. *Id.* at 457-58, 581 P.2d at 691-92. The court began its analysis by observing "that a party may resist an administrative subpoena on any appropriate grounds." *Id.* at 456, 581 P.2d at 690. Such grounds might be

"that the inquiry is not within the agency's scope of authority, that the order is too vague, that it seeks irrelevant information" or "is being used for an improper purpose, such as to harass or put pressure on the investigated party to settle a collateral dispute." *Id.* But due process does not necessarily entitle the recipient of a subpoena to discovery to aid in preparation of its defense to the subpoena:

All that is necessary is that the procedure be tailored in light of the governmental and private interests that are involved, to insure that [the subpoenaed party] is given a meaningful opportunity to present his case. . . . [W]hen the only issue to be resolved at a hearing is whether there is reasonable cause to believe there has been a violation of the act, discovery is not necessary for [the subpoenaed party] to have a meaningful opportunity to be heard."

Id. (Citation omitted.)

The subpoenas in this case were issued pursuant to A.R.S. § 13-2315. In relevant part, subsection B of that statute provides that a subpoena shall be enforced "if the request is reasonable and the attorney general . . . has reasonable grounds to believe the records sought to be inspected are relevant to a civil or criminal investigation." A.R.S. § 13-2315.B. The statute thus establishes that the Attorney General must demonstrate that a subpoena is both reasonable and that it is

issued based on reasonable grounds to believe the information sought is relevant to an investigation.

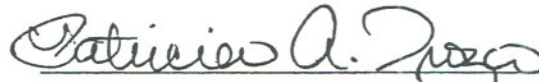
Pursuant to *Herndon*, although Respondents may contest the asserted grounds of the subpoenas based on the face of the subpoenas themselves, they are not entitled to discovery to make their case. Moreover, we do not understand Respondents to be saying that they require discovery on the issue of whether the subpoenas are "reasonable," within the meaning of section 13-2315. For these reasons, we vacate the trial court's order denying the Attorney General's motion for a protective order to permit the court to consider, in the first instance, whether the subpoenas at issue satisfy the requirements of section 13-2315.B. Respondents' discovery requests shall be stayed in the meantime. If, on remand, the trial court finds the Attorney General has satisfied his burden to show that the subpoenas are both reasonable and based on reasonable grounds, the court shall then determine whether and to what extent, if any, discovery is necessary to permit Respondents to present their constitutional and jurisdictional arguments.

Conclusion

1 CA-SA 07-0014
(Page 11)

Therefore, we accept jurisdiction, grant relief as indicated above and lift the stay to the extent consistent with this decision.

DATED this 13th day of March, 2007.

A handwritten signature in cursive script, reading "Patricia A. Orozco", written over a horizontal line.

PATRICIA A. OROZCO, Presiding Judge

Page 12

1 CA-SA 07-0014

Maricopa County Superior Court
CV2006-018804

A true copy of the foregoing
was mailed March 13, 2007 to:

Cameron H Holmes
Assistant Attorney General
Arizona Attorney General's Office
1275 W Washington St
Phoenix AZ 85007
Attorneys for Petitioner

Francis J Burke Jr
Steptoe & Johnson LLP
Ste 1600
201 E Washington St
Phoenix AZ 85004-2382

Karl M Tilleman
Steptoe & Johnson LLP
Ste 1600
201 E Washington St
Phoenix AZ 85004-2382

Steven D Wheelless
Steptoe & Johnson LLP
Ste 1600
201 E Washington St
Phoenix AZ 85004-2382

Stacey F Gottlieb
Steptoe & Johnson LLP
Ste 1600
201 E Washington St
Phoenix AZ 85004-2382
Attorneys for Real Party in Interest

Page 13

1 CA-SA 07-0014

Hon Kenneth L Fields, Judge
Maricopa County Superior Court
Central Court Building
201 W Jefferson St
Phoenix AZ 85003-2243

Philip G Urry, Clerk
By

M E L

Deputy Clerk

