UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 07-21256-CIV-JORDAN

JOHN B. THOMPSON,

Plaintiff,

vs.

THE FLORIDA BAR and
DAVA J. TUNIS, FRANK ANGONES,
and JOHN HARKNESS

Defendants.

THE FLORIDA BAR'S MOTION TO DISMISS PLAINTIFF'S VERIFIED THIRD AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Defendants, The Florida Bar ("the Bar"), John Harkness and Frank Angones (collectively, the "Bar Defendants") move to dismiss the Third Amended Complaint, *with prejudice*, on the following grounds:

- There is no subject matter jurisdiction for federal court review of the matters alleged within the Complaint.
- Plaintiff's Third Amended Complaint fails to state a claim upon which relief can be granted.

The more particular grounds for this motion and supporting authority are set forth in the following memorandum of law.

MEMORANDUM OF LAW

Defendant, The Florida Bar, acting as an arm and agent of the Florida Supreme Court, regulates the practice of law in Florida. Included within The Florida Bar's duties is the authority to enforce the rules of professional conduct and to discipline persons practicing within the State of Florida that violate such rules. Defendant, Frank Angones, is the current President of The Florida Bar. Defendant, John Harkness, is the Chief Executive Officer of The Florida Bar. Plaintiff, Mr. Thompson, a member of The Florida Bar, is subject to the Bar's rules of professional conduct and the Bar's disciplinary authority.

All of the allegations against The Florida Bar, Mr. Angones and Mr. Harkness purportedly arise out of, and concern investigative and disciplinary proceedings by The Florida Bar. Mr. Thompson seeks a declaratory judgment regarding whether The Florida Bar rules unconstitutionally prohibit "pure political speech," "petition speech," as well as civil rights violations under 42 USC 1983.

I. PLAINTIFF'S COMPLAINT MUST BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

As a preliminary matter this Court must determine whether it has jurisdiction of this matter. Dismissal for lack of subject matter jurisdiction is proper when "the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 R.3d 1006, 1010 (5th Cir. 1998)(citations and internal quotation marks omitted). As explained below, dismissal is proper because subject matter jurisdiction is lacking.

A. The Florida Bar is entitled to Eleventh Amendment Immunity to the Equitable Relief Plaintiff Seeks.

While the Eleventh Amendment generally bars claims seeking monetary damages, the Eleventh Amendment has been held to apply to equitable relief. *E.g.*, *Badillo v. Thorpe*, 158 Fed. Appx. 208, 212 n.6 (11th Cir. 2005); *Rosario v. American Corrective Counseling Services, Inc.*, 2006 WL 3313845 (M.D. Fla.). After reviewing Plaintiff's Second Amended Complaint, this Court determined in its Omnibus Order issued September 7, 2007, "any other claims that Mr. Thompson has raised, or may raise, against the Florida Bar itself are barred by the Eleventh Amendment." The Third Amended Complaint adds no new factual allegations or causes of action which require a different result.

B. Younger Abstention is Appropriate and Prohibits The Claims Against the Bar Defendants.

When a private party sues a state official for prospective injunctive or declaratory relief from an alleged ongoing violation of the Constitution, the suit is not considered to be against the state itself, and the Eleventh Amendment does not apply. *See ExParte Young*, 209 U.S. 123, 159-60 (1908). Nevertheless, "[e]ven when a federal court would otherwise have jurisdiction to hear a claim, the court may be obliged to abstain when a federal-court judgment on the claim would interfere with an ongoing state proceeding implicating important state rights." *D.L. v. Unified School Dist. No. 497*, 392 F.3d 1223, 1227-28 (10th Cir. 2004). The doctrine of abstention announces in *Younger v. Harris*, 401 U.S. 37 (1971), requires a federal district court to abstain from assuming jurisdiction when the following conditions are met: (1) there is an ongoing state criminal, civil, or

administrative proceeding, (2) the state court provides an adequate forum to hear the claims raised in the federal complaint, and (3) the state proceedings involve important state interests, matters which traditionally look to state law for their resolution or implicate separately articulated state policies. *Weitzel v. Div. of Occupational & Prof'l Licensing,* 240 F.3d 871, 875 (10th Cir. 2001). "*Younger* abstention is not discretionary; it must be invoked once the three conditions are met, absent extraordinary circumstances." *Amanatullah v. Colo. Bd. of Med. Exam'rs*, 187 F.3d 1160, 1163 (10th Cir. 1999). The doctrine applies to actions for declaratory as well as injunctive relief. *Samuels v. Mackell*, 401 U.S. 66 (1971).

