

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GORDON H. FLATTUM,

Plaintiff,

No. CIV S-11-2711 LKK GGH PS

vs.

STATE OF CALIFORNIA DEPARTMENT
OF CONSUMER AFFAIRS, et al.,

Defendants.

ORDER AND

FINDINGS AND RECOMMENDATIONS

_____ /

Plaintiff is proceeding in this action pro se and in forma pauperis. This proceeding was referred to this court by Local Rule 302(c)(21). Presently before the court are defendant State of California, Department of Consumer Affairs, Board of Accountancy’s motion to dismiss, filed February 28, 2012, and noticed for hearing on April 19, 2012, and plaintiff’s motion to stay proceedings, filed April 3, 2012, but not noticed for hearing. Having reviewed the motions, the court has determined that oral argument is not necessary, and now issues the following order and findings and recommendations.

BACKGROUND

The complaint alleges that plaintiff, a former Certified Public Accountant (“CPA”) in Washington whose license was suspended due to a criminal conviction, was

1 improperly denied a license to be a CPA in California. (Compl. at ¶ 4.) The complaint also
2 alleges violations by defendant in the administrative process following the denial, including the
3 allegation that after plaintiff requested a hearing, the California Board of Accountancy (“CBA”)
4 offered him a “stipulated settlement offer” to which he was originally amenable, but then was
5 informed by the CBA that it did not wish to settle out of court but preferred a hearing. (Id. at ¶
6 12-13.) Plaintiff alleges that the CBA then denied him his right to a hearing based on “time
7 constraints of Section 487.” (Id. at ¶ 13.) Plaintiff implies that he relied on the settlement offer
8 which caused the deadline for an administrative hearing to pass. Plaintiff alleges violations of
9 numerous federal criminal statutes, as well as the First, Fifth, Sixth, Eighth and Fourteenth
10 Amendments. He seeks compensatory and punitive damages.

11 DISCUSSION

12 By his motion to stay, plaintiff seeks to put this case on hold until after his
13 scheduled June 6, 2012 hearing with the State of California’s Office of Administrative Hearings.
14 He claims that this administrative hearing “may resolve all issues presently pending before the
15 Court at this time.”

16 The concern for comity and federalism require the courts to refrain from
17 interfering in pending state civil proceedings where important state interests are involved.
18 Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S. Ct. 1200, 43 L.Ed.2d 482 (1975); Judice v. Vail,
19 430 U.S. 327, 97 S. Ct. 1211, 51 L.Ed.2d 376 (1977). This doctrine of abstention applies to state
20 administrative proceedings where there is an ongoing state judicial proceeding that implicates an
21 important state interest and that provides a full and fair opportunity to litigate a claim. See
22 Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L.Ed.2d 669 (1971); Gibson v. Berryhill, 411
23 U.S. 564, 576-577, 93 S. Ct. 2371, 2377, 60 L.Ed.2d (1973); Middlesex County Ethic Committee
24 v. Garden State Bar Assn., 457 U.S. 423, 102 S. Ct. 2515, 73 L.Ed.2d 116 (1982). While
25 Younger abstention typically requires dismissal by the court, a stay of the proceedings is
26 appropriate where there has been a claim for damages. Gilbertson v. Albright, 381 F.3d 965 (9th

1 Cir. 2004). A reading of the complaint indicates that Younger abstention is appropriate to the
2 extent plaintiff has a pending state administrative proceeding.

3 In Middlesex County Ethics Committee v. Garden State Bar
4 Association, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982),
5 the Supreme Court laid out a three-part test for determining when
6 to apply Younger to a civil proceeding, holding that abstention is
7 required so long as the state proceedings: (1) are ongoing; (2)
8 implicate “important state interests”; and (3) provide an adequate
9 opportunity to raise federal questions. 457 U.S. at 432, 102 S.Ct.
2515. To these three threshold requirements, we recently
articulated an implied fourth requirement that (4) the federal court
action would “ ‘enjoin the proceeding, or have the practical effect
of doing so.’ ” AmerisourceBergen Corp. v. Roden, 495 F.3d 1143,
1148–49 (9th Cir.2007) (quoting Gilbertson, 381 F.3d at 978).

