UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

CASE NO. 07-21256-CIV-JORDAN

JOHN B. THOMPSON,

Plaintiff,

vs.

THE FLORIDA BAR and DAVA J. TUNIS,

Defendants.
_____/

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS VERIFIED THIRD AMENDED COMPLAINT

Pursuant to Fed. R. Civ. P. 12(b)(1), Defendant, The Honorable Dava J. Tunis, Judge of the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida (hereafter, "Judge Tunis"), through her undersigned attorneys, in both her official and individual capacities, for her reply memorandum in support of her motion to dismiss Plaintiff's verified third amended complaint hereby submits:

Introduction

Plaintiff has failed to respond to any of the specific grounds alleged in Judge Tunis' motion to dismiss. (See DE#s 113, 132). He does not explain why any action of Judge Tunis meets the bad faith exception to Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) or why abstention pursuant to Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 97 L.Ed. 1424 (1943) or Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) would not apply. He makes no attempt to refute the prohibition of injunctions against judicial

officers under 42 U.S.C. § 1983, the statute he is relying on. He does not attempt to explain why qualified immunity would not apply to Judge Tunis to the extent the action may be interpreted as against her in her individual capacity. Plaintiff also makes no attempt to correct or explain why he has chosen to file an improper "shotgun pleading," in violation of the federal rules, in his fourth filed complaint.

Plaintiff does, however, attempt to explain that he has stated a claim against Judge Tunis of some kind by contending that, once the Plaintiff filed a civil rights lawsuit against her, she was required to disqualify herself as the referee in his disciplinary action. (DE# 132, p.2-3). He interprets the opinion of the United States Supreme Court in Johnson v. Mississippi, 403 U.S. 212, 91 S.Ct. 1778, 29 L.Ed.2d 423 (1971), to mean that the Court, "...held that no state court judge can preside over a litigant who has brought a federal civil rights claim against him/her." (DE# 132, p. 2). Even if the Plaintiff were correct, there is no indication that such a contention would be sufficient to state a federal claim against a state court judge in an ongoing matter or to establish the level of bad fath required for an except to abstention pursuant to Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Unfortunately for the Plaintiff, however, his interpretation is not the law, anyway.

A. Johnson v. Mississippi, 403 U.S. 212, 91 S.Ct. 1778, 29 L.Ed.2d 423 (1971) is inapplicable to this situation.

First, the charge involved in the Johnson case was contempt of court for disrupting proceedings before the judge whose disqualification was sought, unlike this situation where there is no indication that Judge Tunis had prior involvement with the Plaintiff before being appointed referee in his disciplinary proceedings. Second, in Johnson, affidavits were filed by two attorneys

that the Judge, through charges made to grand juries in his courtroom, revealed deep prejudice against civil rights workers (such as the movant for disqualification) and civil rights lawyers, unlike this situation. Third, plaintiff and others had filed a civil rights lawsuit against the defendant to enjoin trial of Negroes or women in his court until such time as Negroes and women were not systematically excluded from juries **which resulted in an injunction being issued against the Judge**. Id. Therefore, the Court held:

> In concluding that Judge Perry should have recused himself, we do not rely **solely on the affidavits filed by the lawyers** reciting intemperate remarks of Judge Perry concerning civil rights litigants. Beyond all that was the fact that Judge Perry immediately prior to the adjudication of contempt was a defendant in one of petitioner's civil rights suits **and a losing party at that**. From that it is plain that he was so enmeshed in matters involving petitioner as to make it most appropriate for another judge to sit. Trial before "an unbiased judge" is essential to due process. Bloom v. Illinois, 391 U.S. 194, 205; Mayberry v. Pennsylvania, 400 U.S. 455, 465.
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> We accordingly reverse the judgment below and remand the case for proceedings not inconsistent with this opinion.

Id. at 216. (Emphasis added).

Therefore, it was not simply that the judge had been named as a defendant in a lawsuit, but that there were affidavits of attorneys establishing his bias and the lawsuit had already resulted in an injunction against the judge, among other things. Clearly distinguishable from the situation herein.