In this case, Mr. Thompson readily admits that this federal lawsuit corresponds to ongoing proceedings in state court. See Third Amended Complaint, ¶¶33, 37, 43, 51-54, 66-69. Mr. Thompson specifically requests a preliminary injunction for "breathing space in which to prove his case". See Third Amended Complaint, Page 35. Federal courts are required to abstain from interfering with state lawyer disciplinary proceedings. *Middlesex County Ethics Committee v. Garden State Bar Association*, 456 U.S. 423, 434 (1982).

Second, Florida's disciplinary procedures provide extensive due process protections, see Rules 3-7.3 through 3-7.8, *Rules Regulating the Florida Bar*, and there is adequate opportunity to raise federal constitutional issues in the course of such proceedings. See *The Florida Bar v. Daniel,* 626 So.2d 178 (1993); *State ex rel. Florida Bar v. Grant*, 85 So.2d 232 (1956). The required showing that there is a legal barrier to the presentment of constitutional claims in proceedings before the Bar cannot be made. *See Mason v. The Florida Bar*, 2006 WL 305483 (M.D. Fla. 2006).2006 WL 305483 (M.D. Fla. 2006)2006 WL 305483 (M.D. Fla. 2006).

Finally, the United States Supreme Court has specifically recognized that a State has "an extremely important interest in maintaining and assuring the professional conduct of the attorneys licensed" and has expressly held that attorney disciplinary proceedings are subject to the *Younger* abstention doctrine. *Middlesex,* 457 U.S. 423, 434 (1982).

While the Supreme Court has recognized several exceptions to the *Younger* doctrine, the bad faith exception is a narrow one requiring more than mere conclusory allegations to support a request for relief. *Kugler v. Helfant*, 421 U.S. 117 (1975). Bad faith in the context of the *Younger* doctrine refers to proceedings brought solely for the purpose of suppressing an individual's rights with no real hope of ultimate success. *Younger*, 401 U.S. at 48. The factual allegations of the Third Amended Complaint do not support an inference that the disciplinary proceedings were motivated by bad faith or with intent to harass. In fact, the opposite is presented within the allegations.

The disciplinary proceeding currently pending against Mr. Thompson was initiated based on complaints the Bar received from the following third-parties: Judge James Moore, Judge Ronald Friedman, Tew Cardenas and Take Two. See Third Amended Complaint, ¶¶ 21, 30, 31, 37. And, according to Mr. Thompson, previous complaints the Bar received and investigated were also initiated based on complaints from third-parties. *See Third Amended Complaint,* ¶¶ 14, 15, 19,21 (discussing Bar investigations based on complaints filed by Tew Cardenas, Norm Kent and Neil Rogers). The Florida Bar has no control over the circumstances which have caused multiple third-parties to file complaints against Mr. Thompson. The Bar, in good faith, has only opened, investigated, and where appropriate, closed those complaints.

Under these facts, this Court must abstain from any actions, including injunctive relief, that would affect the ongoing state court proceedings.

C. Plaintiff's Claims are Barred by the Rooker-Feldman Doctrine.

Based on the allegations of the Third Amended Complaint, what Mr. Thompson seeks, in essence, is review from this Court of a decision by the Supreme Court of Florida to subject him to investigation and discipline. Under the Rooker-Feldman Doctrine, a federal district court does not possess jurisdiction to review the decision of a state supreme court. Such review rests solely with the United States Supreme Court. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 262 U.S. 413 (1923).

II. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION.

The factual allegations giving rise to each of Mr. Thompson's claims demonstrate that he is not entitled to relief. While the Court is confined to the four corners of the Complaint and may make inferences, this Court cannot by inference or speculation supply essential averments that are lacking. The Complaint contains conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts which cannot prevent dismissal for failure to state claim.