10 Potrero Hills Landfill, Inc. v. County of Solano, 657 F.3d 876, 882 (9th Cir. 2011).

11 Here, plaintiff’s administrative action with the CBA was pending at the time
12 plaintiff filed this action, and is still pending. (Compl. ¶ 13, Mot. for Stay.) Second, the grant or
13 denial of a license to practice accountancy is an important state interest for which a complete set
14 of procedures has been enacted. See Cal. Bus. & Prof. Code § 5070, et seq. Third, plaintiff has
15 the opportunity to raise any constitutional challenges through California’s writ of mandate
16 procedure.¹ Saraswati v. County of San Diego, 2010 WL 4569888, *3 (S.D. Cal. Nov. 4, 2010),
17 quoting Kenneally v. Lungren, 967 F.2d 329, 332-33 (9th Cir. 1992) (finding that writ of
18 mandate procedure fulfills Younger’s third requirement in providing “meaningful opportunity for
19 [a federal plaintiff] to present his constitutional claims for independent judicial review.”). See
20 also Dowden v. City of Sacramento, 40 F. Supp.2d 1146, 1149, n. 1 (E.D. Cal. 1999) (finding
21 plaintiff had adequate opportunity to litigate constitutional claims in judicial proceeding to
22 review administrative ruling). Fourth, for plaintiff to obtain relief in federal court would
23 effectively invalidate the CBA decision and preempt the administrative proceedings now in
24 process, thereby having the effect of enjoining those proceedings.

25 _____
26 ¹ Plaintiff has the burden to show he is barred from raising federal claims in the state
court action. Lebbos v. Judges of Superior Court, 883 F.2d 810, 815 (9th Cir. 1989).

1 Although the Younger requirements are satisfied, dismissal of this case is not
2 appropriate because plaintiff seeks damages. Therefore, the undersigned recommends that the
3 action be stayed as opposed to dismissed. Although defendant requests dismissal based on
4 Eleventh Amendment immunity, and dismissal on this basis would be correct; see Will v.
5 Michigan Dept. of State Police, 491 U.S. 58, 63-67, 71, 109 S.Ct. 2304 (1989) (states and state
6 officers sued in their official capacity are not considered persons under section 1983 because
7 immune from liability under Eleventh Amendment and doctrine of sovereign immunity);
8 granting dismissal to defendant with leave to amend at this stage of the proceedings would be
9 inappropriate, i.e., it is much more logistically appropriate to dismiss with leave to amend after a
10 stay is lifted, if at all.² For this reason, defendant's motion to dismiss will be vacated without
11 prejudice to its renewal after the stay is lifted.

12 CONCLUSION

13 Accordingly, IT IS ORDERED that: the hearing on defendant's motion to dismiss,
14 currently scheduled for April 19, 2012, is vacated.

15 For the reasons stated herein, IT IS RECOMMENDED that:

- 16 1. Defendant's motion to dismiss, filed February 28, 2012, (dkt. no. 18), be
17 denied without prejudice; and
18 2. Plaintiff's motion to stay proceedings, filed April 3, 2012, (dkt. no. 19), be
19 granted, but only for the reasons stated in this opinion; and
20 3. This action be stayed until the administrative proceedings in state court are
21 concluded.

22 \\\

24 ² Indeed, the entire litigation might go away depending on the outcome of the hearing. In
25 any event, granting leave to amend at this point to name individuals, spending resources to
26 litigate the individual's presence in this lawsuit, with the potential for a Younger stay being
enacted at that point as plaintiff travels through the state court system seems highly wasteful and
inefficient.