B. Florida Law precludes disqualification based on a party filing a lawsuit.

Judge Tunis, of course, is a Florida Circuit Court Judge appointed as a referee in a proceeding before the Florida Supreme Court, bound by Florida Law. Florida Law is clear on this issue:

> A defendant in a criminal case cannot disqualify a trial judge by merely filing a civil law action against the judge. To hold otherwise would permit a defendant to decide and control who will be the judge in his own case by merely filing lawsuits against

> judges he does not prefer. He could thereby ultimately select the judge he does prefer by naming all other judges as parties defendants in baseless civil actions. However, the merit or lack of merit of the defendant's civil suit against the judge is immaterial. This is so because if the civil action has no merit the judge should not be disqualified and, if the civil action does have merit, then the basis for the civil action can then also be used as the substantive ground for disqualification under Florida Rule of Criminal Procedure 3.230. The mere filing of a lawsuit against the judge does not constitute a ground for disqualification. It is exclusively within the defendant's control to file the lawsuit which may be frivolous and may not even allege facts which are legally sufficient to disqualify under Rule 3.230. This tactic cannot be approved and made a successful method to disqualify judges in criminal cases.
>
> The petition for writ of prohibition is
>
> DENIED.

Dowda v. Salfi, 455 So.2d 604, 605 (Fla. 5th DCA 1984).

There is no indication that a civil plaintiff should be treated differently than a criminal defendant in this regard. Similarly, in a contempt situation, it was held that, "The fact that May filed a lawsuit **in federal court against Judge Rapp** is as a matter of law, in and of itself, a legally insufficient basis to grant a motion for disqualification." May v. South Florida Water, 866 So.2d 205 (Fla. 4th DCA 2004). (Emphasis added).

The fact that the Plaintiff filed an action against her does not require Judge Tunis' disqualification in Florida.

C. This is equally true of federal law.

As the Ninth Circuit held, long subsequent to the Johnson case on which the Plaintiff relies:

> Following her trial, Studley filed a lawsuit against Judge Schwartz and engaged in leafletting activities directed against him. She argues here that these actions caused him to be "poisoned" against her and were grounds for recusal. A judge is not disqualified by a litigant's suit or threatened suit against him, Ronwin, 686 F.2d at 701, or by a litigant's intemperate and scurrilous attacks, United States v. Grismore, 564 F.2d 929, 933 (10th Cir. 1977), cert. denied, 435 U.S. 954, 55 L. Ed. 2d 806, 98 S. Ct. 1586 (1978); In re Martin-Trigona, 573 F. Supp. 1237, 1243 (D. Conn. 1983),

> appeal dismissed, 770 F.2d
>
> 157 (2d Cir. 1985). Thus, the district court did not abuse its discretion by denying the motion for recusal.

United States v. Studley, 783 F.2d 934, 940 (9th Cir. 1986).

The reasoning for this policy was further explained by Judge Corcoran, Bankruptcy Judge for the Middle District of Florida:

> Finally, the defendant contends that I am biased because he has filed a civil action and a complaint of judicial misconduct against me and plans to file others in the future (Document No. 117A, PP 32, 37, and 38). While the defendant's assertions as to this ground are factually accurate, they do not compel disqualification. To the contrary, I am required to take into consideration that the defendant himself has affirmatively created these alleged grounds for disqualification.
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> In United States v. Owens, 902 F.2d 1154, 1156 (4th Cir. 1990), for example, the court of appeals affirmed the trial court's denial of a motion for disqualification where the appellant alleged bias because he had accused the judge of bribery on national television. In its opinion, the court of appeals cautioned that: Parties cannot be allowed to create the basis for recusal by their own deliberate actions. To hold otherwise would encourage inappropriate "judge shopping." It would invite litigants to test the waters with a particular judge and then to take steps to create recusal grounds if the waters proved uncomfortably hot. Consistent with this reasoning, courts have typically rejected recusal motions based on, and effectively created by, a litigant's deliberate act of criticizing the judge or judicial system. Id.

Henkel v. Lickman (In re Lickman), 284 B.R. 299, 305 (Bankr. M.D. Fla. 2002).

"It cannot be that an automatic recusal can be obtained by the simple act of suing the judge." United States v. Pryor, 960 F.2d 1, 3 (1st Cir. 1992).

Therefore, the Plaintiff has failed to refute any of the grounds relied upon by Judge Tunis in her motion to dismiss. He has raised a new issue which would be insufficient even if Plaintiff's distorted interpretation of the Johnson case were correct, but the examination of the subsequent case law, both in Florida and in the Federal Courts, refute his interpretation anyway. Plaintiff simply may

not file lawsuits against judicial officers and then require that they disqualify themselves from his cases because he has done so.

CONCLUSION

Based upon the above arguments and authorities, the 3rd Amended Complaint should be dismissed with prejudice as to Judge Tunis.

Dated: October 1, 2007
Fort Lauderdale, FL

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October, 2007, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Charles M. Fahlbusch
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SERVICE LIST

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Case No.: 07-21256-CIV-JORDAN
United States District Court, Southern District of Florida

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