A. The Complaint Fails To State Necessary Elements For A Request For Injunctive Relief.

Mr. Thompson requests this Court issue either a permanent or preliminary injunction prohibiting the Bar's ongoing disciplinary proceeding. Permanent injunctive

relief is only appropriate where: 1) a plaintiff is successful on the merits; 2) there is no available remedy at law; and 3) the balance of equities favor granting such relief. *Travellers Intern. AG v. Trans World Airlines, Inc.*, 722 F. Supp. 1087 (S.D.N.Y. 1989). The standard for permanent injunctive relief is essentially the same as that for preliminary injunctive relief except that the plaintiff must show *actual* success on the merits instead of *a likelihood* of success. *Klay v. United Healthgroup, Inc.*, 376 F. 3d 1092, 1097 (11th Cir. Fla. 2004). Mr. Thompson failed to show actual success or likelihood of success on the merits and has therefore failed to state a claim for injunctive relief.

Mr. Thompson does not allege that Florida law precludes him from asserting his federal claims during state court review of the disciplinary proceeding. The Florida Supreme Court's review does provide a meaningful and adequate alternative legal remedy for Mr. Thompson with respect to the disciplinary proceedings. *See Huffman v. State*, 813 So.2d 10,11 (Fla. 2000).

Florida's disciplinary proceedings offer adequate opportunity for review of Mr. Thompson's constitutional challenges. Florida's proceedings provide him with an opportunity to appeal the referee's report and recommendation, and seek review by the Florida Supreme Court, including if the referee were to rule against Mr. Thompson's constitutional claims. *See* Fl. Bar Rule 3-7.7(a)(1) and (c)(5). Because the disciplinary proceeding has not been concluded, Mr. Thompson may raise his constitutional challenges to the state supreme court. *See Majors v. Engelbrecht*, 149 F.2d 709, 729 ("[s]ubsequent judicial review is a sufficient opportunity" to raise constitutional challenges).

B. Plaintiff Fails To State A Claim For Declaratory Relief.

Under Florida law, a party seeking declaratory relief must establish the following elements: there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interests are all before the court by proper process or class representation and that the relief sought is not merely giving of legal advice by the courts or the answer to questions propounded from curiosity. *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So.2d 400, 404 (Fla. 1996); *City Of Hollywood v. Petrosino*, 864 So.2d 1175, 1177 (Fla. 4th DCA 2004); *State v. Florida Consumer Action Network*, 830 So.2d 148, 151 (Fla. 1st DCA 2002).

In determining whether an issue is fit for judicial determination, the court must determine "whether it is faced with an abstract question or a concrete controversy." *Efron By and Through Efron v. U.S.*, 1 F.Supp.2d 1468, 1470 (S.D.Fla. 1998) (denying requested declaratory relief where "[a]t least three contingencies not yet met must be satisfied before [plaintiff] could possibly suffer any injury and before a controversy could arise), citing *Browning-Ferris Industries of Alabama, Inc. v. Alabama Department of Environmental Management*, 799 F.2d 1473, 1478 (11th Cir. 1986). In the declaratory judgment context, the analysis boils down to "whether the facts alleged, under all the

circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Enfron,* 1 F.Supp.2d at 1470. In other words, the injury in question must be "immediate or imminently threatened" and not conjectural, hypothetical or abstract. *Id.* citing *National Treasury Employees Union v. United States,* 101 F.3d 1423, 1427 (D.C.Cir. 1996); *Wilderness Society v. Alcock,* 83 F.3d 386, 390 (11th Cir. 1996).

In the instant case, Mr. Thompson seeks broad declaratory relief regarding "all Florida Bar Rules, as framed and/or as applied, whose effect is to limit, chill, or infringe in any fashion the rights of lawyers to criticize the judicial system or any judges therein..." Yet, he has not demonstrated that he has an "immediate or imminently threatened" injury. It appears that the only immediate or imminently threatened injury is the need to defend a disciplinary prosecution. "The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity..." *Beal v. Missouri Pacific Railroad Corp.,* 312 U.S. 45, 49 (1941). Moreover, the few relative facts alleged under his request for declaratory judgment, do not show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. Because Mr. Thompson has failed to establish the elements necessary to request declaratory judgment, this relief should not be granted.

1. Neither Rule 4.8.2(a) Nor Rule 4-8.4(d) Violate The First Amendment To The United States Constitution.

Mr. Thompson challenges the constitutionality of Rule 4-8.2(a) and Rule 4-8.4(d)

("Rules") both facially and as applied. The Rules are wholly consistent with the First Amendment. In fact, the facial constitutionality of these Rules and similar bar rules has consistently been upheld against similar attacks. See, *e.g., Howell v State Bar of Texas*, 843 F.2d 205 (5th Cir. 1988); *The Florida Bar v. Saylor*, 721 So. 2d 1152 (Fla. 1998); *The Florida Bar v. Van Zamft*, 814 So.2d 385 (Fla. 2002); *Mississippi Bar v. Lumumba*, 912 So.2d 871 (Miss. 2005).

Harper v. Office of Disciplinary Counsel, 113 F.3d 1234 (6th Cir. 1997) (unpublished) is instructive. The petitioner in *Harper* was seeking to enjoin the enforcement of bar rules, comparable to Rules 4-8.2(a) and 4-8.4(d), on the grounds that the rules violated her First Amendment right to freedom of speech and Fourteenth Amendment right to due process.[1] Specifically, the petitioner argued that the rules were overbroad because they could be used to punish constitutionally protected speech. In rejecting this overbreadth argument, the *Harper* court recognized that the rule merely required criticisms to be truthful and accurate. *Id.* at 3.

The "truthful and accurate" requirement in *Harper* is consistent with Rule 4-8.2(a), which prohibits statements "that the lawyer knows to be false" or that is made with "reckless disregard as to its truth or falsity;" and Rule 4-8.4(d), which prohibits conduct that is "prejudicial to the administration of justice." In reaching its conclusion, the *Harper* court noted that the U.S. Supreme Court had upheld similar provisions to

[1] Due to the pending state disciplinary action, the District Court decided to abstain from the action. The petitioner challenged that decision, arguing that under *Middlesex County Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 432 (1982), "extraordinary circumstances" existed that would permit the district court to entertain jurisdiction; the *Harper* court disagreed with the petitioner. See *Harper* at *2 and 6. While the *Harper* court analyzed the abstention argument, its overbreadth and vagueness discussion are also instructive.

"maintain the dignity," and to "promote public confidence." *Id.* at 5, relying on *Parker v. Levy,* 417 U.S. 733 (1974).

Like the rule in *Harper*, Rules 4-8.2(a) and 4-8.4(d) are not overbroad or vague or constitutionally infirm.

2. The Florida Bar Is An Arm Of The State Of Florida.

In Count III of the Third Amended Complaint, Plaintiff seeks a declaration that The Florida Bar is not an arm of the state. However, it is well-settled in Florida federal and state jurisprudence that The Florida Bar is an arm of the state.

Pursuant to *Manders v. Lee*, 338 F.3d 1304, 1308 - 1309 (11th Cir. 2003), the court examines the following four elements to determine whether an entity is an arm of the State: "(1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity."

However, consideration of the *Manders* elements is reserved for circumstances under which there is uncertainty as to whether an entity is an arm of the state. This analytical exercise is unnecessary and unwarranted under circumstances, such as the case at hand, where Florida state and federal courts have already determined that The Florida Bar is indeed an arm of the state. *See Kaimowitz v. The Florida Bar*, 996 F.2d 1151, 1155 (11th Cir. 1993) (applying Eleventh Amendment immunity to The Florida Bar); *Otworth v. The Florida Bar*, 71 F.Supp.2d 1209, 1221 (M.D.Fla. 1999) (recognizing "that the Eleventh Circuit has expressly held that the Florida Bar is entitled to Eleventh Amendment immunity"); *Geer v. Harkness*, 134 Fed. Appx. 312, 314 n.2 (11th Cir. 2005) (recognizing that The Florida Bar is a state agency for purposes of Eleventh Amendment

immunity); *Mueller v. The Florida Bar,* 390 So. 2d 449, 451 (Fla. 4th DCA 1980) (recognizing "The Florida Bar is thus an arm and part of the judiciary, one of the three co-equal branches of state government"); *The Florida Bar v. Lewis*, 358 So. 2d 897, 899 (Fla. 1st DCA 1978) (recognizing that The Florida Bar is "part of the judiciary"). Plaintiff's arguments are further contradicted by the preamble of the Rules Regulating The Florida Bar, whereby the Supreme Court of Florida established the Bar as "an official arm of the Court." *Rules Regulating The Florida Bar*, 494 So.2d 977, 979 (Fla. 1986). If this Court chooses to analyze whether or not the Florida Bar is an arm of the state by considering all four *Manders* elements, Defendants are confident that this Court would reach the conclusion that The Florida Bar is an arm of the state.

Moreover, other state and federal courts considering the application of Eleventh Amendment immunity to state bars have reached the conclusion that Eleventh Amendment immunity is warranted specifically because state bars are arms of the state in which they operate. *McFarland v. Folsom*, 854 F.Supp. 862 (M.D.Ala. 1994) (recognizing that the Eleventh Amendment prohibits actions against state courts and state bars); *see also Bush v. Cheatwood*, 2006 WL 1455655 (N.D.Ga. 2006) (citing *Kaimowitz* with approval); *Bush v. Reeves*, 2005 WL 3542880 (N.D.Ga. 2005) (same); *Ware v. Wyoming Bd. of Law Examiners*, 973 F.Supp. 1339 (D.Wyo. 1997) (same); *LeClerc v. Webb*, 2003 WL 21026709, *3, n.10 (E.D.La. 2003) (same); *Feliciano v. Tribunal Supremo De Puerto Rico*, 78 F.Supp.2d 4, 10 n.6 (D.Puerto Rico 1999); *Cohran v. State Bar of Georgia*, 790 F.Supp. 1568, 1575 (N.D.Ga. 1992) (reasoning that the "Georgia Supreme Court is an arm of the State of Georgia. The State Bar is an arm of the Georgia Supreme Court. . . . Therefore, [the claims] are, in reality, claims against the state and are

barred by the Eleventh Amendment"); *Bishop v. State Bar of Texas*, 791 F.2d 1151, 1155 (11th Cir. 1986) (finding Eleventh Amendment immunity applied to state Bar of Texas as a state agency); *Ginter v. State Bar of Nevada,* 625 F.2d 829 (9th Cir. 1980); *Mattas v. Supreme Court of Pennsylvania*, 576 F. Supp. 1178 (W.D.Pa. 1983).

Plaintiff's attempts, through syllogisms, converse deductions, and presumptions, provides no justification for this Court to disregard the overwhelming legal precedent which has determined that The Florida Bar is an arm of the state.

C. Plaintiff Fails To Properly Plead a 42 U.S.C. Section 1983 Action.

Taking the facts as alleged as true for the purpose of this Motion to Dismiss, and applying a very liberal reading to the Complaint, Mr. Thompson is attempting to assert an action under Section 1983 for substantive and due process violations. The Eleventh Circuit has a higher pleading requirement in Section 1983 actions. See *Omar v. Lindsey,* 334 F.3d 1246, 1250-1251 (11th Cir. 2003), and citations therein.

To state a civil rights claim under 42 U.S.C. Section 1983, a plaintiff must allege that he has been deprived or has suffered the deprivation of "rights, privileges, or immunities secured by the Constitution and laws" of the United States by a person acting under the color of state law. Here, Mr. Thompson has named John Harkness and Frank Angones, two Bar officials, and alleged that they have overseen and directed an assault upon his constitutional rights. See Third Amended Complaint, ¶6. However, "there is no vested right in an individual to practice law." See *In re Isserman*, 345 U.S. 286, 289 (1953). See also, *The Florida Bar v. Sperry*, 140 So.2d 587, 596 (Fla. 1962)(explaining that the right to practice law is not a privilege or immunity with the meaning of the Fourteenth Amendment); *Ippolita v. State of Florida*, 824 F.Supp 1562, 1573 (M.D. Fla.

1993)(explaining that the second element to a Section 1983 action requires the existence of a right, privilege or immunity and that no vested right exists in an individual to practice law); and *McFarland v. Folsom,* 854 F.Supp 862, 879 (M.D.Ala. 1994)(explaining that the right to pursue a particular occupation has never been held to be a fundamental right).

D. The Complaint Fails to State a Claim Under the First Amendment.

Mr. Thompson attempts to state claim for violation of his First Amendment rights. However, he fails to allege how, when, where or by whom, his rights were violated under the First Amendment. Moreover, Mr. Thompson failed to plead facts sufficient to show that Mr. Harkness, Mr. Angones or The Florida Bar violated his rights under the First Amendment.

III. CONCLUSION.

Mr. Thompson has had four attempts to state a claim against The Florida Bar and its representatives. Dismissal with prejudice is warranted where multiple pleadings fail to set forth ultimate facts showing entitlement to relief. Moreover, the Bar Defendants are entitled to be relieved from the time, effort, energy and expense of defending themselves against seemingly vexatious claims.

WHEREFORE, The Bar Defendants request dismissal of Plaintiff's Third Amended Complaint, *with prejudice.*

s/ Karusha Y. Sharpe
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 24, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send a notice of electronic filing to the following:

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